

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1948

559. Public Service Commission--No Power to Require Radio Stations to Secure Certificates of Public Convenience--Reports and Certificates May Be Required from Other Interstate Companies.

CARSON CITY, January 8, 1948.

PUBLIC SERVICE COMMISSION OF NEVADA, Carson City, Nevada.
Attention: J. G. Allard, Chairman.

GENTLEMEN: Receipt is hereby acknowledged of your letter of inquiry of January 2, 1948, referring to the opinion of this office, B-9, dated September 13, 1940, wherein it was held that Station KOH of Reno, Nevada, was not required to obtain a certificate of public convenience and necessity from the Public Service Commission of this State. You refer to the last paragraph of such opinion concerning the constitutional power of the Legislature of this State to confer upon the commission the power to regulate radio broadcasting stations engaged in interstate commerce with the suggestion that such power could not be legally conferred to regulate interstate railroads engaged in interstate commerce.

You inquire whether you are to understand from such opinion that other interstate public utilities such as railroads, telephone companies, power companies, and airline companies are required to obtain a certificate of public convenience and necessity from the commission before starting operations in this State.

You specifically inquire whether radio broadcasting stations such as KOH of Reno are considered as being interstate utilities exclusively. And you further inquire whether airline companies and broadcasting companies are required to file annual financial reports with the Public Service Commission of Nevada.

OPINION

With respect to radio broadcasting stations, this office has again examined the law with respect thereto and we are of the opinion that such Opinion B-9 correctly states the law with respect to such station and insofar as interstate communications by radio are concerned we think there is no power vested in your commission to require such stations or companies operating them to secure a certificate of public convenience from the Nevada Commission.

We think that the dissemination of news, advertisements, commercial advertising and amusement over the air is the highest type of interstate commerce. It is well said by the Supreme Court of the United States in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Company*, 289 U. S. 266, that:

No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities. In view of the limited numbers of radio broadcasting frequencies, the Congress has authorized allocation and licenses. The commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception.

An examination of the so-called Federal Communications Act, dealing with the regulation of radio broadcasting, discloses that Congress has unquestionably occupied the entire field of interstate communication by radio pursuant to the power granted Congress in the commerce clause of the United States Constitution. Such Federal Communications Act being sections 301 et seq. Title 47, Federal Code Annotated. It is clear from this Act that even if a broadcasting station could be so located in a State so that its broadcasts could not be heard beyond the confines of the State, still the Federal Communications Commission would have the power not only to refuse to license such a broadcasting station but to cause its closing because of interference with other radio broadcasting stations. In the final analysis we are of the opinion that insofar as radio broadcasting is concerned the entire regulation and control thereof is now vested in the Federal Communications Commission. Cases examined:

United States v. Gregg, 5 Fed. Supp. 848; Station WBT v. Poulnot, 46 Fed. 2d 671; United States v. American Bond and Mortgage Company, 31 Fed. 2d 448, 52 Fed. 2d 318; General Electric Company v. Federal Radio Commission, 31 Fed. 2d 630; Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. 2d 111; KFKB Broadcasting Association v. Federal Radio Commission, 47 Fed. 2d 670.

You state that an interstate telephone company is subject to regulation by the Federal Communications Commission, but that such company filed application with the commission of this State for a certificate of public convenience and necessity and complies with all provisions of the Public Service Commission law by filing intrastate rate schedules, annual reports and such like.

It is true that an interstate telephone company is subject to regulation by the Federal Communications Commission. However, a telephone company is not in the same category as a radio broadcasting company using the air waves exclusively for communication. An examination of the Federal Communications Act discloses that Congress has not occupied the entire field with respect to regulation of telephone and telegraph companies but has specifically left the regulation thereof with respect to intrastate business and extension of lines wholly within a State to the regulation of the respective Public Service Commissions. See sections 221 and 214 of said Title 47, Federal Code Annotated. So that insofar as the power of your commission is concerned, it has the right to regulate such interstate companies with respect to their intrastate business within Nevada and require reports and such certificates as may be necessary concerning their intrastate business.

The same proposition surrounds the operation of interstate railroads within the State of Nevada as the Interstate Commerce Act contains no provision whereby Congress has entered the

field to the exclusion of all State regulation and it may be further stated with respect to railroads and telephone and telegraph companies that in many instances the line of demarcation between the power of Federal commissions and State commissions is not clearly marked and when cases arise close to the line of demarcation, then the facts in each individual case will be necessary of close examination before any definite rule can be laid down thereon.

With respect to aviation, we beg to advise that Congress has enacted a very comprehensive Act concerning the carriage of passengers and property by air known as the Civil Aeronautics Act, enacted in 1938, the same being section 401 et seq. Title 49, Federal Code Annotated. An examination of this Act discloses that Congress has practically occupied the field with respect to aeronautics and we think such Act is so broad as to preclude control and regulation of air traffic in interstate commerce by any method whatsoever. This, however, does not preclude the Commission of this State from control and regulation of carriers by air engaged in intrastate traffic and we think that such regulation and control attaches to airway companies engaged in interstate traffic whenever they engage in purely intrastate traffic within Nevada. Therefore, it follows that as to intrastate traffic your commission has the power to require certificates of public convenience and such reports and filing of classifications as may be necessary under our law.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

560. Fire Protection--Assistant Forester Firewarden--Salary Limited by Board of Fire Control--Cooperative Agreement Between Board and Regents of University.

CARSON CITY, January 20, 1948.

HON. WAYNE McLEOD, State Forester Firewarden, Carson City, Nevada.

DEAR MR. McLEOD: This will acknowledge receipt of your letter dated January 8, 1948, received in this office January 9, 1948.

You request an interpretation of chapter 149, Statutes of 1945, and particularly section 2, which creates the position of Assistant State Forester Firewarden.

You ask whether the assistant may receive more money than the present salary which is paid one-half out of the State Fire Control Fund and one-half out of the University of Nevada Extension Service Fund, due to the fact that a blanket raise in pay was granted to Extension Service employees.

You ask if funds are available in the Extension Service Fund, would it be legal for the assistant to receive one-half of his salary from the State Fire Control Fund and an amount in

excess of the one-half from the Extension Service Fund, thus increasing his total salary in an amount in excess of \$3,600 per annum.

We are of the opinion that the statute limits the salary of the assistant forester firewarden that may be set by the Board of Fire Control, but does not prohibit the Board of Regents, under a cooperative agreement, from authorizing payment for part-time service as extension forester, which would result in the increase of such combined salary above the \$3,600 per annum basis.

Section 2, chapter 149, Statutes of 1945, provides as follows: "There is hereby created the position of assistant state forester firewarden, who shall be appointed by the state forester firewarden upon the approval of the state board of fire control. The assistant state forester firewarden must be a graduate of a recognized school of forestry, or the equivalent; he must be trained in fire control work. His salary shall be set by the state board of fire control at not to exceed thirty-six hundred (\$3,600) dollars per annum."

Section 3 creates the State Board of Fire Control which shall consist of the Governor, the Director of Agricultural Extension of the University of Nevada, and the State Forester Firewarden.

The following sections of the Act define the duties of the Board of Fire Control, the State Firewarden and his assistant, which are to promote and encourage the protection of forest and other lands from fire and to authorize cooperation of the State with the Federal Government, counties, organizations, and individuals in providing such protection.

Section 2 requires that the Assistant Forester Firewarden shall have certain qualifications. His salary as such assistant shall be set by the Board of Fire Control at not to exceed thirty-six hundred dollars per annum. This salary is for his services as defined in the Act. There is no additional duty imposed upon the assistant in this section.

Section 11 of the Act provides: "The state board of fire control is hereby empowered to cooperate and enter into agreements with the University of Nevada agricultural extension service through the board of regents of the University of Nevada in combining the work of assistant state forester firewarden with those of the University of Nevada extension forester on a part-time basis."

There is nothing in the statute that provides for an equal distribution of the salary of the assistant between the Board of Fire Control and the University. The statute does not provide that the salary fixed by the Board of Fire Control shall be in full compensation for all services rendered. It does provide that the cooperation with the University Agricultural Extension Service shall be by agreement with the Board of Regents which implies that the assistant firewarden would necessarily be a party to the agreement.

The statute limits the salary that may be paid to the assistant forester firewarden by the Board of Fire Control for his services as such assistant.

The statute also provides for a cooperative agreement between the Board of Fire Control and the Regents of the University whereby the assistant is employed as extension forester with the University Agricultural Extension Service on a part-time basis, but does not fix the compensation that may be paid by the Extension Service for such employment.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

561. Courts--Extradition Proceedings--Municipal Courts Created for Municipal Purposes Only.

CARSON CITY, January 20, 1948.

HON. ROBERT E. JONES, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. JONES: This will confirm our telephone conversation of today re the extradition of a person escaping from the city jail at Las Vegas where such person was confined upon conviction under a city ordinance.

Misdemeanors are extraditable offenses. The Governor of the asylum State, however, may exercise his discretion in surrendering the fugitive, but, nevertheless, persons charged with misdemeanors can be and many of them have been extradited.

The question presented as to whether the city or the county acting through the District Attorney's office should institute the extradition proceedings is not entirely free from doubt. However, assuming that the city of Las Vegas has not adopted an ordinance concerning prisoners escaping from the city jail (it may be said that it is very doubtful that the city would have the power to enact such an ordinance in view of the fact the Legislature has provided by statute for such contingency), we are of the opinion that it is incumbent upon the District Attorney to institute the extradition proceedings for the purpose of returning the escaped prisoner to Nevada for trial under section 10023 N. C. L. 1929, providing the penalty for escaping from prison. This section provides that where a person is confined in a jail upon conviction for a misdemeanor that such person escaping from such jail will be guilty of a misdemeanor. This being a State statute, any violation thereof is not punishable in the municipal court, but of necessity must be tried in the justice court at Las Vegas.

An examination of the law of extradition discloses that a complaint charging an offense must be made before a magistrate. Magistrates are defined in section 10727 N. C. L. 1929, and include police judges and others, upon whom are conferred by law the powers of a justice of the peace in criminal cases. Section 1, article VI of the Constitution, provides that the judicial power of this State shall be vested in a Supreme Court, district courts, and in justices of the peace. The Legislature may also establish courts, for municipal purposes only, in incorporated cities and

towns. Section 9 of the same article empowers the Legislature to prescribe the powers, duties and responsibilities of any municipal court that may be established pursuant to section 1 of the article and also to fix by law the jurisdiction of said court, but so to fix it as not to conflict with that of the several courts of record. The case of Meagher v. Storey County, [5 Nev. 244](#), held that the Legislature could not endow a recorder of the recorder's court of Virginia City (such recorder being nothing more or less than a police judge) with the powers and duties of a magistrate, that is a justice of the peace, for the reason that the constitutional provisions above-cited empowered the Legislature to create municipal courts for municipal purposes only. So it appears that insofar as the police judge of Las Vegas is concerned, a complaint could not well be laid before him concerning the escaped prisoner but that such complaint would have to be filed in the justice court of that township and the violation of law charged would be the violation of a State law and not a city ordinance.

Section 11242 N. C. L. 1929 provides that the Board of County Commissioners of every county is authorized to provide for the payment by the county of the expenses of extradition and that such authorization of payment must be made by the board before the extradition proceedings are instituted. There is no provision in the law requiring the city council to defray extradition expenses. However, we are of the opinion that the city council of Las Vegas could, under its general powers, reimburse Clark County for the cost of extradition if the council so desired.

Very truly yours,

ALAN BIBLE, Attorney General.

562. Highway Department, State--Legal Right to Remove Lake Ditch and Reconstruct--
Holcomb-Huffaker Lane.

CARSON CITY, January 20, 1948.

HON. W. T. HOLCOMB, State Highway Engineer, Carson City, Nevada.
Attention: H. D. Mills, Assistant State Highway Engineer.

DEAR MR. HOLCOMB: Reference is hereby made to your letter of January 13, 1948, requesting the opinion of this office with respect to Contract No. 687 for the construction of Federal Aid Secondary Road No. 708, Holcomb-Huffaker Lane, Washoe County. The question presented being whether the State Highway Department under the law of this State may, in the reconstruction of the Holcomb-Huffaker Lane, remove from the right-of-way for the roadway of such Lane a certain irrigation ditch and reconstruct such ditch outside of the right-of-way acquired for highway purposes in such Lane. It is noted from your letter that the Public Roads Administration questions the eligibility for Federal participation and expense of removing and replacing the existing ditch, basing its objection upon whether the irrigation ditch in its original location had a legal right to occupy the Holcomb-Huffaker Lane right-of-way.

OPINION

The facts, as detailed in your letter and as acquired from your Mr. Boyer, disclose that some 90 years ago a roadway was acquired in the section now dominated Holcomb-Huffaker Lane. This road, as we understand it, was opened up for the purpose of conveying timber and other products from the western side of the Truckee Meadows to Virginia City in the early days of the Comstock Lode. It appears that no record of a dedication of this road can be found. Historical evidence discloses that in the main landowners in the immediate vicinity of the Lane now in question agreed to the use of the land for road purposes. It does not appear, other than from historical facts, that all of the land along the so-called Lane was at that time under fence, but the assumption is that some of it was under fence and under the control of private individuals. From such facts as we delineate from your letter and from the conversations that Mr. Boyer has had with descendants of parties in existence at the time the so-called road was located, we think demonstrates the proposition that the so-called road was located, we think demonstrates the proposition that the so-called Lane was, became and is a highway acquired by user and as such became a public highway without the sanction of any recorded documents concerning such road. Undoubtedly some 90 years ago a roadway was acquired by user long prior to the creation of Washoe County and that in the following years Washoe County and the State of Nevada did by reason of the dedication of the road by user, in effect, acquire a public road and that a right-of-way for a public road was acquired first by the county and thereafter by the State for a secondary Federal Aid Highway.

It is very hard to determine at this late date the exact width of the right-of-way or easement therefor acquired by the county and the State, so, we think, it is safe to say that some 90 years ago the easement pertained to the roadway itself in actual use and such ground on the side thereof as might be necessary for the passage of traffic. Under some authorities the right-of-way is held to extend the full width between any boundary fences that may have been erected for the purpose of marking the boundaries of the highway. Other cases hold that the only dedication had was that of the actual traveled portion of the highway. It seems from the historical facts, as we understand them, that some portion of the Lane in question may have been fenced in the very early days of the use of the road. Again, it may be that no fences at all were erected. However, assuming that the present fence line, if any exists, marked the boundaries of the highway easement, still, we are of the opinion, as hereinafter expressed, that the ditch in question constructed closely adjacent to the traveled portion of the highway also occupied an easement acquired by the owners thereof of equal importance with the roadway and, by reason of the long continued use of the easement for ditch purposes, the State today has no right to question the validity and the legality of such an easement.

Record evidence, as appears in the final judgment adjudicating the water rights of the Truckee River in the case of the United States of America, Plaintiff, v. Orr Water Ditch Company, et al., Defendants, in the United States District Court for the District of Nevada, discloses beyond any question of a doubt that on January 1, 1865, water rights on the Truckee River were acquired by appropriation for the lands immediately adjacent and served by the ditch in question which is now required to be removed from the highway right-of-way. Such judgment discloses that the lands in question are irrigated from the Lake ditch and that immediately adjacent to the ditch now proposed to be removed and constructed on a different line some 200 acres and more of land were brought under such ditch and at the present time are irrigated

therefrom, some of the land being easterly of the South Virginia Road and the water therefor taken from the ditch by means of a culvert under such road. We understand the ditch in question parallels the present Holcomb-Huffaker Lane for quite a distance westerly of the South Virginia Road, or State Highway 395, and that it would be impossible to reconstruct the Holcomb-Huffaker Lane as a secondary highway without moving the ditch farther away from the traveled roadway. We also understand that the landowners abutting such Lane have agreed to convey an easement over their land for the purpose of constructing a new ditch and pipe line.

Boiling the matter down to the exact question as to whether, at the present time, the Lake ditch occupies and has the legal right to an easement along the so-called Lane, we are of the opinion that such an easement was acquired as far back as 1865 and that down through the years it has ripened into such an easement that at the present time neither the State nor the county can well question such easement and the right to the use thereof. It seems to us that a ditch occupying the land as this portion of the Lake ditch has so occupied for a period of 83 years has established an easement by adverse possession beyond any question of a doubt and that neither the county nor the State could hope to prevail in any proceeding seeking to eject the owners of the ditch from the use thereof in its present location, nor could the county and State well prevail in insisting upon the removal of such ditch by and at the expense of the owners thereof.

We are aware of the holding in many States that adverse possession does not run against the State and, of course, could not well run against a county by reason of the fact that it is simply an arm of the State for the more convenient administration of the government of the State. However, the Lake ditch was undoubtedly constructed during territorial days, or, at the very least, completed soon after Nevada became a State in 1864. The statute of limitation, enacted by the Territorial Legislature in 1861, the same being chapter XII, Laws of Nevada 1861, provided in section 19 of such chapter that "The limitations prescribed in this Act, shall apply to actions brought in the name of the Territory, or for the benefit of the Territory, in the same manner as to actions by private parties." Thus, the Territorial Legislature made applicable to the Territory of Nevada the statute of limitations and by reason thereof permitted adverse possession to run against the Territory with respect to real property and an easement over land is a species of real property, although incorporeal in nature. The said Act of 1861 was continued in effect in the laws of this State and compiled in the Statutes of 1873 with the change made in the Statutes of 1867 eliminating the word "Territory" of Nevada and inserting the word "State," thus continuing the proposition that adverse possession would run against the State. And last, but not least, section 8528 N. C. L. 1929 continued the same provision of the law in the statute of limitations provided for this State.

So, it is our opinion that the time within which the State of Nevada, the county of Washoe, or any department of the State, could question the right of the owners of the Lake ditch to occupy a portion of the right-of-way of the Holcomb-Huffaker Lane has long gone by. It is the opinion of this office that the State Highway Department has the legal right, having obtained a right-of-way for ditch purposes, to remove the Lake ditch in the vicinity of the Holcomb-Huffaker Lane and to pay or cause to be paid the expenses of moving such ditch.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

563. Nevada Hospital for Mental Diseases--Labor or Services Performed by Patients Not Compensable.

CARSON CITY, January 21, 1948.

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

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated January 15, 1948, received in this office January 17, 1948.

You recite the facts concerning the money due for subsistence and care of two patients in the hospital and the grounds upon which the guardians of the estates of these patients claim justification for nonpayment, namely, that the patients rendered services to the hospital and that compensation for such services should be deducted from the hospital charges for subsistence and care.

You request an opinion as to whether it is proper to consider services rendered by patients as being in lieu of payment for subsistence and care.

We are of the opinion that it is not within the purview of the Statute concerning the insane or the mentally ill that any labor or services performed by a patient at the hospital can be compensable, or be in lieu of payment for subsistence and care.

28 Am. Jur. page 686: "The view has been stated that where a person is legally committed to a state insane asylum and a statute requires the cost of his maintenance therein to be paid for by his estate or by his relatives, and does not expressly or by necessary inference provide for deducting the value of any labor performed by him, while an inmate of the asylum, from the amount charged by the state for his maintenance, no such deduction can be allowed."

Section 3513 N. C. L. 1929 which concerns pay patients provides in part as follows: "In any case where the insane person is able, by possession of money, or real or personal property, to pay said expenses, the district judge shall appoint a guardian for said insane person, who shall be subject to the general law in relation to guardians as far as the same may be applicable and when there is not sufficient money in hand, the judge shall order the sale of the property of such person, or so much thereof as may be necessary, and from the proceeds said guardian shall pay all proper costs and charges incidental to arrest, transmission and proper care and support of such insane person, during the period of his or her insanity, or so long as there shall be sufficient means to meet said charges and expenses."

There is nothing in the Act that expressly provides for deducting the value of labor performed, or, by necessary inference, that in administering the accepted and appropriate treatment when a patient is required to undertake occupational activities that for such activities compensation should be allowed.

In re Peterson, 74 P. (2) 60. In this case the guardian of the insane patient set out that the patient rendered services to the State hospital, and that the reasonable value of such services was over and above the amount claimed by the hospital for subsistence. The statutes required that the estate or relatives of persons committed and confined in the hospital are required to pay the maintenance charge for such person. The court held: "The conception of the law is that it is better for the patient to be engaged to some extent and that such would tend to amelioration of the patient's condition." And as the statute does not allow an offset for these services against the maintenance charge, compensation could not be allowed.

Annotations in 114 A. L. R. 981 under the foregoing case sustain this rule.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

564. Motor Vehicles--Motor Vehicle Fund--Allocation Of.

CARSON CITY, January 22, 1948.

HON. JERRY DONOVAN, State Controller, Carson City, Nevada.
Attention: D. H. Riddell, Deputy.

DEAR MR. DONOVAN: This will acknowledge receipt of your letter dated January 7, 1948, received in this office the same date.

You request an opinion interpreting section 4435.29, 1929 N. C. L. 1941 Supp., respecting the Motor Vehicle Fund; the appropriations fixed by this section to the Motor Vehicle Administrative Fund, the County Motor Vehicle Fund and the transfer to the Highway Bond Redemption Fund and the balance to the Highway Fund.

We are of the opinion that fifty cents for each motor vehicle registered is placed to the credit of the Motor Vehicle Administrative Fund and that any balance in this fund does not revert or is it subject to transfer to any other fund. The same applies to the twenty-five cents certified and credited at the end of the year to the Conty Motor Vehicle Fund. After these definite appropriations are made the balance in the Motor Vehicle Fund is subject to the requirements of the Highway Bond Redemption Fund and any balance then remaining is transferred to the State

Highway Fund.

Section 4435.29, 1929 N. C. L. Supp., provides for the creation of a Motor Vehicle Fund. All moneys received under the provisions of the Act are deposited in this major fund. Subsections under this section provide as follows:

(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 who shall be paid in accordance with section 7562 Nevada Compiled Laws 1929, as amended by chapter 121 Statutes of Nevada 1931; all claims for such expenses and salaries shall be certified to the board of examiners and paid as other claims against the state are paid.

(c) In addition to the foregoing the department will at the end of the year certify claims to the board of examiners in favor of each and every county of the state to the amount of twenty-five cents for each and every registration issued in that county; the amount to be placed in a special fund by the treasurer; said fund to be applied to the payment of expenses incurred by the assessor in carrying out the provisions of this act, to be paid as all other claims against the county are paid.

(d) To meet the requirements of the "Nevada Highway Bond Redemption Fund," as defined by section 6 of an act entitled "An act authorizing the board of examiners to issue and sell bonds to provide money to pay a portion of the cost of constructing a state highway system, and providing for the payment of said bonds," approved March 28, 1919, and all subsequent acts relating thereto, the state controller is hereby authorized and directed to make the necessary transfer.

(e) When the foregoing requirements have been met the state controller shall transfer at the end of each quarter-year to the state highway fund any balance in the motor vehicle fund.

Subsections (b) and (c) make definite appropriations for specific purposes.

The balance in the major fund is then appropriated, first to meet the requirements of the Nevada Highway Bond Redemption Fund and when this requirement is met any balance in the Motor Vehicle Fund is transferred to the State Highway Fund. The Nevada Highway Bond Redemption Fund created by section 6, chapter 169, Statutes of 1919, provided for the levy of an ad valorem tax in the event there was not sufficient money in the fund from other sources set apart to pay the interest and discharge the principal of the bonds during each year.

Subsection (e) of section 4435.29, 1929 N. C. L. 1941 Supp., uses the following language: "When the foregoing requirements have been met * * *." This language refers to the balance in the major fund after the definite appropriations have been made as provided in subsections (b) and (c). The last antecedent in subsection (d) and the words "foregoing requirements" do not qualify the requirements of the state or county motor vehicle administrative funds.

The rule of construction expressed in *Thompson v. Hancock*, 49 Nevada 336, is that relative and qualifying words and phrases, where no contrary intention appears, refers solely to last antecedent.

The intention of the Legislature was to set aside a certain amount out of each license collected to support the State administration of the Act, and to assist the counties in their part of such administration. To transfer at the end of each quarter from such administrative fund any balance would require the department to operate on the money appropriated during each quarter. Such construction would make inoperative the provisions of subsection (b).

As held by the court in *Nye County v. Schmidt*, 39 Nevada 456, it will not be assumed that one part of a legislative Act will make inoperative or nullify another part of the same Act, if a different and more reasonable construction can be applied.

Any transfer made to the Highway Bond Redemption Fund and the State Highway Fund is made after the amounts specified in subsections (b) and (c) have been appropriated and any balances in these funds do not revert and are not subject to transfer by the Controller.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

565. Banking--Continuous Holding and Management of Real Property for Indefinite Period Constitutes "Doing Business" in This State.

CARSON CITY, January 23, 1948.

MR. GRANT L. ROBISON, Superintendent of Banks, Banking Department, Carson City, Nevada.

DEAR MR. ROBISON: This will acknowledge receipt of a copy of a letter addressed to you respecting the question of the Wells Fargo Bank & Union Trust Co. acting in this State as trustee in the matter of certain property situated in Reno, which letter was submitted to this office by you for an opinion.

As stated in the letter, the facts which concern the trusts are that the stockholders who held 50 percent of the stock of a corporation transferred that stock to Wells Fargo Bank & Union Trust Co. under a trust agreement between the stockholders and the bank. The trust was created in California by residents of that State. More than half of the assets of the corporation consisted of securities and other personal property and the remaining assets consist of a piece of real property in Reno which is subject to a medium-long-term lease. It is proposed that the Wells Fargo Bank & Union Trust Co. will upon the proposed dissolution of the corporation receive

about 40 percent of the total trust assets. The question is whether the receipt of this property by the bank and the continued holding thereof under the terms of the trust, until the death of the last life tenant causes its termination, will be considered as doing business in this State under its statutes.

We are of the opinion that the continuous holding and management of the real property in this State for the indefinite period of time by the Wells Fargo Bank & Union Trust Co. under the terms of the trust created would be doing business in this State within the meaning of the Nevada statute.

Chapter 89, Statutes of 1907, being sections 1841-1843 N. C. L. 1929, provides the qualifications for foreign corporations before carrying on business in this State.

Section 1841, quoting that part deemed relevant to carrying on business, contains the following language: “* * * which shall hereafter enter this state for the purpose of doing business therein, must, before commencing or doing any business in this state * * *.”

The term “doing any business” was construed by the Supreme Court in the case of Pacific States Security Co. v. District Court, 48 Nevada, page 53. The court held, citing from R. C. L. 19, as follows: “It seems to be the consensus of opinion that a corporation, to come within the purview of most statutes prescribing conditions or the right of corporations to do business within the state, must transact some substantial part of its ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligations. Hence, it may be laid down as a general rule that the action of a foreign corporation in entering into one contract or transacting an isolated business act in the state does not ordinarily constitute the carrying on or doing business therein.”

As stated in State Highway and Public Works Com. v. Diamond S. S. Transp. Corp., 34 S. E. (2) 78, no general definition can be made of the phrase “doing business” in statutes relating to foreign corporations, each case must be determined on its own facts, especially where entrance into a State is in ordinary prosecution of the corporation’s business.

Upon the facts to be considered in the question submitted, and the application of the test, it appears that the holding, leasing and management of the real property in Nevada is a substantial part of the trust created. The trust is continuous as distinguished from merely casual or an occasional transaction. The operation of the trust may give rise to some form of legal obligation. The execution of this trust is in the ordinary prosecution of the corporation’s business.

The question of doing business under a trust for the management of a single parcel of real property was decided in respect to capital stock tax in 30 Fed. Supp. 732. In this case the trust was created by several owners of the property, and represented fourteen-fifteenths of the entire interest in a single parcel of real estate. The court held that the trust was organized for the purpose of owning, managing, leasing, and selling the property and distributing the gains

therefrom to shareholders, and its activities reflected that it was doing just what it was organized to do. The court said: "The fact that only one piece of property was included in the trust and that no control was vested in the shareholders is of no importance." * * * "Tested by the principles announced in these cases, if a corporation, or here an association is organized for profit and was doing what it was organized to do in order to realize profit, it makes little difference how few or small its activities are in carrying out its purpose. It is held to be doing business."

In re Wellington's Estate, 221 P. 628, held that a foreign corporation entering a State to exercise some of the functions for which it was created, as in the case of a foreign trust company asserting ownership of land devised to it as testamentary trustee and assuming to administer the trust, is "transacting business" in the State, and though it acts as trustee in only one case.

The trust company in this case, however, was permitted to carry out the trust under a provision of the statute which permitted foreign corporations to act in the State as executor of or trustee under the will of any deceased person upon complying with the provision of the statute.

The provisions of chapter 63, Statutes of Nevada 1943, prohibits any corporation not organized under the laws of this State from being appointed to act as trustee under appointment of any court or by authority of any law of the State.

Therefore, according to the facts and the decisions which we believe to express the law on the question presented, the Wells Fargo Bank & Union Trust Co., in the execution of the trust, would be doing business in this State within the purview of the statute.

Very truly yours,
ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

566. U. S. Geological Survey--Procedure for Payment of State's Cooperative Share.

CARSON CITY, January 27, 1948.

HON. JOHN KOONTZ, Secretary of State, Carson City, Nevada.

DEAR MR. KOONTZ: This will acknowledge receipt of your letter dated January 23, received in this office January 24, 1948.

You enclose a claim made by the U. S. Geological Survey for the State's cooperative share of expenditure by the Survey under chapter 231, Statutes of Nevada 1947, together with correspondence with the Director of the Nevada State Bureau of Mines, and inquire as to the proper procedure to be followed in meeting the claim.

The statute referred to above provides that the claim shall be approved by the Director,

and when thereafter approved by the State Board of Examiners, shall be paid in the same manner as other claims against the State.

The claim should be presented as other claims against the State showing the statement from the United States Geological Survey together with the breakdown, and showing the approval by the Director. The claim is then submitted to the Board of Examiners under the provisions of chapter 201, Statutes of 1947, transmitted to the Controller, and the warrant drawn against the appropriation made in chapter 231, Statutes of 1947.

We are returning herewith the claim and correspondence submitted.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

cc: Hon. Vail Pittman, Governor of Nevada and Hon. Jay A. Carpenter, Director, Bureau of Mines.

567. Motor Vehicles--Nonresidents Employed in This State are Subject to Registration Laws.

CARSON CITY, January 29, 1948.

HON. JOHN KOONTZ, Secretary of State, Motor Vehicle Commissioner, Carson City, Nevada.

DEAR MR. KOONTZ: Reference is hereby made to your inquiry of January 23, 1948, relative to certain residents of California, who, while being residents of that State use their California registered passenger vehicles for daily transportation into and out of the State of Nevada in connection with their gainful employment in this State. You inquire whether under such circumstances such residents are required to register their vehicles under the Nevada law which requires a nonresident owner of a vehicle who comes into the State for the purpose of being gainfully employed therein shall be considered a resident of this State and pay such registration fees as are provided for in section 17(a), chapter 186, 1943 Statutes.

OPINION

We think the proviso incorporated in said section 17(a) in 1943 was incorporated therein for the very purpose of requiring all nonresidents, whether residing in the State or coming into the State for the purpose of being gainfully employed, to register their motor vehicles under the Nevada law. The fact that such nonresidents may reside in California and drive back and forth to their place of employment in the State every day does not change the rule or the effect of the statute.

Prior to the 1943 amendment the law provided that a nonresident owner of a vehicle, who, while residing in the State, accepts gainful employment, must register his vehicle in this State. It was found that this provision of the law failed to cover many instances of the use of our highways by those gainfully employed in the State, but who came into the State solely for the purpose of being employed and used their vehicles for conveyance in and out of the State. The amendment of 1943 was enacted by the Legislature for the very purpose of correcting such a situation. As stated in our Opinion No. 221, dated August 21, 1945, directed to your office, "The amendment shows the deliberate intention of the Legislature to require all persons who work in Nevada to pay a fee for the registration of their motor vehicles and comply otherwise with the Act in the same manner as ordinary residents."

It is the opinion of this office that the California residents in question are subject to the motor vehicle registration laws of this State.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

568. Taxation--Affidavit for Widow's Exemption Must be Filed Prior to Completion of Tax Roll--Procedure for Refund.

CARSON CITY, January 30, 1948.

HON. JAMES W. JOHNSON, JR., District Attorney, Churchill County, Fallon, Nevada.

DEAR MR. JOHNSON: This will acknowledge receipt of your letter dated January 16, 1948, received in this office January 19, 1948.

Your statement of fact is that a woman in your county failed to file her application for widow's exemption as to taxes prior to the completion of the tax roll and certificate to the County Treasurer by the Assessor.

The question presented is whether it is necessary for a widow to file the affidavit for exemption previous to the closing of the tax roll, or whether she has the right to file at any time during the calendar year and receive the exemption. Also you inquire as to the procedure for refunding the difference in the amount of taxes as shown by the tax roll and the amount payable had the exemption been allowed in the first instance.

We are of the opinion that the affidavit for widow's exemption from taxes under the provisions of the statute must be filed annually on or before the date of the last meeting of the board of equalization, and may not be filed after that time.

The procedure for the refund of taxes paid in excess of the amount legally payable is

defined under section 6637-6644 N. C. L. 1929.

If the facts involved in your inquiry are such as to warrant a refund, the statutes above-quoted outline the necessary procedure to be followed.

Section 5 of chapter 200, Statutes of 1947, subsection 6, quoting the language relative to the exemption allowed widows, reads: "The property of widows * * * not to exceed the amount of one thousand dollars to any one family; * * * provided, that no such exemption shall be allowed to anyone but actual bona fide residents of this State, and shall be allowed in but one county in this state to the same family, and the party or parties claiming such exemption shall make an affidavit before the county assessor of such residence, and that such exemption has been claimed in no other county in this state for that year; * * *."

The seventh subsection which provides for the exemption of persons who have served or are serving in the military service during the war, provides that such exemptions shall be allowed only to claimants who shall make an affidavit annually on or before the third Monday in August.

Subsections six and seven only, require the filing of an affidavit.

The third Monday in August is the last day on which the County Board of Equalization may met to make changes on the assessment roll as provided in section 6434, 1929 N. C. L. 1941 Supp.

Subsection seven is the only part of the section which fixes a penalty for a false affidavit, the language used is: "* * * and any person who shall make a false affidavit or produce false proof to the assessor, and as a result of such false affidavit or false proof a tax exemption is allowed to a person not entitled to such exemption, such person shall be fined in any amount not exceeding one thousand (\$1,000) dollars * * *."

The two subsections require affidavits before an exemption shall be allowed and refer to the same matter or subject in this respect, and should be harmonized. The definite object sought to be accomplished by the Legislature was to allow exemptions to widows, orphans, blind persons and persons who had or were serving in the military forces of the United States in time of war, upon the filing of the necessary affidavit.

The rule expressed in *Nye County v. Schmidt*, 39 Nevada 456, on page 464, is as follows: "Where the legislative body manifests a definite purpose, it will be presumed that, in furtherance of this definite purpose, the law-making body formulated the subsidiary provisions in harmony therewith." * * * "Courts in constructing statutes must presume a legislative intendment of reasonable operation of all parts of the statute."

Roney v. Buckland, 4 Nevada, on page 57, "Hence, in the interpretation of any phrase, sentence of section of a law, the first thing to be ascertained is the ultimate and general purpose of the Legislature in the enactment of the law. When that is known or ascertained, then every sentence

and section of the entire law should be interpreted with reference to such general object, and with a view to giving it full and complete effect, extending to all its logical and legitimate results.”

Attorney General’s Opinion No. 155, February 18, 1918, relative to the filing of an affidavit in order to claim a widow’s exemption, held as follows: “Clearly, the affidavit must be annually made as provided, because after the taxes are levied they become a lien, and when the Board of Equalization has acted an obligation immediately arises on the part of the party taxes to pay the amount due; and thereafter County Commissioners can neither release the property from the lien nor discharge the party from such obligation. (State v. C. P. R. R. Co., [9 Nev. 79](#)).”

Therefore, we are of the opinion that in order for a widow to have the exemption provided by statute placed on the assessment roll the affidavit required by the statute should be made annually, before the third Monday in August, to the County Assessor.

The procedure for refund of money wrongfully paid into the State or county is found under sections 6637-6644 N. C. L. 1929. Section 6637, supra, after naming specific conditions contains the following language: “* * * and also in all cases where, in the opinion of the state board of examiners, or the board of county commissioners, according to which board the applicant for refund has a just cause for making such application, and the granting of such a refund would be equitable.”

Section 6638 provides: “Whenever it shall appear to a board of county commissioners of any county of the state, by competent evidence, that money has been paid into the county treasury of the county under any of the circumstances mentioned in section 1 of this act, said board of county commissioners, by its unanimous resolution, may direct the county treasurer of the county to refund to the applicant the amount of money so paid into the county treasury in excess of the amount legally payable.”

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

569. Nevada Hospital for Mental Diseases--Attorney General Not Empowered to Modify Administrative Practices Provided by Statute.

CARSON CITY, January 30, 1948.

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

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated January 19, 1948, received in this office January 22, 1948.

You call attention to chapter 98, Statutes of 1943, and chapter 205, Statutes of 1937, and particularly to section 19 as amended by these statutes. You state that section 19 of chapter 98, Statutes of 1943, shows it to be unworkable under the administrative conditions of the hospital, if literally applied, and must cause hardship on patients having to wait for the quarterly report to the Board of Commissioners before eligibility for discharge is determined. You suggest that this particular statute be reviewed for the purpose of modification at the earliest opportunity.

We concur with the opinion expressed by the District Attorney of Washoe County that chapter 98, Statutes of 1943, amends section 19 of the basic insane Act of March 25, 1913, and supersedes section 19 of the 1937 amendment of this section.

Chapter 98, Statutes of 1943, is an Act to amend the Act concerning the insane. Section 1 provides as follows: "Section 19 of the above-entitled Act, being chapter 52 of the 1913 Statutes of Nevada, being section 3523 N. C. L. 1929, is hereby amended so as to read as follows:"

There is a defect in this amendment as chapter 52, Statutes of 1913, purports to amend section 3 of the original Act and in fact amends section 9 of the Act. This chapter was approved March 7, 1913. The Legislature at the same session adopted a new Act concerning the insane which was approved March 25, 1913, under chapter 231. Chapter 52 was therefore superseded by chapter 231. Section 3523 N. C. L. 1929 was amended by chapter 205, Statutes of 1937.

The amendment in 1943 referred to a chapter which had been repealed and to a section which had been amended, but the title of the Act was correct and reference was made to section 19 of the Act of 1913 which shows that the intention of the Legislature was to amend this particular section.

The rule applied in *Worthington v. District Court*, 37 Nevada 212, is that the intention of the Legislature to amend a specified section of the statute must govern, and a clerical mistake as to the section amended must be disregarded. The court said on page 225: "While there is some conflict on the subject,' says the State Court of Appeals, 'the decided weight of authority and the better opinion is that an amendatory statute is not invalid, though it purports to amend a statute which had previously been amended, or for any reason had been held invalid.'" The court said this view is sustained by the numerous cases cited by the court.

It is not within the province of this office to modify a statute to accord with administrative practice at the hospital to determine the better or wiser method. This is a matter for legislative action, and naturally will depend on the submission and passage of a correct amendment.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

cc: Hon. Harold O. Taber, District Attorney.

570. Fish and Game--District No. 2--Fishing Season--Earliest Date April 15.

CARSON CITY, February 2, 1948.

NEVADA FISH AND GAME COMMISSION, P. O. Box 678, Reno, Nevada.
Attention: S. S. Wheeler, Director.

GENTLEMEN: Reference is hereby made to your letter of January 30, 1948, requesting the opinion of this office as to the earliest date the fishing season can be opened in District No. 2. Your inquiry is based upon an apparent conflict between sections 22, 23, and 26 of the 1947 Fish and Game Act.

OPINION

That there is such a conflict is clearly apparent in that section 22 provides an open season from the first day of may to the 31st day of October, inclusive, on the waters of the Truckee River lying west of Derby Dam. Section 23 fixes an open season on the waters of the Truckee River and *District No. 2* between the first day of May and 31st day of October, both inclusive. Section 24 provides that open season for the fishing in the waters of Pyramid Lake from the first day of March to the first day of October, both dates inclusive.

District No. 2 consists of all waters and lands of Humboldt, Pershing, Washoe, and Storey Counties. Section 21.

Section 26 then provides it shall be unlawful for any person to fish in or from the waters of Pyramid Lake and Washoe Lake in District No. 2 between the first day of October and the first day of March next following, thus fixing an open season for Pyramid and Washoe Lakes from the first day of March to the first day of October in line with section 24.

However, section 26 then provides that it shall be unlawful for any person to fish in or from any of the waters of Districts Nos. 1 to 5, inclusive, except between the 15th day of April and the first day of October of the same year, thus fixing an open season in District No. 2, excepting Pyramid and Washoe Lakes, from the 15th day of April to the first day of October which undoubtedly conflicts with the provisions of sections 22 and 23. Section 26, being later in position in the statute, consequently, according to the canons of construction of our Supreme Court, is later in time than sections 22 and 23. Therefore, it is clear that the 15th day of April is the earliest date of the open season in District No. 2.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

571. County Commissioners--Long Term County Commissioner Appointed to Office Holds to Expiration of Term.

CARSON CITY, February 9, 1948.

HON. WILLIAM J. CROWELL, District Attorney, Nye County, Tonopah, Nevada.

DEAR MR. CROWELL: Receipt is hereby acknowledged of your letter of February 5, 1948, wherein you make the statement and inquiry concerning such statement as follows hereinafter.

STATEMENT

Mr. S. was elected County Commissioner, for the long term, for Nye County, at the November 1946 general election, assumed office January 1, 1947, resigned in February of 1947. The Governor appointed Mr. C. to fill the unexpired term of Mr. S., resigned. The term of Mr. S. will have expired January 1, 1951.

INQUIRY

The office of County Commissioner is a constitutional office, in that the Legislature is required to provide by law for such office. Sec. 26, Art. IV, Const. However, the Constitution provides no specific term of office for such commissioner, but leaves such term to be provided by law. Sec. 11, Art. XV. Const. Neither does the Constitution provide for the election to fill a vacancy in such office. Section 8 of article V of the Constitution empowers the Governor to fill vacancies in any office, which appointment shall expire at the next election, and qualification of the person elected where no mode is provided by the Constitution and laws for filling such vacancy.

Section 1935 N. C. L. 1929, as amended at 1869 Stats. 92, provides for the election and terms of office of County Commissioners including the four-year long term. Such section also provides:

“Any vacancy or vacancies occurring in any board of county commissioners shall be filled by appointment of the governor, and such appointee or appointees shall hold his or their offices until the first Monday of January following the then next general election, except as provided otherwise in this act.”

Section 1936 N. C. L. 1929, also as amended in 1869 Stats. 92, supplements section 1935 with respect to the election and terms of office of county commissioners and specifically provides the exact time of the end of the term for which elected, to wit, at 12 p.m. on the day preceding the first Monday in January. Such section also provides: “that the term of a person appointed to the office of county commissioner shall not by virtue of such appointment extend beyond the hour of

twelve o'clock p.m. of the day preceding the first Monday of January next following a general election."

Thus, the Legislature has provided by law for the election, term of office and the filling of vacancies in the office of county commissioner. The Legislature not having specifically provided for an election to fill the vacancy in the office of county commissioner at a definite time or at a specifically designated election after such vacancy occurs, particularly with respect to a vacancy in the office of long-term commissioner, but left the matter to be determined from the term "general election" as used in both of the foregoing cited statutes, we think the inquiry is to be answered by the construction to be placed upon such term.

There is, under Nevada law, no inherent right of an election by the people in the absence of legislation clearly authorizing the same with respect to an election to fill a vacancy in office.

Sawyer v. Haydon, [1 Nev. 75](#), followed in State ex rel. Bridges v. Jepsen, [48 Nev. 64](#), and Grant and McNamee v. Payne, [60 Nev. 254](#).

In State ex rel. Bridges v. Jepsen, supra, the court construed the term "the next general election," with respect to the filling of a vacancy in the office of County Clerk, as such term was used in section 2813 Rev. Laws 1912, now section 4813 N. C. L. 1929, to mean the general election at which the office of County Clerk would be filled in the event no vacancy had occurred, but in the proper course of events every four years, and that no election for the filling of such vacancy could legally be held at the intervening biennial election. Such statute was amended in 1933 and again in 1939, and now provides for election to fill a vacancy in county or township offices, the appointing power of which is vested in the Board of County Commissioners, at the *next biennial election*. Section 4813, N. C. L. Supp., 1931-1941. This amendment was enacted for the purpose of changing the rule announced in State ex rel. Bridges v. Jepsen, as so stated in Grant and McNamee v. Payne, supra.

The Supreme Court again construed the term "general election" as used in section 12, article IV of the Constitution, in answer to the contention such term meant the next ensuing biennial election with respect to the filling of a vacancy in the office of State Senator. The court in construing such term followed its holding in the Bridges v. Jepsen case, supra. A quotation from the opinion is apropos here. The court said at pages 257-258:

Petitioners claim that such legislation has been enacted, and point to section 4813 N. C. L., as amended in 1939, c. 112, page 146. The claim may not be allowed. The section, as amended, does not include state senators, which in a strict legal sense, are state officers. It was amended for the purpose of changing the rule declared by this court in State ex rel. Bridges v. Jepsen, supra, in relation to filling vacancies by election in county offices. While the constitution and statutes provide for the election of certain officers every two years, this, in itself, does not authorize the election of an officer not appointed by law to be elected at that time. The people are presumed to know what officers are designated by law to be elected at each biennial election, but in the absence of legislation they cannot be presumed to know when an

election is to be held to fill a vacancy. *State v. Superior Court*, 140 Wash. 636, 250 P. 66; *People ex rel. McKune v. John B. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People ex rel. Leverson v. Thompson*, 67 Cal. 627, 9 P. 833, and cases cited therein; *State ex rel. Sampson v. Superior Court*, 71 Wash. 484, 128 P. 1054, Ann. Cas. 1914C, 591; *Second v. Foutch*, 44 Mich. 89, 6 N. W. 110; *State v. Kehoe*, 49 Mont. 582, 144 P. 162.

It was insisted that the 1922 amendment to the constitution itself furnished the needed legislation. We are satisfied that it does not. The bare statement "general election" if accorded the meaning "biennial election" is wholly inadequate to express or imply a sufficient rule of legislative enforcement. To read such into the proviso would be judicial legislation, which courts, having due regard for the separation of the powers of our government, should scrupulously avoid. Whether it would be better policy that a vacancy in the office of state senator should be filled at the first election following the vacancy is none of our concern. The legislature or the people, as the case may be, formulate policy. The courts are given no hand in it.

We think that the construction placed upon the term "general election" by the Supreme Court in the above cases is applicable to and controls the construction of the term as used in sections 1935 and 1936 N. C. L. 1929. Mr. S. was duly elected at the general election at which the long-term commissioner was due to be elected. If he had continued in office, the next general election for that particular office would not occur until the November election of 1950 at which time he or his successor would have been elected thereto. The Legislature not having amended said sections 1935 and 1936, or either of them, with respect to the filling of the vacancy in the office of long-term commissioner at the next ensuing biennial election, as was done with respect to other county officers, or as was the change made in section 12 of article IV of the Constitution by the adoption of the amendment thereto in the general election of 1944 relative to the filling of vacancies in the office of state senators to change the rule in the *Grant and McNamee v. Payne* case, in our opinion, leaves such sections 1935 and 1936 subject to the construction placed on the term "general election" by the Supreme Court in the above-cited cases.

We are constrained to hold that the Governor's commission to Mr. C. was and is correct in stating that he was appointed to fill the unexpired term.

If an election to fill the vacancy in the office of long-term commissioner should be had at the very next election after such vacancy occurs, we think such matter must receive the attention of the Legislature.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

CARSON CITY, February 10, 1948.

NEVADA TAX COMMISSION, Carson City, Nevada.
Attention: R. E. Cahill, Secretary.

GENTLEMEN: Reference is hereby made to your letter of January 10, 1948, our reply thereto of January 13, 1948, and the letter of Attorney Recht of January 29, 1948, relative to whether the operation of pari-mutuel machines in connection with the game of Jai-a-lai would constitute gambling and, if so, if the same is subject to the gambling license law of this State.

Jai-a-lai is a game of skill and as such game does not constitute gambling in any sense of the word. However, bets placed on the result of such game through pari-mutuel machines or by the simply operation of purchase of tickets without the use of the machines where the seller of the tickets retains a percentage of the money bet constitutes in our opinion, gambling under the laws of this State.

The operation of pari-mutuel machines constitutes the operation of a mechanical device or machine for money and where the operator thereof receives directly or indirectly any compensation, percentage, or share of the money placed for keeping, running, carrying on or permitting such machine to be so operated constitutes a gambling game within section 1 of the 1931 Gambling Act, the same being section 3302 N. C. L. 1931-1941 Supp., and as such is required to be licensed under the licensing provisions of such law.

We make the above statement after an exhaustive examination of the general law on the subject and find such law to be that in all games of skill where betting is permitted and carried on by means of the pari-mutuel machine or system that while the game itself does not constitute gambling, the operation of the pari-mutuel machine or system where the operator retains a percentage of the moneys bet constitutes gambling and the machine or system constitutes a gambling device. Authorities examined: 24 Am. Jur. 415, sec. 25, sec. 36; Pompano Horse Club v. State ex rel. Bryan, 111 So. 801, 52 A. L. R. 51, and extensive annotation; 52 A. L. R. 74.

Nothing in this opinion is to be construed as requiring racing commissions and dog racing associations holding races in this State to obtain a gambling license provided in the Gambling Act as a prerequisite for the operation of pari-mutuel machines in the conduct of such races. The operation of pari-mutuel machines or pari-mutuel systems in connection with horse racing and dog racing is covered by a special Act, the same being sections 6215-6224 N. C. L. 1929, as amended, 1943 Stats. 105.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

CARSON CITY, February 11, 1947.

MR. RAY P. SMITH, Secretary-Treasurer, Nevada State Real Estate Board, No. 8 Arcade Building, Reno, Nevada.

DEAR MR. SMITH: This will acknowledge receipt of your letter of February 3, 1948, received in this office on February 4, 1948, asking for our construction of section 8 of the 1947 Real Estate Act, the same being chapter 150.

Section 8, insofar as pertinent to your inquiry reads as follows:

Every applicant for license as a real estate broker or real estate salesman shall be of the age of 21 years or over and a citizen of the United States, and a resident of the State of Nevada for a period of at least six months next immediately preceding the filing of the application for license.

Every applicant for license as a real estate broker shall have actively served as a licensed real estate salesman within the State of Nevada or elsewhere for a period of at least six months next immediately preceding the filing of the application for license.

It is our opinion that the statute should be given a reasonable construction and that reading the section, as well as the Act in its entirety, we feel that it was the legislative intent to permit persons, who are otherwise qualified to secure brokers' licenses, to take the examination when they have fulfilled the residence requirement and have had prior experience as salesmen outside the State of Nevada, even though such experience could not be "next immediately preceding the filing of the application for license."

To hold otherwise would be to give no meaning whatever to the words in section 8 following Nevada and reading, "or elsewhere." Significantly enough this sentence, as found in Assembly Bill No. 100, introduced in the Nevada Legislature, the 1947 Session, is word for word the same as that finally enacted except that the language in the bill as introduced was "one year" instead of "six months". We feel that it was the intent of the Legislature to allow those who had prior experience in other States as real estate salesmen to receive credit for such service. The allowance of credit for prior service is a common provision in almost all licensing statutes and one that is reasonable, fair and just.

To read the law in its narrow sense would be to reach an absurd result and, in our opinion, we should not make such an inference if it is possible to construe the statute otherwise.

From our Supreme Court in the case of Nevada Cornell S. M. v. Hawkins, [51 Nev. 420](#), we find the following sound rule of statutory construction:

If language of a statute admits of two constructions, one of which would give absurd results, the construction giving a reasonable result should be adopted, it being

presumed the Legislature intended to avoid absurd consequences.

See also Las Vegas ex rel. v. Clark County, [58 Nev. 469](#).

Very truly yours,

ALAN BIBLE, Attorney General.

574. Fire Protection--Powers of Organized Districts.

CARSON CITY, February 16, 1948.

HON. WAYNE O. JEPSON, District Attorney, Yerington, Nevada.

DEAR MR. JEPSON: The following is in response to your telephone call of Wednesday last, respecting the authority of the directors of an organized county fire protection district to contract for the borrowing of money to purchase fire-fighting equipment without the necessity of a bond issue.

We are of the opinion that the directors of an organized fire protection district are authorized to purchase fire-fighting equipment for such district, and may borrow money to pay for the same without a bond issue, provided the amount of money needed for such purpose does not exceed one percent of the assessable property in the district for any one year.

Section 1929.08 N. C. L. 1931-1941 Supp., authorizes the board of directors of an organized fire protection district to make and execute in the name of the district all necessary contracts to maintain and operate the property acquired for the purpose of the district, and to acquire real and personal property needful for the purposes of the district.

Section 1929.10 N. C. L. 1931-1941 Supp., provides: “* * * that the amount of money to be raised for the purpose of establishing and equipping said district with fire-fighting facilities shall not in any one year exceed one percent of the assessable property within the district, * * *.” Chapter 182, Statutes of 1945, provides the method of raising money in an amount not to exceed ten thousand dollars to be paid within the period of eleven years by means of a bond issue authorized by the Act.

It appears therefrom when the amount of money required to furnish fire-fighting equipment for the district will exceed one percent of the assessable property within the district in any one year, the only method of raising money is by bond issue as authorized in the 1945 supplementary Act.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

575. Hospitals--State Board of Health Has Authority to Make Survey, But no Authority to Adopt State Plan--Sections 601(a) and 622, Public Law 725, 79th Congress.

CARSON CITY, February 25, 1948.

MR. JOHN J. SULLIVAN, Acting Secretary, State Board of Health, Carson City, Nevada.

DEAR MR. SULLIVAN: This will acknowledge receipt of your letter dated February 19, 1948, received in this office the same date, requesting an opinion on the following questions:

Does the Governor have the authority to issue an executive order designating the Department of Health as the sole official agency responsible for carrying out the provisions of section 601(a) and section 622 of the Public Law 725 passed by the 79th Congress?

Does the Department of Health have the authority to accept funds made available to the State by this law and to carry out a program of hospital survey, planning and construction as envisioned by the law?

Does the Board of Health have the authority to establish and enforce minimum standards of maintenance and operation of hospitals operating in this State?

Your first question is answered in the negative.

In answer to your second question, we are of the opinion that the State Department of Health has authority to accept funds made available by the Federal Government to inventory the State's existing hospitals and related facilities, but if such funds are dependent upon the condition that the department must adopt a State plan within the purview of section 601(b), general regulations under sections 622 and 623 of Public Law 725, 79th Congress, the department does not have authority under the statute. Such power would require legislative action.

Your third question is answered in the negative.

Public Law 725, 79th Congress, section 601(a) and (b) declares the purpose of the Act to be to assist the States; (a) to inventory their existing hospitals as defined in section 631(3); to survey the need for construction of hospitals, and to develop programs for construction of such public and other nonprofit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing hospital, clinic and similar services to all their people; and to construct public and other nonprofit hospitals in accordance with such programs.

The term hospital is defined in section 631(e), includes public health centers and general,

tuberculosis, mental, chronic disease, and other types of hospitals, and related facilities such as laboratories, outpatient departments, nurses' homes and training facilities and central facilities operated in connection with hospitals, but does not include, primarily, domiciliary care. Subdivision (b) to construct public and other nonprofit hospitals in accordance with such program.

The only State Hospital is the Hospital for Mental Diseases. The related facilities of the State under this section are found under section 5260, 1929 N. C. L. 1941 Supp., subdivision 4, Division of Laboratories, and 6, Division of Venereal Disease Control.

Section 611 of Public Law 725 provides for an application by the State for funds to carry out the purposes of section 601(a). First, there must be a single State agency as the sole agency for carrying out such purpose.

Section 5259.02, 1929 N. C. L. 1941 Supp., provides that the State Department of Health is designated as the agency of the State to cooperate with the duly constituted Federal authorities in the administration of the Federal Social Security Act which relates to the Maternal and Child Health Services, care and treatment of crippled children, and the general promotion of public health, and is authorized to receive and expend all funds made available to the State Department of Health by the Federal Government.

Section 623 of the Federal Act provides for the adoption of a State plan. Such plan must designate a single State agency for supervising the administration of the plan. This section also provides that the plan must contain satisfactory evidence that the State agency will have authority to carry out such plan in conformity with this section. The plan includes the designation of a State Advisory Council which shall include representatives of nongovernment organizations and of State agencies concerned with the operation, construction or utilization of hospital services selected from among persons familiar with the needs for such services in rural areas and to set forth a hospital construction program.

Section 5259.02, *supra*, designates the State Department of Health as the State agency to cooperate with the Federal Government, but does not give authority to adopt a State plan which will contain the regulations required under section 622 of the Federal Act. The State Department of Health, under the statutes, has the authority, if it had the funds, to inventory the existing State hospitals, and related facilities, and to survey the need for the construction of public hospitals, but not the development of a hospital construction for the State.

Section 5259, 1929 N. C. L. 1941 Supp., delegates broad powers to the State Board of Health. The administrative power must be exercised within the frame work of the provisions bestowing such power. The board cannot give itself power and then execute the power.

The rules and regulations of the Health Department must be consistent with the existing laws, and the policy of the Legislature to delegate additional authority is indicated by that language in this section which reads: "The State Board of Health, with the assistance of the State Health Officer, shall make a biennial report to the

Governor, setting forth the conditions of public health in the State and making such recommendations for legislation, appropriations and other matters as are deemed necessary or desirable.”

This policy is indicated in other Acts, such as the Aid to Crippled Children, which authorizes the department to administer a detailed plan which shall be submitted to the Federal Department and when approved shall be made effective by the department.

Your third question is answered in Opinion No. 114 from this office, under date of February 25, 1944, which held that there was not sufficient statutory authority for the general inspection and the establishment of standards for hospitals by the State Department of Health.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

576. Insurance--Commercial Life Insurance Company of Phoenix Not Qualified To Do Business in Nevada.

CARSON CITY, February 28, 1948.

HON. JERRY DONOVAN, Insurance Commissioner, Carson City, Nevada.
Attention: G. C. Osburn, Deputy.

DEAR MR. DONOVAN: Your letter of February 19, 1948, was received February 29, 1948.

You inquire as to the qualifications as to capital and surplus of Commercial Life Insurance Company of Phoenix, Arizona, a foreign corporation, to do business in Nevada, in view of section 13 of the Nevada Insurance Act of 1941, section 3656.12, 1929 N. C. L. 1941, Supp., the pertinent provisions of which read as follows:

(1) A stock company organized under this article shall have and at all times maintain a paid-up capital of the amount set forth in its articles of incorporation, which amount shall not be less than the minimum capital requirement applicable to the class and clause or clauses of section 5 describing the kind or kinds of insurance which it is authorized to write, as set forth in the following table:

LIFE, ACCIDENT, AND HEALTH

(a) Class 1(a) or (b) one hundred thousand (\$100,000) dollars.

(2) A company in addition to the minimum capital required by subsection (1) shall

have at the time of the issuance to it of a license, a paid-in surplus of not less than fifty (50%) percent of its required minimum capital. * * *

This company is a life insurance company Class 1(a). Such companies, if domestic, must have and maintain a paid-up capital of \$100,000. This company does so.

Such company must also have a paid-in surplus of \$50,000 or more. Section 13 of the Act, subdivision 2. This company does not do so.

The company is not qualified.

It is not enough that the capital and surplus exceeds \$150,000. The defect is that it must meet the requirements of each subdivision of the section, that is, \$100,000 capital (Subd. 1) and \$50,000 surplus (Subd. 2).

By section 23 of the Act (1929 N. C. L. 1941 Supp., sec. 3656.22) corporations having the qualifications as to capital and surplus of a Nevada corporation (sec. 13), that is, in this case \$100,000 capital and \$50,000 surplus, are qualified to enter this State and do business provided they would be qualified to enter Arizona from another State. (Sec. 23, provisos 1 and 2.) Section 23, subdivision 1, of the Act reads as follows:

(1) Upon complying with the provisions of this article, a foreign or alien company domiciled in any other state shall be permitted to enter this state; provided, that the qualifications for their admittance to do business in this state shall be equal to the present existing capital and/or surplus qualifications for a similar company entering the state in which such company is domiciled; and provided further, that the capital and/or surplus requirements of such company desiring to enter this state shall be at least equal to the capital and/or surplus requirements, if any, for similarly organized domestic companies under this act; and provided further, that a nonprofit hospital association may be admitted subject to the provisions of this act upon statement from the proper state official that such hospital association has properly qualified under the laws of its state of domicile.

If the demands of Arizona on a foreign corporation are stricter than the 100 percent capital and 50 percent surplus, then Commercial Life would have to meet them besides meeting the minimum requirements of 100 percent capital and 50 percent surplus. We do not know how Arizona treats a foreign corporation in this respect.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

Nomination.

CARSON CITY, March 2, 1948.

MR. A. L. PARK, County Clerk, Mineral County, Hawthorne, Nevada.

DEAR MR. PARK: The following is in response to a telegram received March 1, 1948, from District Attorney Martin G. Evansen requesting an opinion from this office, directed to you, as to the right of a candidate for the office of school trustee who has filed for such office to withdraw as such candidate.

We are of the opinion that the declaration of candidacy required in a primary election, that the candidate files and certifies that he will accept such nomination and not withdraw, does not apply to a candidate for the office of trustee at a school election.

The provision of the statute requiring a candidate to take an oath that he will not withdraw, if nominated, may reasonably imply that prior to his receiving such nomination he may withdraw. Attorney General's Opinion No. 243, August 3, 1926.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

578. Insurance--Tax on Annuity Considerations--Law Should be Clarified.

CARSON CITY, March 2, 1948.

HON. JERRY DONOVAN, State Controller, Carson City, Nevada.
Attention: G. C. Osburn, Insurance Deputy.

DEAR MR. DONOVAN: Your letter of February 5, 1948, was received February 7, 1948.

You refer to an earlier inquiry and now furnish us with a list of express statutory amendments in many States now providing a tax on "considerations or premiums" received by insurance companies for annuities or deferred annuity policies.

Section 59 of the Nevada Insurance Act of 1941 (1929 N. C. L. 1941 Supp., sec. 3656.58) governs this matter. Sections 3648 and 3648.02 to which attention is called as a footnote were repealed by section 145 of the Insurance Law (sec. 3656.165).

Section 59, above cited, reads as follows:

Every insurance company or association of whatsoever description, except fraternal or labor insurance companies, or societies operating through the means of a lodge system, or systems, doing an insurance business in this State, shall annually pay to the state controller, as insurance commissioner of the State of Nevada, a tax of two (2%) percent upon the total premium income from all classes of business covering property or risks located in this state during the next preceding calendar year, less return premiums and premiums received for reinsurance on such property or risks; *provided*, that there shall be deducted from such tax on premiums the amount of any county and municipal taxes paid by such companies or associations on real estate owned by them in this state; *provided further*, that the amounts of annual licenses paid by such companies or associations upon each class of business licensed annually shall be deducted from such tax on premiums if such tax exceeds in amount the licenses so paid.

In view of the ambiguity of the section in question this office does not feel justified in advising you that you should collect the tax on annuity considerations. To attempt to do so would undoubtedly precipitate a suit, the outcome of which in the present state of the decisions would be doubtful. We feel the law should be clarified by the Legislature as it has been in the statutes, a list of which you submit. Many of these amendments were made after litigation disclosed the ambiguity of the statutes pre-existing.

The matter in question is treated briefly in Appelman on Insurance, vol. 19, sec. 10591, page 305, citing State ex rel. Hart v. New York Life Ins. Co., 135 S. W.(2) 639 (Ark. 1939), holding annuity payments to be taxable. That decision turned on the question whether annuity receipts are "premiums."

The matter is extensively annotated in 109 A. L. R. at page 1060 following N. W. Mutual Life Ins. Co. v. Murphy, 271 N. W. 899 (Iowa) at page 1054. Also annotations at 135 A. L. R. 1248 to case of Equitable Life Ins. Co. v. Hobbs, Commissioner of Insurance (Kan. 1941), 114 P.(2) 871, at 135 A. L. R., page 1234.

In these cases questions arose whether these transactions were "insurance," whether the consideration were "premiums," besides other questions.

You call our attention to statutes of sixteen States specifically taxing annuity considerations.

In at least three of these States the law has been made more specific after the pre-existing law (similar to the present Nevada law) was found by the courts to be not specific enough. See secs. 26-0111 RC 1943 North Dakota; sec. 14.02 (not .03) chap. 79 Laws 1947 Washington; chap. 32, sec. 2301 C. L. 1945 Wyoming.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

579. Daylight Saving Time--Governor Not Authorized by Statute to Establish Daylight Saving Time in State.

CARSON CITY, March 3, 1948.

HON. VAIL PITTMAN, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR PITTMAN: Reference is hereby made to your inquiry of March 2, 1948, whether you, as Governor of the State, are vested with the power to proclaim daylight saving time within the State of Nevada, due to the necessity of curbing the use of electric power for the reason there is a shortage of such power due to drought conditions.

OPINION

An exhaustive examination of the general law on the question of providing daylight saving time or changes in time discloses that it is a purely legislative matter. In brief, any change in the method of computing and marking time and changing the daily time to what is known as daylight saving time requires the action of the lawmaking body of the State. The Legislature may enact a statute to become operative and effective upon a contingency and in such statute provide that the executive of the State may find the facts to warrant making such statute effective and thus be empowered by the legislative body to take care of the emergency for which the statute was enacted.

The Constitution of this State provides a marked separation of the powers of government and has divided such powers into three separate departments and prohibits any person charged with the exercise of powers properly belonging to one of the departments from exercising any functions pertaining to either of the others, except as specifically pointed out in the Constitution. Article III, sec. 1, Constitution.

As to the need for statutory enactments for daylight saving time, see 52 Am. Jur. sec. 4, page 332. Also see 143 A. L. R. 1246.

The Legislature of this State, insofar as the statutory law is concerned, has not enacted daylight saving time legislation of any kind and, of course, has not provided by law for the present emergency whereby electric power is required to be conserved. We are of the opinion that such emergency cannot serve to provide for a proclamation proclaiming daylight saving time within the State of Nevada. An Act of the Legislature will be necessary.

We are advised that Governor Warren of California will shortly issue a proclamation proclaiming daylight saving time in a large portion of California. We are also advised that such proclamation will be issued pursuant to an Act of the Legislature, which Legislature, as we understand, is now or shortly will be in session.

Very truly yours,
ALAN BIBLE, Attorney General.

580. Public Service Commission--May Promulgate Rules and Regulations Curtailing Electrical Energy During Emergency.

CARSON CITY, March 4, 1947.

PUBLIC SERVICE COMMISSION, Carson City, Nevada.
Attention: J. G. Allard, Chairman.

GENTLEMEN: Reference is hereby made to your inquiry of this date concerning the power of the Public Service Commission of this State to authorize the promulgation of rules and regulations found to be necessary to conserve electric power within the State of Nevada due to the extreme drought conditions existing in California and Nevada which seriously interfere with the generation of electrical power by hydroelectric plants. You advise that the generation of the necessary electric power conveyed into Nevada from California is being seriously interfered with by the foregoing stated drought conditions, and that it is imperative that certain curtailment of the use of electric power, particularly in western Nevada, is now and will be during the period of extreme drought, necessary to conserve the electric power. We are advised that in this particular area of Nevada no stand by plants are available and that the entire volume of electrical energy must come from the hydroelectric plants in the State of California. We are also advised that the Public Service Commission of California has considered the emergency very carefully and have ordered marked reductions in the use of power in order that so much of the public may be served by the available sources of power as possible.

OPINION

This office has carefully considered the question of the power of the Public Service Commission of this State to order, direct, and promulgate rules and regulations curtailing the use of electrical energy during the period of emergency, and after careful consideration of the statutory law of this State, together with what we deem to be an Act of God, we are of the opinion that your commission, in the interest of conserving electrical energy and for the purpose of serving as much of the general public of the State as possible, has the power to order, direct, promulgate, and issue reasonable rules and regulations looking toward that, with the thought in mind, of course, that such rules and regulations will be abrogated at the earliest possible moment when the emergency has come to an end and, naturally, during the interim, if changes are necessary in any particular set of rules or single rule, your commission will make such necessary changes and modifications.

We are of the opinion that the language contained in section 14 of the Public Service Commission Act granting the commission the power to enter upon hearings concerning the propriety of rate, fare, charge, classification, regulation, or practice of public utilities certainly fits in with the present emergency. Again, in section 17 of the Act, the Legislature has provided the commission with full power to prescribe classifications of service of all public utilities. Also, in

section 18 of the Act, the commission is empowered, in the interest of safety or service, to inquire into the matter, and in so doing shall have power in the supervision, regulation, and control of rates *and services* of all public utilities and in the adoption of necessary rules and regulations in connection therewith. These powers in connection with the universal theory of the power of the Public Service Commission, in our opinion, vests your commission with the necessary power to act in the present emergency. It is well said in *Copley Cement Manufacturing Company v. Public Service Commission*, 16 A. L. R. 1214, that the power and authority given public service commissions must be liberally construed.

The present emergency confronting the power users of the western section of Nevada unqualifiedly requires that the Public Service Commission act in the matter so as to conserve electrical energy and provide the utmost service to the public possible under the conditions.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

581. Apprenticeship Council--Funds May Not Be Expended to Pay Expenses of Delegates to Conference Outside State.

CARSON CITY, March 6, 1948.

HON. R. N. GIBSON, Labor Commissioner, Carson City, Nevada.

DEAR MR. GIBSON: Reference is hereby made to your letter of March 4, 1948, wherein you inquire whether it would be legal for the Nevada State Apprenticeship Council to pay the expenses of two delegates to attend the Eleven Western States Conference on Training to be held in California. You state the purpose of the conference is to consider ways and means of furthering the training of skilled mechanics and other subjects relating to apprenticeship and on-the-job training.

We have no doubt that the conference to be held in California would be of great benefit to your council and the State of Nevada. We regret very much to render the following opinion. However, we are bound by the law as we find it to be.

OPINION

Section 12½ was added to the Act providing for voluntary apprenticeship by chapter 243, Statutes of 1947. This section contains the provision making appropriation for the present biennium in the sum of \$3,000 for the uses of the Apprenticeship Council. However, the appropriation was and is specifically limited to two purposes, (1) to pay the necessary travel and living expenses of the members of the council while attending council meetings away from their

respective places of residence, and (2) to pay the necessary printing required by the Act. Most travel allowance statutes are general in form, but as just noted the statute involved here is very specific and limited.

It is a cardinal rule of statutory construction relating to appropriations made by the Legislature that none of the appropriation may be used for purposes except as specifically provided in the law for which the appropriation is made.

A similar inquiry to yours was presented to Attorney General Diskin in 1928 whereby the Labor Commissioner requested an opinion as to whether money appropriated for the support of the State Free Employment Service under chapter 121, Statutes of 1923, could be used for payment of expenses of delegates attending the conference of government officials and other State employment officials in a conference held in some other State. Attorney General Diskin ruled that such expenditures were not designated in the statute as an item for which money appropriated may be used, and such expenses payable out of such appropriation could not be legally incurred. Opinion No. 309, August 13, 1928.

We find no change in the law in this respect since the rendering of the foregoing opinion and therefore we, regretfully, are of the opinion that the appropriation made in chapter 243, Statutes of 1947, could not be legally used in the payment of expenses of the delegates to the Eleven Western States Conference to be held in California.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

582. Counties--Sheriff--Chapter 29, Statutes of 1947, Supersedes Prior Statutes Relating to Salary and Fees.

CARSON CITY, March 11, 1948.

HON. ROBERT E. JONES, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. JONES: Reference is hereby made to your letter of March 9, 1948, requesting the opinion of this office as to whether chapter 29, Statutes of 1947, supersedes section 2940 N. C. L. 1929 relating to Sheriff's fees so as to preclude the Sheriff of Clark County from making claim against the county for the sum of \$300 per year claimed to be due under said section 2940.

It is the opinion of this office that chapter 29 of the Statutes of 1947, which is an Act fixing the salaries of the respective officers of Clark County, including the Sheriff, supersedes said section 2940 and preceding salary statutes pertaining to Clark County, and that the Sheriff is

not legally entitled to claim the \$300 or any other sum accruing under the provisions of section 2940 since the first day of April 1947, the effective date of the 1947 Act.

In our opinion rendered your office under date of November 29, 1947, we touched upon this question in the following language: "However, we are of the opinion, assuming that the prior salary Acts permitted the Sheriff to retain some \$300 per annum from the Sheriff's fees collected by him, that said chapter 29 has abrogated such right, and that since April 1, 1947, he was and is not entitled to retain any such fees."

Further examination of the statutes in question confirm our views as above expressed.

Section 2940 N. C. L. 1929, as amended at 1933 Statutes, page 201, certainly relates to fees to be collected by the Sheriff as Sheriff and not acting in his ex officio capacity as license collector. We think the language contained in section 1 of the 1947 Act providing that they shall receive the thereafter following salary and compensation "which shall be full compensation for all services rendered" indicates and provides the legislative intent that insofar as the Sheriff is concerned he was to receive a salary thereafter fixed at \$4,200 per annum in full for all his services as Sheriff, and the fact that the Legislature did not incorporate in the 1947 Act the language appearing in prior Acts that he would be allowed commissions not to exceed \$300 per annum, indicates beyond question that the Legislature did not intend that the Sheriff continue to receive such remuneration in addition to his annual salary.

We, therefore, conclude that chapter 29 of the 1947 Statutes relating to the salary of the Sheriff as Sheriff is conclusive, and that additional remuneration by way of commissions and fees as provided in prior Acts will be illegal.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

583. Public Schools--Election School Trustees--Procedure Where Tie Vote Was Cast.

CARSON CITY, March 11, 1948.

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

DEAR MR. EVANSEN: The following is in reply to your telegram received in this office March 8, 1948, requesting information as to the procedure where a tie vote was cast at an election for school trustees in your county.

The question of a tie vote in the election of school trustees was submitted to this office in 1934. See Attorney General's Opinion No. 134, Biennial Report, 1932-1934. See Attorney General's Opinion No. 134, Biennial Report, 1932-1934. Sections 63 and 64 of the school code

at that time were substantially the same as sections 269 and 270 of the present code, with the exception as to the date on which the biennial school election is held.

The opinion held that it is the policy of the State Government and the theory of the law that election to office be by the people when it can be conveniently done, and that there is a direct implication contained in the two sections that an election to fill vacancies on a board of school trustees should be held, if not, indeed an express direction so to do.

We are of the opinion that an election should be held under the provisions of section 269, chapter 63, Statutes of 1947.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

584. Husband and Wife--Separate Property--Community Property--What Is.

CARSON CITY, March 12, 1948.

NEVADA TAX COMMISSION, Carson City, Nevada.
Attention: R. E. Cahill, Secretary.

GENTLEMEN: Reference is hereby made to your letter of March 10, 1948, requesting the opinion of this office on the following quoted queries:

1. If a wife owned one-third of a property before marriage and two-thirds of the said property was bought after marriage, the deed recorded is only in the wife's name, would this be separate or community property?
2. If the husband owns property before marriage, is this community property, or how long should they live together before it becomes community property?
3. If the wife owns property before marriage, does this become community property after marriage, if the husband assumes all the expenses of upkeep, taxes, etc.?
4. If the wife or husband fails to file an inventory of their separate properties, and record the same, does the property automatically become community property?

OPINION

Answering Query No. 1--The statutory law of this State with respect to the ownership of community property is 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, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. Sec. 3355 N. C. L. 1929.

All other property acquired, after marriage, by either husband or wife, or both, except as provided in sections 14 and 15 in this act, is community property. Sec. 3356 N. C. L. 1929.

Pursuant to the foregoing sections of the law it is apparent that one-third of the property mentioned in the query was at the time of the marriage the separate property of the wife. Unless, after the marriage some agreement was entered into between husband and wife whereby the separate property became merged with the community property, and of this there must be competent evidence that such is the fact, then such portion of the property is still the separate property of the wife.

It was said in *Barrett v. Franke*, 46 Nevada, at page 176:

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct evidence to the contrary is made to appear.

With respect to the balance or two-thirds of the property in question, purchased after the marriage, we assume that it was purchased with community funds and not the separate funds of the wife. If such two-thirds was purchased with community funds, there is no question but what such property constitutes community property, even though the deed thereto is recorded in the wife's name only. It is said in the case of *In re Wilson's Estate*, 56 Nevada, at page 365, as follows:

The true test of the separate or community character of property acquired during marriage automatically lies in whether it was acquired by community funds and community credit or by separate funds.

In *Barrett v. Franke*, above-cited, the Supreme Court held that even the purchase of ranch property after marriage but paid for with funds acquired from the sale of the separate property of the husband did not constitute the later purchase of land community property, but that it constituted the separate property of the husband because it was purchased with money derived from sale of his theretofore separate property, even though such separate property was sold after his marriage.

The fact that the deed to the two-thirds of the property is in the wife's name only is not controlling as to whether it constitutes separate or community property. If, in fact, the property was acquired after marriage with community funds, it is community property regardless to whom the deed was issued.

Answering Query No. 2--Separate property of either spouse owned prior to the marriage does not become community property by reason of the marriage and their living and cohabiting together. The right of the spouses in their separate property is as secure as their right in the community property, and when property was once of a separate character it is presumed to retain that character until there is direct evidence to the contrary. *Barrett v. Franke*, supra.

Answering Query No. 3--The fact that the husband assumes all expenses of upkeep, payment of taxes, etc., does not in itself change the separate property of the wife into community property in the absence of a specific agreement to convert the separate estate into community estate. *Lombardi v. Lombardi*, 44 Nevada 314.

Answering Query No. 4--We think the law does not require the husband to file an inventory of his separate property, although he may do so. The failure of a wife to file an inventory of her separate property does not in itself constitute such property community property. The effect of the failure to so file such inventory is that it raises a presumption that such claimed separate property is in fact community property and constitutes prima-facie evidence that it is community property, subject, of course, to rebuttal.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

585. Elections--Procedure to Recall Public officer--Section 4865 N. C. L. 1929.

CARSON CITY, March 15, 1948.

HON. HARRY E. CLAIBORNE, Chief Deputy District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. CLAIBORNE: This will acknowledge receipt of your letter dated March 1, 1948, received in this office March 3, 1948.

You request an opinion as to the interpretation of section 4865 N. C. L. 1929, which provides the method of procedure in filing a petition to recall a public officer. Your particular question is directed to the percentage of the electors required as signers on a petition to recall when three Justices of the Supreme Court were elected at the last general election.

You also inquire if an elector who voted at the last general election, but has since left the State, may sign the petition for recall.

At the last preceding general election there were three Justices of the Supreme Court

elected. This was occasioned by the necessity of electing Justices to fill the unexpired term in two offices. There was a contest in only one office.

We are, therefore, of the opinion that under these circumstances the only reasonable rule to apply is to consider the entire vote cast for each of the contesting candidates as a basis for determining the number of signers required on a petition for recall.

Section 4865 N. C. L. 1929 provides as follows: “For the purpose of recalling any public officer there shall be first filed with the officer with whom the petition for nomination to such office is required by law to be filed, a petition signed by the qualified electors who voted in the state, or in the county, district, or municipality electing such officer, equal in number to twenty-five percent of the votes cast in said state, or in the county, district, or municipality for the office of justice of the supreme court, at the last preceding election; said petition shall also contain the residence of the signer, and set forth, in not to exceed two hundred words, the reason why said recall is demanded.”

The statute uses the language “the votes cast” at the election for the office of justice of the supreme court.

A “vote” is the registration in accordance with law of the preference or choice of an elector on a given subject. *State v. State Board of Canvassers*, 172 N. W. 80.

“Vote” is the formal expression of will, preference, wish, or choice in regard to any measure proposed, in which a person voting has interest in common with others, either in electing a person to fill certain situations or office, or in passing laws, rules, or regulations. *Sawyer Stores v. Mitchell*, 62 P.(2) 342.

See *Words and Phrases*, Permanent Edition, vol. 44, page 452.

Under ordinary circumstances only one office of Justice of the Supreme Court is to be filled by the election of a Justice. At the last general election there were two Justices running to fill the unexpired term of office to which they were appointed, and one for a full term. The only opposition was for the unexpired term of one office. An elector could vote for each of the other Justices who were not opposed, and in addition express his choice for one of the candidates to the contested office. The combined vote for the candidates for the contested office would be the whole expression of choice of the electors, and would come within the definition of votes cast as provided in the statute.

Your question as to the right of a person to sign a recall petition who voted at the last election and who has since moved to another State would, in our opinion, be answered as to whether such person is now a qualified elector in this State.

The intent of the statute is that a person who signs the petition must be a qualified elector in the State, county, district, or municipality, and who voted at the last preceding election. The statute provides for the calling of an election to determine if the people, the electors, shall recall

such officer. This would imply that a signer of the petition which initiates the proceedings would be qualified to vote at the election to determine the recall.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

586. Taxation--Commission Has Authority to Require Taxpayer to Furnish Information Concerning Income of Property.

CARSON CITY, March 16, 1948.

NEVADA TAX COMMISSION, Carson City, Nevada.
Attention: R. E. Cahill, Secretary.

GENTLEMEN: Reference is hereby made to your letter of March 15, 1948, propounding the following queries upon which you request the opinion of this office:

1. Is income a recognized factor in measuring the value of property?
2. Does the Tax Commission have the authority under section 6544 N. C. L. 1929 to require the taxpayer to furnish information concerning the income of his property and produce books and records relating thereto if the commission deems it necessary?

OPINION

Answering Query No. 1--Please be advised that it is universally recognized that one of the elements from which a composite valuation may be arrived at is the income derived from property, particularly business property. The income of such property is recognized as one of the elements of value which may be examined and used in arriving at the valuation of the property. It must be said, however, that income is not the sole test of value of such property, but only one of the elements. 51 Am. Jur. 652-658, secs. 701-711.

Answering Query No. 2--An examination of section 6544 N. C. L. 1929 discloses that the Tax Commission and the members thereof are granted very broad statutory powers. Such commission, in the eighth subdivision of such section, is granted the power to exercise general supervision and control over the entire revenue system of the State. In the fifth subdivision the commission is empowered to summon witnesses to appear and testify on any subject material to the determination of property valuations. In the sixth subdivision the commission is empowered to make diligent investigation with reference to any kind or class of property believed to be escaping just taxation and, in so doing, such commission, or any commissioner thereof, may examine the books and accounts of any person, copartnership, or corporation doing business in

this State when such examination is deemed necessary to a proper determination of the valuation of any property subject to taxation. And in the tenth subdivision the commission is empowered to authorize its secretary to hold hearings or make investigations, and upon any such hearing the secretary shall have authority to examine books, compel the attendance of witnesses, administer oaths, and conduct investigations.

The Supreme Court of this State has on two occasions stated that the Nevada Tax Commission is vested with very broad and extensive powers with respect to the problem of taxation in this State. *State v. Boerlin*, [38 Nev. 39](#); *State ex rel. Las Vegas v. Clark County*, [58 Nev. 469](#).

While the opinions in the foregoing cases did not deal with the power of the Tax Commission to examine the books and records of owners of taxable property, still the context of each of those opinions clearly expresses the view that the Legislature has vested the Nevada Tax Commission with the broadest of powers with respect to property valuation and the taxation problem as a whole.

We are, therefore, of the opinion that the Tax Commission has the authority under section 6544 N. C. L. 1929 to require the taxpayer to furnish information concerning the income of his property and to produce his books and records relating thereto if the commission deems it necessary.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

587. Mining--Gas, Diesel, or Other Oil-Burning Engines Cannot Be Used Underground Except as Specifically Provided in the Statute--Speed of Cage in Mine Shaft.

CARSON CITY, March 16, 1948.

MR. A. E. BERNARD, Inspector of Mines, Carson City, Nevada.

DEAR MR. BERNARD: Reference is hereby made to your letter of March 15, 1948, propounding two queries upon which you desire the opinion of this office.

1. You inquire whether, under section 4229 N. C. L. 1929, Diesel motors could be used underground if an arrangement of some sort were put on the end of the exhaust to filter the gases, and if oxygen were further forced into the gases from a tank in the motor to eliminate most of the poisonous fumes. You further inquire whether said section means that no gas, Diesel, or oil-burning engine could be used except as specifically provided in such section.

OPINION

Section 4229 N. C. L. 1929, as amended at 41 Statutes, page 122, provides as follows:

Use of gasoline, Diesel, or any oil-burning engine underground is forbidden, except as follows: Gas, Diesel, or any oil-burning engines of not more than eight horsepower may be operated not more than one hundred feet below the surface, providing each of said engines exhausts into a pipe which extends to the surface; or to a depth of two hundred fifty feet below the surface, providing the exhaust from said engine is attached to a pipe through which air is drawn by means of a suction fan, or otherwise, to the surface. All engines and their method of installation as provided in this section shall be subject to the approval of the inspector of mines of the State of Nevada.

A reading of such section discloses that gas, Diesel, or any oil-burning engine of not more than eight horsepower may be operated not more than one hundred feet below the surface, providing each of said engines exhausts into a pipe which extends to the surface. This is one mandatory provision and condition. The statute further provides that said engines may be operated to a depth of two hundred fifty feet below the surface provided the exhaust from said engine is attached to a pipe through which air is drawn by means of a suction fan or otherwise to the surface. This provides a condition whereby the poisonous gases must be drawn to the surface by means of a suction fan or some other attachment which would serve the same purpose, such as a blower perhaps which would in fact force all of the poisonous gases to the surface.

We are of the opinion that gas, Diesel, or other oil-burning engines cannot be used underground except as specifically provided in the statute and that any attachment that would not serve to remove *all* poisonous gases would not and will not comply with the provisions of this section of the law.

2. You state that section 4246 N. C. L. 1929 states in part, "Three bells--Men on, run slow." Your inquiry is, in our opinion, who would determine what "slow" speed would be.

Speed is a relative term. When applied to certain conditions a speed of perhaps fifty miles per hour would be deemed to be slow, while, at the same time, such speed might be deemed to be excessively high and dangerous to human life. We apprehend that the speed of a cage in a mine shaft is surrounded with the same conditions and that an empty cage could be raised and lowered at a much higher speed than a loaded cage, and, insofar as safety of human life is concerned, no doubt, a cage loaded with ore or other material could be operated at a higher rate of speed than one on which men were riding.

We think that a determination of what slow speed should be when men are riding on the cage should be determined by your office, inasmuch as such a matter should be left to those absolutely conversant with mining operations, particularly the operation of cages. A layman's point of view would not be consistent in many cases with proper safety precaution. Perhaps a

conference between yourself, the mining operators, and the men employed would arrive at an amicable solution of this problem.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

588. Contracts--Violation of Nepotism Act, When.

CARSON CITY, March 16, 1948.

HON. JAMES W. JOHNSON, JR., District Attorney, Churchill County, Fallon, Nevada.

DEAR MR. JOHNSON: Reference is hereby made to your letter of March 13, 1948, received March 15, 1948, wherein you state the facts in connection with the advertising for bids and the awarding of a contract to the lowest bidder for the construction of a garage by the county of Churchill. It appears from the facts stated in your letter that the successful bidder is the son-in-law of the Chairman of the present Board of County Commissioners of Churchill County. As such son-in-law he is in the second degree of affinity to the Chairman of the Board of County Commissioners and thus within the third degree of affinity provided in the Nepotism Act of this State, the same being section 4851 N. C. L. 1929, as amended at 1935 Statutes, page 172, and sections 4852-4854, inclusive, N. C. L. 1929.

You inquire whether the awarding of a contract for the construction of the garage to the son-in-law of this Chairman of the Board of County Commissioners is in violation of the Nepotism Act.

OPINION

From an examination of the facts detailed in your letter, it is the opinion of this office that the awarding of the contract to the person in question would and will constitute a violation of the Nepotism Act. We have made an exhaustive research of the law concerning nepotism and related Acts and the authorities state the rule to be that Nepotism Acts are to be strictly construed. Anno. 88 A. L. R. 1103. Section 4851, as amended in 1935, contains an express prohibition wherein county commissioners are prohibited from employing *in any capacity* on behalf of the county any relative of any member of such board within the third degree of affinity. We are of the opinion that the term "employ in any capacity" means just what it says, and while a person may bid upon a contract advertised by the Board of County Commissioners, still, if such person is the successful bidder and in the prohibited degree of affinity, the acceptance of his bid constitutes, in our opinion, an employment prohibited by such

statute irrespective of whether the employment is that of day labor or under a contract to do a certain piece of work for a stated price.

In view of all the circumstances surrounding this matter, and in complete fairness to all concerned, it might be advisable to reject all bids and to readvertise.

As you know, section 1963 N. C. L. 1929, as amended at 1947 Stats., page 764, after providing for the letting of contracts where the contract exceeds the sum of \$1,000 and after setting forth advertising procedure goes on to state as follows:

All such contracts shall be let to the lowest responsible bidder, subject to the provisions of the twenty-third section of the act to which this is supplementary; *provided*, that the provisions of this act shall not apply to contracts for the construction or repair of bridges, highways, streets, or alleys where the same conflicts with other acts in relation to bridges, highways, streets, or alleys.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

589. Gambling--Both Landlord and Those Conducting Games Must Obtain License if Receiving Share in Proceeds of Business.

CARSON CITY, March 17, 1948.

NEVADA TAX COMMISSION, Carson City, Nevada.
Attention: R. E. Cahill, Secretary.

GENTLEMEN: Your letter of March 15, 1948, was received March 16, 1948. You inquire:

Under the law should the Tax Commission require both the owners of the business or lessor, and the operators of the games, who are financially interested, as lessees, to be licensed and jointly responsible to the Tax Commission for its operation.

The answer is in the affirmative. Both the landlord or owner and those conducting the games must obtain a license, providing each has a share in the proceeds of the business. This excludes mere employees receiving salary or wages on a flat basis.

The matter is clearly covered by section 1 of the original Act of 1931 (1929 N. C. L. 1941 Supp., sec. 3302) and by section 10a of the Act added by Statutes of 1945, page 493 (1929 N. C. L. 1941 Supp., sec. 3302.17). The former applied to so-called "county" licenses and the latter to "State" licenses. In both cases the requirement for

a license extended to all persons whether “owner, lessee, or employee” who operate any gambling game “in which any person, firm, association, or corporation, keeping, conducting, managing, or *permitting the same to be carried on*, receives, directly or indirectly, any compensation or reward, or any percentage or share of the money or property played, for keeping, running, or carrying on, or permitting the said game or games to be carried on * * *.” (Italics ours.)

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

590. Public Employees Retirement Board--Section 8 of Act Construed--"Appointive Offices."

CARSON CITY, March 17, 1948.

MR. KERWIN L. FOLEY, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

DEAR MR. FOLEY: Your letters dated March 10 and March 11, 1948, were received as of those dates and will be answered together as involving similar problems.

In your letter of March 11, 1948, you ask as to the meaning of the phrase “appointive offices” appearing in paragraph 6, section 8 of the Public Employees Retirement Act (chapter 181, Statutes 1947)

The paragraph in question reads as follows:

(6) A person holding an elective office or an appointive office may become a member of the system only by giving the board written notice of his desire to do so within 30 days after he takes the office or, in the event that he takes the office before this act takes effect, within 30 days after July 1, 1948, or, in the event that he is not eligible to become a member of the system at the time he takes the office, within 30 days after he becomes eligible.

No difficulty arises as to an “elective office” even when, in case of vacancy, it is supplied by appointment. It is still an elective office.

As to an appointive office it must be an office and the appointment must be one specifically authorized by law. By section 2 of article 15 of the Constitution of Nevada, all officers must take the oath.

The words “office” and “officer,” within statutes, are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and to determine such meaning correctly, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used. State ex rel. Cline v. Payne, [59 Nev. 127](#), 86 P.(2d) 32.

The office of Deputy Sheriff is a public office. State ex rel. Walker v. Bus, 36 S. W. 636.

Public “office” is a position specifically created by law for discharge of designated public duties prescribed by law involving exercise of some part of sovereign power, and incumbent of such position is public “officer.” Lentz v. City Council of August, 173 S. E. 406.

In State v. Cole, [38 Nev. 215](#), the court distinguished between an office and an employment in a case where Senator Kendall was appointed Superintendent of the Nevada Exhibit at the San Francisco Fair of 1915. The court quoted from Mechem on Public Officers, sec. 1, as follows:

A public office is the right, authority, and duty, created and conferred by the law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.

While we believe the paragraph in question should be clarified by the Legislature, we think the board by its rules and regulations is justified in placing its construction on the language to the effect that the words will be construed to include all appointed department heads and all deputies whose appointment is authorized by law who are empowered to exercise some function of the sovereign power of government either in the presence or in the absence of the appointing power.

Your letter of March 10 submits the final draft of your rules and regulations for our approval as to legality. We have already orally approved the draft and now confirm the same, including the part defining “appointive officers.”

In the introduction to the rules and regulations it is stated that a computation of rates actuarially would result in a burden too great to encourage acceptance by those political subdivisions free to act. Therefore, in view of other factors, the rate is fixed at 5 percent on gross salary for the employee and 5 percent up to \$200 on the employee’s salary, for the employer. In addition each contributes 50 cents per month per employee for administrative costs. It is foreshadowed that after July 1, 1949, the employer shall pay 2½ percent monthly on the gross salary of each employee (in addition to the 5 percent presently computed). We understand you will recommend to the next Legislature that the employee pay 5 percent and the employer pay 7½ percent on the gross payroll and the administrative cost be paid by the employers ratably to the number of employees.

We think the board is within its powers in this respect (even though some of its estimates will not be tested until after July 1, 1949). Certain rule-making power is given by paragraph 2 of section 15 of the Act. Rules should be promulgated in faithful observance of section 6 of the Act.

Section 14 of the Act outlines its objectives and does not limit the percentage to be collected to the result of actuarial computations exclusively, and does not forbid the adoption of rules by the board designed to obtain the objectives of the Act.

Specifically answering your inquiry of March 10, we do not find that by the rules and regulations submitted and approved the board has "taken more latitude than the Act intended" in fixing employers' and employees' rates of contribution.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

591. Public Schools--Voters of Districts Not Authorized to Levy Tax Above the Limit Fixed by Statute.

CARSON CITY, March 18, 1948.

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

DEAR MISS BRAY: The following is in reply to your request by telephone of March 16, 1948, desiring information as to whether this office had given an opinion recently in which we held that school districts are limited to a twenty-five cent special tax for operation and maintenance purposes.

On April 21, 1947, we gave an opinion to Hon. Gordon R. Thompson, Assistant District Attorney of Washoe County, relative to sections 5788 and 5789 N. C. L. 1929, being sections 140 and 141 of the School Code in connection with the provisions in the 1947 School Code.

Section 5788 N. C. L. 1929 is incorporated in the new school code under section 181, subsection 3, page 169, 1947 Statutes, which provides, under special district school tax, "that a tax of not more than twenty-five cents (25¢) on each one hundred (\$100) dollars of the assessed valuation of all taxable property in the district shall be levied."

Section 5789 N. C. L. 1929 provided a method of holding an election to determine whether a tax shall be raised to furnish additional school facilities, or to keep school in the district open for a longer period than the ordinary funds will allow.

We held that the later section was not included in the new school code and that there was no provision in the new school code which authorizes the voters of such district by election to levy a tax above the limit fixed by the statute.

Sections 5650 to 5867 N. C. L. 1929 were specifically repealed in the new school code.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

592. Public Schools--Election School Trustees--Procedure Where Tie Vote Was Cast.

CARSON CITY, March 22, 1948.

MR. FLOYD SMALLEY, Superintendent, Hawthorne School District No. 7, P. O. Box LL-6, Hawthorne, Nevada.

DEAR MR. SMALLEY: This will acknowledge receipt of your letter dated March 18, 1948, received in this office March 19, 1948, enclosing a copy of Mineral County Independent which carries an article relative to the school board situation as a result of a tie vote cast at the school election for two candidates for the short-term position on the board of trustees.

In the opinion from this office to Hon. Martin G. Evansen, dated March 11, 1948, we advised that an election should be held under the provisions of section 269, chapter 63, Statutes of 1947.

Section 269 provides as follows: "On the fourth Saturday after the occurrence of any vacancy or vacancies in any board of school trustees, an election may be held to elect a trustee or trustees for the remainder of the unexpired term or terms. Such election shall be conducted in accordance with the law now in effect for the election of public school trustees; *provided*, that the remaining member or members of the board may serve as a full board for the purpose of making all required preliminary arrangements for conducting said election to fill said vacancies."

The preceding section, section 268, provides that trustees elected shall take office on the third Saturday in March following their election.

At the last school election the voters failed to elect a trustee for the short-term position on the board, due to the fact that the vote for the two candidates resulted in a tie. On the third Saturday in March following the election, Saturday, March 27, there was no person entitled to receive a certificate of election for short-term trustee and there was a vacancy by reason of the failure of the voters to elect.

Section 269 provides that on the fourth Saturday after the occurrence of any vacancy an election may be held to elect a trustee. This would fix the date of the election as April 24. The election shall be conducted in accordance with the law for the election of school trustees.

Section 265 provides the method of filing by candidates. Under the particular circumstances there is but one office to be filled, but there is nothing in the statutes that limits the number of qualified candidates that may file for such office.

Section 268 which defines the term of office of trustees, contains the provision that a trustee elected shall hold his office until his successor is duly elected or appointed and qualified. The trustee who held the office of short-term before the election will therefore hold his office until a successor is elected at the election on April 24.

Section 269 uses the language, an election may be held for the remainder of the unexpired term of a trustee. This does not appear to be a mandatory provision.

Under the former opinion from this office that it is the policy of the State Government and the theory of the law that election be by the people when it can be conveniently done, it appears that in the event an election is not held by the school district on April 24, under the provisions of section 269, the Superintendent of Public Instruction would appoint a trustee for the position of short-term trustee to hold office until the third Saturday in March 1950.

Very truly yours,

ALAN BIBLE, ATTORNEY GENERAL.

By GEORGE P. ANNAND, Deputy Attorney General.

cc: Hon. Mildred Bray and Hon. Martin G. Evansen.

593. Public Schools--Liability for Liquidation of Bonds Upon the Consolidation of School Districts.

CARSON CITY, March 23, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated march 18, 1948, received in this office March 19, 1948.

You request an interpretation of section 222, chapter 63 Statutes of 1947, regarding liability for liquidation of bonds upon the consolidation of school districts. The case in point presented is that of Consolidated School District A which is organized by consolidation of Districts Nos. 1, 2, and 3. Prior to the consolidation School Districts 1 and 3 had incurred bonded indebtedness which had not been entirely liquidated at the time they combined with School District No. 2 to form a consolidation. At the time of the consolidation, did School District No. 2 become subject to the tax required to liquidate the bonds outstanding for Districts Nos. 1 and 3; did District No. 1 become subject to the tax for the retirement of the outstanding

bonds of School District No. 3, and District No. 3 for the outstanding bonds of School District No. 1?

We are of the opinion that section 59, chapter 9, of the 1947 School Code specifically answers the question. The bonded indebtedness of Districts 1 and 3 shall attach to and become a charge against the entire taxable property in Consolidated District A.

Section 222 of chapter 63, Statutes of 1947, is a general provision relating to taxation to pay bonds issued by school districts.

While the latter part of this section, which relates to taxation for the purpose of paying bonds when school districts are annexed or included in another school district, is not expressed in plain language and would be susceptible to construction, there is a special provision in section 59 of chapter 63 which specifically provides how old debts should be paid when districts unite to form a consolidated district.

This section provides as follows: "If any school district uniting to form a consolidated district shall have, at the time of its disorganization, a legal bonded indebtedness, such indebtedness shall attach to and become a charge against the territory comprised in the consolidated district, and it shall be the duty of the county commissioners of the county in which such territory is located to cause annually to be levied upon the property, real and personal, in such consolidated district, a tax sufficient to meet the interest and provide a sinking fund for the payment of such indebtedness.

Ex parte Smith, [33 Nev. 466](#): In the construction of a statute, a special provision will control as against a general one.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

594. Nevada Hospital for Mental Diseases--Authority to Employ or Discharge Employees Vested in Board of Commissioners.

CARSON CITY, March 24, 1948.

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

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated March 19, 1948, received in this office March 20, 1948, requesting information as to the proper person at the Nevada Hospital for Mental Diseases who should be vested with the authority to employ help at

the institution. You cite the provision of chapter 154, Statutes of 1945, before amendment, which provided that the Superintendent shall employ all necessary help at the hospital, and request advice as to who is the proper person with authority to employ or discharge employees under the statutes now in effect.

We are of the opinion that chapter 277, Statutes of 1947, places this authority in the board of hospital commissioners, who may by regulations define the duties and authority of the superintendent and regulate all business pertaining to the hospital.

Chapter 277, Statutes of 1947, amends section 3510 N. C. L. 1929, as amended by chapter 154, Statutes of 1945.

Section 6 as amended provides that the board of commissioners of the hospital shall elect a physician who shall be resident physician of the hospital, an assistant resident physician, and shall employ a business manager. Subsection (d) provides: "The board shall have power to appoint either the resident physician, the resident assistant physician, or the business manager, as Superintendent of the Nevada Hospital for Mental Diseases and designate by rules and regulations the duties and authority of said superintendent, but no additional compensation shall be paid to the superintendent."

The provision in this subsection supersedes the provision in section 6 of the Act appearing under chapter 154, Statutes of 1945, which contained the language quoted in your letter, that is "The superintendent so elected shall employ all necessary help in and about said hospital."

"When the amendatory Act purports to set out the original Act or section as amended, all matter in the Act or section that is omitted in the amendment is considered repealed." Sutherland Statutory Construction, 3d Edition, vol. 1, section 1932.

Crawley v. Pershing Co., 50 Nevada 237: "In amending statutes or constitutional provisions, omission of portion of original provision carries implication that omitted part was intended to be ineffective.

The Legislature not only omitted the language vesting the employing authority in the superintendent, but specifically delegated to the board of commissioners the power to designate by rules and regulations the duties and authority of the superintendent chosen by the commissioners.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

595. Welfare, State Department--Guardianship.

CARSON CITY, March 24, 1948.

MR. WILLIAM E. ROSE, Supervisor, Division of Child Welfare Services, Room 2, 309 N. Virginia Street, Reno, Nevada.

DEAR MR. ROSE: This will acknowledge receipt of your letter dated March 15, 1948, received in this office March 18, 1948.

You request advice from this office relative to the practice of the Division of Child Welfare Services in certain situations where abandoned or dependent children are placed in the custody of individual members of your staff through an order of guardianship, and when adoption proceedings were subsequently initiated, the individual guardian would release the child to the welfare service for adoption and the supervisor of the division then executes a release to the proposed adoptive parents. You state that this is a cumbersome arrangement and suggest that the State agency be made the guardian in the first instance.

We are of the opinion that the statutes contemplate the appointment of an individual as guardian of the person of a child, and no authority to appoint the State Welfare Department as such a guardian is given.

Section 5154.53, 1929 N. C. L. 1941 Supp., as amended by the Statutes of 1943, page 112, defines the duties generally of the State Welfare Board, which includes the authority to supervise the administration of aid to dependent children as defined in Title IV of the Social Security Act. There is nothing in this Act which relates to the procedure in the matter of the guardianship or adoption of an abandoned child.

Section 9496 N. C. L. 1929 provides the procedure for the appointment of a guardian for a minor. This section uses the language, "any person interested in or befriending a minor, may file a petition." The term person is not defined and its ordinary meaning, that of an individual, would apply.

Section 9548 N. C. L. 1929 concerning the guardianship of incompetent veterans defines person to include a partnership, corporation, or association.

Chapter 92, Statutes of 1943, amends the guardianship Act to provide that the State Welfare Department may petition for the appointment of a guardian of the estate of any person who is a recipient of assistance from any division of the department. In the waiver of the bond required the section uses the language, "by any person appointed as guardian under this section."

In many jurisdictions, as stated in 25 Am. Jur. page 28, statutory provisions, which are

held to be constitutional, confer upon corporations the power to act as guardians of estates of infants. This fiduciary or trust relation applies to estates and not the guardian of the person.

Section 9478, 1929 N. C. L. 1941 Supp., relating to the adoption of legitimate and illegitimate children without consent of parents or consent of the mother, provides for the relinquishment by the parent, for the purpose of adoption, expressed in writing signed and acknowledged by such parent or parents before an officer authorized to take acknowledgments, or signed by the parent or parents before two subscrib-witnesses.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

596. Constitutional Law--Section 28, Article IV of the Constitution Prohibits Granting Extra Pay or Bonus to Officers and Employees of Legislature.

CARSON CITY, March 29, 1948.

MR. J. E. SPRINGMEYER, Legislative Counsel, Carson City, Nevada.

DEAR MR. SPRINGMEYER: Reference is hereby made to your letter of March 5, 1948, propounding the following query:

Under Article IV, section 28, of the Constitution of the State of Nevada, may a Legislature pay its officers or employees extra compensation, ordinarily called a "bonus," over and above the salaries fixed by a law in force prior to the election or appointment of such officers or employees?

This office has given this matter exhaustive study and research, and our opinion is as follows.

The exact question presented is whether the Legislature has the constitutional power, after providing a law whereby the salaries and compensation of the officers and employees of the Legislature have been fixed prior to the selection of such officers and employees, to thereafter, presumably at the end of the session, by means of a bonus voted in resolutions by either or both houses of the Legislature, pay extra compensation or money to such officers and employees.

Section 28 of article IV of our Constitution reads as follows:

No money shall be drawn from the state treasury as salary or compensation to any officer or employee of the legislature, or either branch thereof, except in cases where such salary or compensation has been fixed by a law in force prior to the election or appointment of such officer or employee, and the salary or compensation so fixed

shall neither be increased nor diminished so as to apply to any officer or employee of the legislature, or either branch thereof, at such session; provided, that this restriction shall not apply to the first session of the legislature.

This provision was written into the proposed Constitution of 1863, Constitutional Debates of 1864, page 26, and was copied therefrom into our present Constitution and adopted without amendment or change of any kind or discussion had thereon, save and except, that the proviso in the 1863 section reading, “that this restriction shall not apply to the first special and regular sessions of the legislature,” was amended in 1864 to read, “that this restriction shall not apply to the first session of the legislature.” This was and is the only change that has been made in the particular section since its inception in 1863.

We have searched the authorities for cases in point dealing with such a constitutional provision and have found no cases directly in point and construing identical language. We have found two cases somewhat in point, namely:

Roberson v. Dunn (Calif.) 19 Pac. page 78, held that the Legislature of California did not possess the power to allow \$1 per day for extra services to porters for the session, due to the fact that such porters worked about sixteen hours per day. The court held that the compensation fixed at \$4 per day meant a day of twenty-four hours and that any resolution providing additional pay for porters, pages, etc., was wholly unauthorized and, if allowed, would constitute a violation of the constitutional provision prohibiting the gift of any public money to individuals or any extra compensation to public officers or servants after service has been rendered.

The other case, *Hilborn v. Nye* (Calif.), 114 Pac. 801, which case dealt with the effect of section 23a of article IV of the California constitution adopted in 1908, which provision prohibited the Legislature from providing or paying any additional sums of money over \$500 per day for employed officers, employees, and attaches of each House of the Legislature during the regular biennial session. In the particular case the resolution of the Senate directed payment to the State Printer and the Secretary and Assistant Secretary out of the Legislative Fund for services to be performed after the adjournment of the Legislature which apparently would have been an addition to the \$500 per day salary fund for either house as above stated. The court held that in view of the language of the constitutional provision the Legislature, while it might provide additional duties after the adjournment of the Legislature, nevertheless, must find the compensation therefor wholly within the appropriation provided in the constitutional provision.

In our opinion it is unnecessary to go beyond the language of the constitutional provision itself. That language is clear, express, and to the point and, in my opinion, wholly prohibits the paying of any additional compensation by whatever name it may be termed by the Legislature over and above the salary and compensation theretofore fixed by the Legislature in the law enacted previous to the selection and appointment of the officers and employees. No other construction can well be placed upon such language.

The Supreme Court long ago said: “The constitution is to be construed in the ordinary sense and usage of language, literally, unless some apparent absurdity or

obvious and manifest violation of the sense of the instrument, or unmistakable intent of its framers forbids.” *State v. Doran*, [5 Nev. 399](#).

Our Supreme Court has stated that where the language of a statute is clear, plain, and express, there is no room for construction. This statement has been made by our court so many times it has now become axiomatic.

In *State v. Clark*, [21 Nev. 337](#), the court was construing the constitutional provision relating to the holding of civil office of profit under this State. It had this to say with respect to the construction of the constitution:

We are to seek for the meaning that the words were intended to convey, and endeavor to carry out the intention of those adopting it. But a fundamental principle in all construction is that where the language used is plain and free from ambiguity, that must be our guide. We are not permitted to construe that which requires no construction.

The Supreme Court reiterated such doctrine in the case of *State v. Cole*, 38 Nev. at page 236.

State ex rel., Cutting v. LaGrave, [23 Nev. 387](#), was a case dealing with the payment of a sum of money to Cutting for services rendered to the State as ex officio Curator of the State Museum. It was claimed on the part of the State in that action that the compensation for Cutting should have been fixed by law prior to the rendition of his services. Cutting was made ex officio Curator of the State Museum several years before, but no appropriation was made for his salary in later years until 1897, when the Legislature provided in a bill the payment of \$2,800 to him. The Supreme Court directed the State Controller to issue his warrant pursuant to the 1897 statute. However, in court of the opinion the Supreme Court called attention to the explicit and express provisions of section 28, article IV of the Constitution, for the very purpose of illustrating that the framers of the Constitution did not intend that such provision should be misconstrued. In brief, that it meant just what it said. The court said at pages 389 and 390:

It is said that the salaries and compensation exempted by the constitution must be those that have been settled by preexisting law. Had such been the intention, apt words would have been employed. For instance: In section 28 of article IV, it is provided that “no money shall be drawn from the state treasury as salary or compensation to any officer or employee of the legislature, or either branch thereof, except in cases where such salary or compensation has been fixed by a law in force prior to the election or appointment of such officer or employee.” This illustration from the constitution shows that its framers intended that no question should arise touching the meaning that should be attached to its language in that case, and it is probable that if any restriction or qualification had been intended to apply to section 28 of article IV it would have been fairly expressed, and not left to implication or conjecture. We find no reason for giving to the sentence an interpretation other than the natural import of the language used.

The Legislature in 1947 provided for the salaries and compensation of the officers and employees of the Legislature. 1947 Statutes, chap. 220, page 730.

This Statute undoubtedly complies with the constitutional provision in question and certainly fixes the salary and compensation of the officers, employees, and attaches of the Legislature next to be convened.

Very truly yours,

ALAN BIBLE, Attorney General.

597. Courts--Juror Fees in Criminal Cases Not Recoverable as Costs.

CARSON CITY, April 6, 1948.

HON. JOHN F. SEXTON, District Attorney, Eureka, Nevada.

DEAR JACK: This will acknowledge receipt of your letter of March 27, received in this office on March 29, 1948.

In our opinion juror fees in criminal cases in justice court are not recoverable as costs.

Section 11296, N. C. L. 1929, provides that when the defendant pleads guilty or is convicted, either by the court or by a jury, the court shall render judgment thereon of a fine or imprisonment, or both, with or without costs.

Costs in criminal prosecutions were and are unknown at common law. Their recovery in any criminal case depends wholly upon the statutory provisions therefor. 14 Am. Jur. 69, sec. 107.

The same rule is applicable to costs in civil cases, and the general law is that costs in civil cases cannot be recovered except as provided by statute, and such is the law of this State. *State v. Baker*, [35 Nev. 300](#); *Dixon v. District Court*, [44 Nev. 98](#); *Wolfe v. Justice of the Peace*, [47 Nev. 359](#).

An examination of our statute fixing the fees or per diem of jurors, the same being section 8491, 1929 N. C. L. 1931-1941 Supp., discloses that in civil cases the juror fees are expressly made recoverable as costs and thus come within the rule that costs are recoverable only when provided by statute. On the other hand, there is no provision in such section whereby juror fees in criminal cases are made recoverable as costs, and particularly is this true with respect to trial jurors in justice court.

Section 11262, N. C. L. 1929, specifically provides as follows:

The fees allowed to justices of the peace, and other officers having the jurisdiction and authority of justices of the peace, clerks, peace officers, and district attorneys, shall, when the defendant is convicted, be considered and recovered against him as costs in the suit, and be collected in like manner as costs in civil cases.

Here we have express statutory provision, which, in my opinion, fixes the items or fees that can be legally assessed against a convicted person in a justice court. These fees, of course, would be those fixed by statute that could be collected under the law by the justice of the peace or other officers having to do with criminal cases where the fee statute fixes certain fees.

Very truly yours,
ALAN BIBLE, Attorney General.

598. Old-Age Assistance--Warrants May Be Printed by Highway Department on International Business Machines Under Certain Conditions.

CARSON CITY, April 6, 1948.

MRS. HERMINE G. FRANKE, Director, 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 March 31, 1948, received in this office April 1, 1948.

You request an opinion as to whether it would be legally possible under the statutes for the State Controller to have old-age assistance warrants printed for issue on the International Business Machines operated by the State Highway Department.

We are of the opinion that the State Controller may arrange for the printing of the old-age assistance warrants by the State Highway Department on the International Business Machines, provided, the operation is not paid out of highway funds, and that the provisions of chapter 30, Statutes of 1945, protecting the confidential records of old-age assistance are followed.

Section 18, chapter 1, Statutes of 1945, provides that the State Controller shall promptly, upon receiving the certified list of old-age recipients, draw his warrant, and immediately after such warrants have been drawn in the manner provided by law mail all such warrants for distribution in each county to the County Clerk; said clerk shall immediately mail such warrants to each recipient.

The State Controller is authorized to use a facsimile of his signature, produced through a mechanical device, and the State Treasurer has like authority.

The section further provides that such facsimile signature shall only be used under the personal direction and supervision of the Controller in drawing and issuing such warrants and in the countersigning by the Treasurer, and providing that said mechanical devices shall at all times be kept in a value securely locked when not so in use. The section further provides: "All officers mentioned hereinbefore in this section and concerned with the handling of such Federal funds are hereby fully authorized to do and perform all acts and things necessary to accomplish the purposes of this section."

Chapter 30, Statutes of 1945, provides that the State Welfare Department shall make rules and regulations establishing and protecting certain records as confidential; requiring certain officials to adopt rules protecting certain records relating to old-age assistance, and making certain uses of such records unlawful. Section 2 of the Act contains the following language: "Wherever, under provisions of law, names and addresses of, or information concerning, applicants and recipients of old-age assistance are furnished to or held by any other agency or department, such agency or department of government shall be bound by the rules and regulations of the State department prohibiting the publication of lists and records thereof or their use for purposes not directly connected with the administration of old-age assistance." Section 3 makes it a misdemeanor for any person found guilty of violation of any provision of the Act.

The intent of the Legislature as evidenced by the repeated use of the terms "promptly" and "immediately" is to insure that the recipients receive their allotments as soon as it is capable of being accomplished. A facsimile signature is authorized through a mechanical device in order to facilitate prompt issuance of the warrants.

The names of and amount of assistance to old-age recipients furnished the Highway Department are punched in code on cards and the list returned to the State Controller. There is nothing in the statute to prohibit the State Controller, in performing all acts, and things necessary to accomplish the purposes of the Act, to have these warrants printed by the Highway Department on the International Business Machines, provided, the facsimile signatures on such warrants are placed thereon as provided in section 18 of the Act, and that the employees of the Highway Department be bound by the provisions of chapter 30, Statutes of 1945, respecting the confidential nature of such records and lists.

Attention is also called to the constitutional provision on diversion of highway funds which reads as follows:

The proceeds from the imposition of any license or registration fee and other charges with respect to the operation of any motor vehicle upon any public highway in this State and the proceeds from the imposition of any excise tax on gasoline or other motor vehicle fuel shall, except for costs of administration, be used exclusively for the construction, maintenance, and repair of the public highways of this state. Section 5, article IX.

It is, of course, clear from this that the Highway Department must be fully compensated for any expense or cost involved for performing this service.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

cc: Hon. Jerry Donovan, State Controller.

599. Nevada State Prison--Not Mandatory That Prisoner Accept Parole When Granted--Penalty for Attempted Prison Break.

CARSON CITY, April 7, 1948.

HON. RICHARD L. SHEEHY, Warden, State Penitentiary, Carson City, Nevada.

DEAR MR. SHEEHY: The following is in response to your telephone inquiry to this office on March 31, 1948.

Your first question is, may an application for parole of a prisoner be made and parole granted if the prisoner is not willing to accept a parole? Second, what is the sentence for attempted prison break?

Answering your first question, we are of the opinion that a parole must be accepted by the prisoner before it becomes effective to secure him his liberty.

Your second question is answered in the sections of the statutes hereinafter quoted.

Section 11580, 1939 N. C. L. 1941 Supp., provides for petitions for parole. This section provides that application for parole shall be made on forms prescribed by the Board of Parole Commissioners from time to time. The following sections provide the conditions governing the conduct of paroled prisoners. These sections contemplate that application for parole be made by the prisoner and that parole be granted under rules and regulations as to conditions made by the board.

39 Am. Jur. page 572 defines a parole as a temporary release from imprisonment on conditions which he is at liberty to accept or reject. On page 576 of the same volume it is stated: "It is a well established rule that a parole must be accepted by the convict before it becomes effective to secure him his liberty; that is, it is for him to elect whether he will accept the parole with its conditions or reject it and remain in prison." Fuller v. State, 26 So. 146; Re Patterson, 146 P. 1009; 45 L. R. A. 502; 52 A. L. R. 836.

Ex parte Hawkins, 136 P. 991, held that paroles or conditional pardons do not become effective and enforceable until they have been received and accepted by the prisoner. "Such acceptance is a condition precedent to the validity of the parole or conditional pardon."

Sentence for attempted prison break:

Section 10023 N. C. L. 1929: "Every prisoner confined in a prison, or being in the lawful custody of an officer or other person, who shall escape or attempt to escape from such prison or custody, by force or fraud, if he is held on a charge, conviction, or sentence of a felony, shall be guilty of a felony; if held on a charge, conviction, or sentence of a gross misdemeanor or misdemeanor, he shall be guilty of a misdemeanor."

Section 9967 N. C. L. 1929. Punishment for felony when not fixed by statute provides: "Every person convicted of felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state prison for not less than one year or more than ten years, or by a fine of not less than five hundred dollars or more than one thousand dollars, or by both."

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

600. Bonds--Beatty School District--Valid.

CARSON CITY, April 7, 1948.

MR. DWIGHT F. DILTS, Executive Secretary, Public School Teachers' Retirement Salary Fund Board, Carson City, Nevada.

DEAR MR. DILTS: We have examined a certified copy of the record of the proceedings of the trustees of the Beatty School District, Nye County, Nevada, taken preliminary to and in the issue and readvertiseing of the Beatty School District Bonds in the principal sum of \$10,000 bearing date the 1st day of January 1948, and being of the denomination of \$500, maturing on the first day of January in each of the years 1949 to 1968, bearing interest at the rate of 3 percent per annum, payable semiannually on January 1 and July 1 of each year, both principal and interest being payable at the office of the County Treasurer of Nye County in Tonopah, Nevada.

We are of the opinion that the proceedings show lawful authority for the issue of said bonds and the sale of the same under the statutes of this State and that said issue of bonds constitutes a valid and legally binding obligation of said Beatty School District.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

601. Hospitals--Clark County--Removal of Trustees.

CARSON CITY, April 8, 1948.

HON. ROBERT E. JONES, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. JONES: Reference is hereby made to your letter of April 7, 1948, advising that the Grand Jury of Clark County has made an official request that proceedings be brought to

remove the entire Board of Trustees of the Clark County General Hospital from office for failure to perform the duties imposed upon them by law. You further advise that the foreman of the Grand Jury has been authorized by that body to sign a complaint to remove the Board of Trustees and that he has requested that your office bring proceedings and perform the necessary legal services to institute the action.

Your inquiry is whether, under such circumstances, it is the duty of your office to represent the complainant in the action as District Attorney.

OPINION

We assume from your letter that the Grand Jury and its foreman seek to remove the Board of Trustees from office pursuant to sections 4860-4863 N. C. L. 1929, and particularly section 4861. These sections of the law, in our opinion, provide a summary method of removal in the nature of a civil action in that no provision is made therein for the charging of crime or criminal intent against the officers sought to be removed, and further that any complainant is authorized to make a complaint in writing, that is to say, any individual may do so and thus set the machinery in motion for the removal of the officers sought to be removed. This opinion is written upon the foregoing assumption in view of the fact that your letter did not expressly point out under what statutes the removal was sought.

At the threshold of this opinion we desire to point out that there are three methods of removal of officers from office, all of which are based upon chapter CC, page 293, Statutes of 1909. The first ten sections of such chapter relate to the action of the Grand Jury in presenting an accusation in writing against the officer to be removed, which accusation shall be delivered to the District Attorney and a copy thereof served upon the delinquent officer, and a trial thereafter had in the District Court before a jury. These sections correspond to sections 10691-10704 N. C. L. 1929. Sections 11-20, inclusive, of said chapter relate to the method of impeachment of public officers which correspond to sections 10675-10690 N. C. L. 1929. The remainder of such chapter is identical with sections 4860-4863 N. C. L. 1929.

We mention the foregoing matter for the reason we think it significant that in the same chapter the Legislature required a District Attorney to handle the matter in the event an accusation was presented by the Grand Jury, whereas, under the so-called summary removal from office by the District Court, in the nature of a civil action, there is no provision therein contained that the District Attorney is required to present the matter to the court or to draft any complaints with respect to the matter. Such chapter of the 1909 Statutes being continued in our law to date lends credence to the proposition that where a private individual lodges a complaint against any public officer seeking removal thereof, he does so upon his own initiative and cannot legally require the District Attorney to present the matter for him.

From your letter we think the situation is identical with that in the case of *In re Jones and Gregory*, [41 Nev. 523](#). In that case the Grant Jury of Elko County suggested and requested the removal of two county commissioners and directed that the foreman of the Grand Jury sign the complaint against them, which procedure was followed. It was objected in the case in the

Supreme Court, where prohibition was sought, that such procedure denied the accused officers of due process of law in that it was an act of the Grand Jury and should have been brought under the present sections 10691-10704 N. C. L. 1929. However, the Supreme Court pointed out that the complaint as signed was not the act of the Grand Jury and neither was it the act of the foreman of the Grand Jury as such, but he simply became the complainant the same as any other individual, and that the summary procedure for removal under what is now sections 4860-4863 N. C. L. 1929 provided due process of law and, in effect, was in the nature of a civil action.

Practically the same holding of the Supreme Court was had in *Gay v. District Court*, [41 Nev. 330](#), where the removal was sought under the so-called summary civil procedure Act. It is true that in the *Gay* case the District Attorney of Clark County represented the relator and we think that the District Attorney of Elko County represented the foreman of the Grand Jury as complainant in that case, however, the question of whether the District Attorney should handle either case was not represented to the Supreme Court and we think the question was not raised therein. A later case for removal of public officer, to wit, a hospital trustee, the same being *Kenny v. Hickey*, [60 Nev. 187](#), shows that the complainant in that action was represented by attorneys in private practice.

We have examined the statutes of this State with respect to the instant question, and while the District Attorney is a public prosecutor of the county under section 2073 N. C. L. 1929, the following section 2074 makes it clear that he is a public prosecutor in criminal matters and not in civil matters. A further examination of the law discloses that the duties of District Attorneys have been particularly spelled out insofar as they relate to the instant matter, in that such a matter is not brought within the purview of the statute. Section 2076 N. C. L. 1929, as amended at 1935 Statutes, page 19, the same being section 2076, 1929 N. C. L. 1931-1941 Supp., provides as follows:

The district attorney shall draw all indictments, when required by the grand jury; shall defend all suits brought against his county; shall prosecute all recognizances forfeited in the district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to his county; he shall also draw all legal papers and transact the legal business of the school districts within his county, and such other legal duties as may be required of him by law.

It is to be noted that such section closes with the following language, “and he shall also perform such other duties as may be required of him by law.” We fail to find in the statutory law of this State wherein the District Attorney is required to bring a summary action of a civil nature for the removal of public officers.

It is, therefore, the opinion of this office that the District Attorney of a county is not required as District Attorney to bring a summary action of a civil nature for the removal of public officers, including hospital trustees, although he may do so if he so desires.

Very truly yours,

ALAN BIBLE, Attorney General.

602. Welfare, State Department--Placement of Children in Foster Homes--Religious Choice.

CARSON CITY, April 10, 1948.

HON. HAROLD O. TABER, District Attorney, Washoe County, Reno, Nevada.
Attention: Hon. John C. Bartlett, Assistant District Attorney.

DEAR JOHN: This will acknowledge receipt of your letter of April 6, 1948, with the outlined procedure under regulations of the State Welfare Department in placing children in foster homes. The particular case involved is one where the foster home mother is a Christian Scientist and the girls staying in the home are fifteen and sixteen years of age and are also Christian Scientists. Your decision in this case was that the requirement that a doctor be called in the event of an illness would be complied with for the purpose of determining if there was any communicable disease. In the particular case you decided the children in question had reached an age where they were entitled to their religious choice, but could not come to a definite conclusion as to what standard should be adopted to define the age at which a child could be considered capable of making a choice in such matters. You suggest that the analogy of guardianship statutes which allows children of fourteen years, or older, to select their guardians could be used as a basis for establishing the child's right to a choice in such matter.

You state that you will appreciate any thoughts that we may have on this matter and will operate under the terms outlined in your letter pending a reply from this office. We believe you have very logically analyzed and solved the problem submitted, and we concur with your opinion.

We have been unable to find any law dealing specifically with this question regarding children. The following Nevada law may be helpful.

Section 1030 Nevada Compiled Laws 1929, under the juvenile court law, provides:

The court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association or institution which is controlled by persons of like religious faith of the parents of said child.

Section 5276 N. C. L. 1929, under public health, provides:

None of the provisions of this act or the laws of the State regulating the practice of medicine or healing shall be construed to interfere with the treatment by prayer or with any person who administers to or treats the sick or suffering by mental or spiritual means, nor shall any person who selects such treatment for the cure of disease be compelled to submit to any form of medical treatment, nor shall any such person be removed to any isolation hospital or camp without their consent; *provided*,

the sanitary and quarantine laws of the state are complied with.

The minimum age at which a child would be deemed capable of making its choice in such matters would be a reasonable regulation, but the Child Welfare Department, which is particularly qualified in this work, should consider the facts in particular cases rather than a general classification.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney
General.

603. Bonds--Las Vegas--Storm Sewer Bonds.

CARSON CITY, April 10, 1948.

NEVADA INDUSTRIAL COMMISSION, Carson City, Nevada.
Attention: Hon. George W. Friedhoff, Chairman.

Re: City of Las Vegas, Nevada--Storm Sewer Bonds, Series of January 1, 1948,
\$250,000.00, dated January 1, 1948.

DEAR MR. FRIEDHOFF: Pursuant to your request of March 27, 1948, we have examined the transcript of the record of the proceedings of the Board of City Commissioners of the City of Las Vegas, County of Clark, State of Nevada, taken preliminary to and in the issue of its Storm Sewer Bonds, Series of January 1, 1948, in the aggregate principal amount of \$250,000, and find that:

1. That each and every notice required by law preliminary to and in the issue of the bonds and thereafter was duly given and made.
2. That the election to authorize the bond issue was held according to law, and the bond issue therein duly authorized.
3. That the proper ordinance creating the bond issue was legally enacted by the City Commissioners.
4. That all the necessary steps and proceedings creating the bond issue were duly and legally taken and had.
5. That the bond issue creates a legal debt and obligation of the city of Las Vegas.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant
Attorney General.

604. Nevada Hospital For Mental Diseases--City Health Officer of Sparks Has No Authority to Inspect.

CARSON CITY, April 12, 1948.

HON. VAIL PITTMAN, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR PITTMAN: Receipt is hereby acknowledged of your letter of April 8, 1948, requesting advice as to whether the Building and Sanitary Inspector of the city of Sparks has jurisdiction over the Nevada State Mental Hospital located within the city of Sparks. You inquire whether the provisions of the law would allow such inspector to make an inspection of the institution.

While the Nevada State Mental Hospital may be located within the corporate boundaries of the city of Sparks, still it is a State institution and as such undoubtedly subject to the will of the Legislature.

That the city of Sparks has the power to provide a city board of health and an inspector for the purposes thereof is provided in the laws of this State. Sections 5263-5264 N. C. L. 1929. However, the main duties of the city board of health are to guard against contagious and infectious diseases dangerous to the public health under rules approved by the State Board of Health.

In 1945 the Legislature of this State vested the jurisdiction over State institutions, including the State Hospital for Mental Disease, in the State Board of Health, and required the State Health Officer to inspect such institutions at least once each calendar year and whenever in his discretion he deems an inspection necessary. In such statute the State Health Officer was given full power and authority to enter upon any and all parts of the premises of any such institution and to make examinations and investigations to determine the sanitary condition of such places. The State Health Officer was empowered to perform these duties in person or by his duly authorized agent. Chapter 138, Statutes of 1945.

In 1947 the Legislature amended the foregoing Act to include public school gymnasiums and left the jurisdiction in the State Board of Health and the State Health Officer. Chapter 158, Statutes of 1947.

We are advised from the office of the State Board of Health that neither such board nor the State Health Officer has designated the Building and Sanitary Inspector as its agent to inspect the Nevada State Hospital for Mental Diseases.

We, therefore, are of the opinion that unless and until the State Board of Health or the State Health Officer should authorize the Health Inspector of Sparks to inspect the institution, he has no legal jurisdiction there over.

Very truly yours,
ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant
Attorney General.

605. Athletic Commission--Jurisdiction Of.

CARSON CITY, April 15, 1948.

MR. RICHARD R. HAMAN, Chairman, State of Nevada Athletic Commission,
1390 Ridgeway Court, Reno, Nevada.

DEAR DICK: This will acknowledge receipt of your letter dated March 24 and received in this office on March 27, 1948.

You ask three questions:

First. What jurisdiction does the State of Nevada Athletic Commission possess over fights held on a Government Indian Reservation?

Second. What jurisdiction does the Athletic Commission possess over organized college teams when such teams participate against noncollege fighters?

Third. What provisions are made in the State Athletic Commission law concerning exemptions for veterans organizations?

In answer to your first question, it is our opinion that where the contests are held on a Government Indian Reservation, they are held subject to the exclusive Federal Reservation and that the State Athletic Commission cannot enforce its jurisdiction thereon. The commission, of course, can enforce its jurisdiction in places within Nevada off the Federal Reservations, save and except where the contest falls within section 15 of the Athletic Commission Act (chapter 40, 1941 Statutes, sec. 905.15, 1929 N. C. L. 1941 Supp., as amended).

Section 15, which is self-explanatory, reads as follows:

The provisions of this act shall not apply to any amateur boxing, sparring, or wrestling matches, contests, or exhibitions or any combination thereof conducted by or participated in exclusively by any school, college, or university or by any association or organization of said school, college, or university, when each contestant in such matches is a bona fide student in such school, college, or university.

In answer to your second question, it is our opinion that where college students engage with noncollege students, the State Act would apply unless it appears that the so-called noncollege boxer was in fact boxing as an amateur and representing some school or organization under the exceptions noted in section 15 cited above.

In answer to your third question, you are advised that section 14 of the Act reads as follows:

The commission may, in its discretion, for good cause shown, issue without charge a license to hold boxing contests, sparring or wrestling matches or exhibitions to any local post or unit of any national organization of ex-service men, or any fraternal society or organization. Upon making such application, the executive officer of any such fraternal organization, society, post, or unit shall attach to such application an affidavit specifying the pro rata of proceeds, to whom they are to be paid, the recipient's connection with the fraternal organization, society, post, or unit that such post or unit intends to hold such match, contest, or exhibition for the sole benefit of the fraternal organization, society, post, or unit, and it shall be unlawful and a cause for the revocation of such license to hold any such contest, match, or exhibition under such license other than for the sole benefit of such fraternal organization, society, or local post or unit of a national organization of ex-service men.

This section is clear, definite, and positive and needs no statutory construction.

Very truly yours,

ALAN BIBLE, Attorney General.

606. Employment Security--Section 9 of Act Construed Relative to Interstate
"Arrangements" Between "Liable" and "Paying States."

CARSON CITY, April 14, 1948.

MR. FRANK B. GREGORY, Attorney for Employment Security Department, Carson City,
Nevada.

DEAR MR. GREGORY: Your letter dated March 30, 1948, was duly delivered at this

office and we have carefully considered the same.

You discuss the proposed “interstate arrangement” to facilitate the payment of benefit claims through the several States, each acting as agent for the other.

Authority for such an agreement must be found, if at all, in section 9 of the employment security law as amended by Statutes of 1945, page 119 at 124 (1929 N. C. L. 1941 Supp., sec. 2825.25h).

You enclose with your letter the covering letter of R. G. Wagenet, Director, Social Security Administration, Washington, D. C., containing copies of Attorneys General opinions on the legality of the proposed arrangement in sixteen of the eighteen States which have adopted the “arrangement,” and you ask that we review the subject matter and advise you whether the opinion you express in your letter is correct or not.

It is your opinion that the director should not enter into this arrangement for the reason that, if he did so, it would be in reliance of an invalid delegation of legislative powers, citing 11 Am. Jur. “Constitutional Law,” sec. 214.

It is our opinion that if the factual basis of your position is correct the arrangement would be proscribed by general principles of law.

As we understand it, the provision in the proposed “arrangement” reads as follows:

III. C. Benefits shall be paid to an interstate claimant from the unemployment fund of the paying state *in the same manner* and under the same conditions as if such claimant were eligible to receive benefits under the unemployment compensation law of such state, *except* that the amount of qualifying wage credits required, his weekly rate or its equivalent, his maximum benefit amount, his partial earnings limit, the seasonal provision applicable to him, the duration for and the period during which benefits are payable to him, the length of his waiting period, and if the claim is the first one in his benefit year, whether the claimant is otherwise currently eligible for benefits and whether he is disqualified including the period of any disqualification, shall be governed by the provisions of the unemployment compensation law of the *liable* state and shall be determined by the state agency administering the unemployment compensation law of the *liable* state. Provision of the unemployment compensation law of the *paying* state shall *otherwise* apply to an interstate claimant. (Italics added.)

The Nevada law on the subject is contained in section 9 of the Act as amended in 1945 (Stats. 1945 at page 124; 1929 N. C. L. 1941 Supp., sec. 2825.25h).

The section empowers the executive director to enter into reciprocal arrangements with other States. Conditions affecting these arrangements are set out in four categories.

1. If the employee works for the same employer in two States, it may be agreed that the services will be deemed performed in one of the two States designated in the agreement.

2. “Potential *rights* to benefits accumulated under the unemployment compensation laws of one or more States or under one or more such laws of the Federal Government, or both, may constitute the *basis* for the payment of benefits *through* a single appropriate agency under *terms* which the executive director *finds* will be *fair and reasonable* as to all affected interests and *will not result in any substantial loss* to the unemployment compensation fund.” (Italics added.)

3. The wage base of another State shall become the wage base in Nevada when Nevada (as agent) pays compensation for unemployment, and vice versa; but in every case when one State makes payment as agent for another the other shall repay the same. These provisions for reimbursement must be found by the director authorizing them to be *fair and reasonable* to all affected interests.

4. This is a specific provision as to the effect of reimbursements. It is stated generally that when compensation is paid by another State and this State makes reimbursement therefor the process thus followed will amount to paying benefits to the absent claimant under the Nevada law. It would appear from this that if the reimbursement was equal to the benefit, the paying State would be required to expend the amount of the statutory benefits under the Nevada law. If two sums are each equal to a third amount, all three must necessarily be equal.

We find in this section 9 a delegation of authority to the director to make arrangements that shall not alone be (in the director’s opinion) “fair and reasonable” and “will not result in any substantial loss (in the director’s opinion) to the unemployment compensation fund,” but within the standards and substantive limitations of the Act fixing its benefits and governing the earning and the loss thereof. In other words, the director is made the administrative arm of Legislature to “fill in the details” within the standards and limitations laid down in the Act. (U. S. v. Grimand, 220 U. S. 506 at 517.) See, also, State v. Shaughnessy, [47 Nev. 129 at 136, sec. 3](#).

The factual situation you present is, as stated in your letter:

This proposed arrangement goes far beyond the interstate benefits payment plan now in operation in that it provides among other things that disqualification provisions arising after the initial determination shall be made according to the law of the agent state (paying state?) rather than according to the law of the liable state, that is, the state in which the wage credits were earned. Thus a wage claimant who earned his credits in Nevada and subsequently moved to Colorado, files his initial claim through Colorado against Nevada, would be determined according to the law of Nevada, *but subsequent disqualification* such for example (as) the refusal to accept suitable work, would be determined according to the law of Colorado.

If this is an accurate statement of the problem, we think you are correct in advising the director not to enter into the arrangement. We think the legal principle lies in the decisions cited above rather than those set forth in 11 Am. Jur., sec. 214, on “Constitutional Law.” We think the proper principle is set forth in 11 Am. Jur., sec. 240 on “Constitutional Law,” pages 955-956. See, also, 97 A. L. R. 947, note to Schecter Poultry Co. v. U. S., 295 U. S. 495.

If there are to be further negotiations, we suggest you adopt the proposal contained in the opinion of the Attorney General of Louisiana. He considers the section of the arrangement in question as one governing *procedure* only, and to make certain he suggests on the last page of his opinion that the arrangement should “plainly state that in all substantive matters the law of the liable State should govern and all determinations should be made by it.”

We have the distinct impression on reading par. III, subdivision C, of the proposed arrangement that such is already the effect of the proposal, especially in view of the part following the word “except.” You and the director may have a better understanding of the practical meaning of the words.

We return the papers you sent.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

cc: Denver Dickerson, Executive Director.

607. Nevada Hospital for Mental Diseases--Travel and Per Diem Allowance Cannot Be Paid Out of the Operating Funds of Hospital.

CARSON CITY, April 15, 1948.

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

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated April 19, 1948, received in this office April 12, 1948.

You write that the Board of Hospital Commissioners has decided in favor of sending the Superintendent of the Hospital to a national convention on matters of interest and importance to the hospital, which convention will be held in Washington, D. C., and Boston sometime in May 1948. You ask whether per diem and travel allowance could be made available from the operating funds of the hospital or some other fund for such purpose that may be available.

We are of the opinion that the only available fund out of which the expenses mentioned can be paid, according to the statutes, is the appropriation for travel expenses for the Nevada State Hospital. Travel and per diem allowance cannot be paid out of the operating funds of the hospital.

Section 29, chapter 278, Statutes of 1947, designates the appropriation by the Legislature for the Nevada State Hospital for Mental Diseases for the purposes expressed therein. A specific appropriation is made for travel expense. General support, including dental and extra medical services is also an expressed purpose. These appropriations are carried in a special account by the State Controller in accord with the statute, and warrants are drawn on claims for the specified purposes.

The Legislature has designated the maximum sum for which travel expenses can be paid.

Section 57 of the same chapter provides that no transfer shall ever be made to or from the sums appropriated specifically for salaries and for traveling expenses.

The only fund out of which travel and per diem allowance could be made is the fund set aside in the hospital appropriation for travel expense.

The per diem allowance for travel outside the State is fixed by sec. 6942 N. C. L. 1929 at not to exceed ten dollars per day as fixed by the State Board of Examiners. Permission of this board, upon written application by the State officer desiring to travel outside the State, is also required.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

608. Old-Age Assistance--Funds May Be Used for Printing of Warrants by Highway Department on International Business Machines.

CARSON CITY, April 16, 1948.

MRS. HERMINE G. FRANKE, Director, Old-Age Assistance, P. O. Box 1331, Reno, Nevada.

DEAR MRS. FRANKE: This will acknowledge receipt of your letter dated April 14, 1948, received in this office April 15, 1948. You request advice in conjunction with the opinion from this office furnished you under date of April 6, 1948, in which we held that arrangements could be made to have the old-age assistance warrants printed by the Highway Department on the International Business Machines, provided certain provisions of the statutes were observed. You now ask if funds of the Division of Old-Age Assistance may be used to pay for such printing in view of the provisions of section 18 of the Old-Age Assistance Act.

Section 18 provides that the State Controller shall draw his warrants on the fund payable to each recipient and the State Treasurer shall pay the same. This section further provides: "Insofar as that portion of said moneys so deposited to pay on the expenses of the administration of this act and of said social security act, and in the distribution of such old-age assistance is concerned, it shall be disbursed in the same manner as provided for hereinabove in this section, except that claims therefor shall be made and filed directly by the claimants entitled thereto and paid directly

to them, upon the written approval of such claims by said secretary of said state board, and the audit and allowance thereof as required by the laws of this state * * *.”

The printing of the warrants is an administrative expense the same as any other printing jobs required by the department. From the language of the section quoted above, the claim of the Highway Department would be filed as other claims for expenses of administration of old-age assistance, approved by the secretary of the State Board and audited and allowed as required by law.

The section provides that the amounts paid to recipients be by warrants drawn directly from the certified lists, except that claims against the administrative expense be filed directly by the claimants and when approved by the secretary of the State board, warrants shall be drawn and paid as required by the laws of the State governing the payment of claims.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

609. Public Schools--Wadsworth District High School Lost Legal Identity--Power to Reestablish Vested in State Board of Education.

CARSON CITY, April 15, 1948.

HON. HAROLD O. TABER, District Attorney, Washoe County, Reno, Nevada.
Attention: Gordon Thompson, Esq.

DEAR MR. THOMPSON: This will acknowledge receipt of your letter dated March 31, 1948, received in this office April 2, 1948.

You set out in your letter a statement of facts concerning the Wadsworth district high school and enclosed a letter from the Superintendent of Public Instruction to the Board of Trustees of the Wadsworth School District, and upon the basis of the facts submitted request an opinion as to whether or not the Wadsworth district high school has lost its legal identity.

Subsequent to the receipt of your letter a conference was held in this office on April 5, 1948, attended by the trustees of the school district, Mr. Stetler, Deputy Superintendent of Public Instruction, Honorable E. P. Carville, representing the trustees, and yourself.

It is our opinion that the Wadsworth district high school by operation of law has ceased to exist and has lost its legal identity under the facts hereinafter set forth.

It is our further opinion that the power to reestablish the Wadsworth district high school is vested by law in the State Board of Education.

There has been a great deal of misunderstanding throughout this entire controversy. There has also been a great number of conflicting claims made by the various parties interested in the question. For example, there is a claim that the Wadsworth school board opened its school upon representations that the reestablishment of the district high school would be voted by the State Board of Education. Suffice it to say that we believe that the State Board of Education under all the circumstances of this case and in the exercise of well-informed discretion could vote to reestablish the school, or it could vote to not reestablish the school. In either event, we believe that the action of the board would be equally lawful, and that in the absence of a showing that the board acted arbitrarily, it is our opinion that the courts would not overturn such decision.

From a summary of the facts presented it appears that the report of the Deputy Superintendent of Public Instruction for the 1944-1945 school year determined that the average daily attendance at the end of the school year, as reported by the principal, was 2.43. During the school year 1945-1946 the district high school did not operate, and no high school tax was levied. No district high school was held in the district during the school year 1946-1947 and no tax was levied for district high school purposes. The pupils of high school grade attended the district high school at Fernley during this time. The Wadsworth district high school was carried as dormant on the report of the Deputy Superintendent of Public Instruction. There is no record of a written agreement between the trustees of the Wadsworth and Fernley districts under the provisions of the statutes, chapter 62, Statutes of 1945, or sections 156-159, chapter 63 of the 1947 school code, under which a county or district high school may retain its legal and educational identity.

On April 14, 1947, a meeting of the trustees of the Wadsworth district was held at which the Superintendent of Public Instruction was present. The meeting was held for the purpose of determining the status of the high school. As a result of this meeting a request for an opinion from the Attorney General was submitted on April 15, 1947. The inquiry stated that during the past six or seven years, six of the twelve one-teacher district high schools in Nevada ceased to function, and since some of these inactive districts were showing signs of again wanting to maintain their high schools, the problem arose as to their status, and how they could become active. The answer to this question was, in substance, that the statutes do not contemplate the revival of a dormant district high school. The provision for the levy of taxes to maintain such school is one of the conditions precedent to maintain the life of the school and must be made within the prescribed time. The existence of the requisite eight pupils is a further condition to maintain such school is existence. When either of these requirements fails the school no longer exists, as a matter of law, and the only curative procedure is to reestablish the school in the same manner as prescribed in the case of a newly established district high school. This opinion was given on April 19 and forwarded to the trustees of Wadsworth school district by the State Superintendent of Public Instruction under date of April 26, 1947.

The Deputy Superintendent of Public Instruction on April 28, 1948, by letter to the trustees referred to the opinion, and stated that the only course open was the reestablishment of the school on the basis of a new district high school. As the district did not at that time have the required ten resident pupils this did not appear possible at that time.

Prior to the date of the opinion in the preparation of the budget, the Deputy Superintendent certified to the county commissioners that the prospects were that there would be at least eight actual resident students of high school grade in attendance for the ensuing year. At the time of presenting the budget he stated that he informed the county commissioners that a question as to whether or not the district high school was then in existence depended upon the opinion of the Attorney General in reply to an inquiry by the Superintendent of Public Instruction. He advised that if under the opinion the school had ceased to exist, the tax was not to be levied.

Following the receipt of the opinion from the Attorney General, a petition from the taxpayers of the Wadsworth district was presented to the State Board of Education requesting the reestablishment of a district high school in the Wadsworth district. In January 1948 the State board denied the request on the basis that the district was within forty miles of another district high school; that it was about three or four miles distant from the Fernley district high school and that it was possible to transport the Wadsworth pupils to this school at a cost that was not excessive.

You call attention to the letter from the State Superintendent of Public Instruction, under date of November 13, 1947, containing a resolution providing for the transfer of funds to cover the expenses of educating the Wadsworth pupils at the Fernley high school.

This resolution was adopted by the board of trustees of the Fernley district under sections 152-153, chapter 63 of the 1947 school code, which provides for such resolution when a regularly established high school is giving instructions to high school pupils from an adjoining county. The resolution states that the high school is the nearest and most convenient high school for such pupils to attend and that the high school is offering a course of study approved by the Superintendent of Public Instruction. Section 154 provides that the superintendent shall send a copy of this resolution to the board of trustees of the elementary school district in which the pupils have a legal residence, and if such trustees shall not protest within ten days, the order to transfer shall be made. In case a protest is made, the Superintendent of Public Instruction shall decide whether the situation in question comes within the provisions of the chapter. It did not appear that the Wadsworth district was operating under a written agreement with Fernley district, and the order was based on the premise that a district high school did not exist at Wadsworth. As no protest was made by the Wadsworth school district trustees, and section 154 was quoted in the letter, it appears that the Wadsworth trustees accepted the conclusion of the Superintendent of Public Instruction.

By operation of law the district high school at Wadsworth has ceased to exist under the facts submitted, and may only be reestablished upon petition to the State Board of Education under the provisions of the school code, and as the district is within forty miles of another district high school its establishment rests entirely within the discretion of the State Board of Education.

We feel the facts presented in this particular case fall under the law as set forth in our opinion of April 19, 1947.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

610. County commissioners--Not Authorized to Appoint or Pay Attorney to Prosecute Action for Removal Hospital Trustees Brought by Private Individual.

CARSON CITY, April 19, 1948.

HON. ROBERT E. JONES, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. JONES: This will acknowledge receipt of your letter of April 15, 1948, received in this office on April 17, 1948.

Subsequent to the opinion of this office with respect to the summary removal of the Board of Hospital Trustees of Clark County rendered April 8, 1948, you now propound the following query.

Assuming that the Foreman of the Clark County Grand Jury, as a private individual, should file a complaint pursuant to sections 4860 to 4863, N. C. L. 1929, for the removal of the members of the Clark County Hospital Board, would it be proper for the Board of County Commissioners to appoint an attorney to prosecute this action and pay said attorney out of the county treasury?

OPINION

The foregoing stated former opinion of this office held that the filing of complaint or the bringing of an action for the removal of members of the board of hospital trustees by the Foreman of the Clark County Grand Jury at the suggestion of the Grand Jury did not constitute an act of the Grand Jury, nor that of the foreman of the Grand Jury acting as such, but that such action constituted the action of a private individual authorized by section 4861, N. C. L. 1929, to bring an action for the summary removal of such trustees. The law to this effect was well settled in the case of *In re Jones and Gregory*, 41 Nevada 523, cited in our April 8 opinion. It was further held that such action constituted a summary removal action in the nature of a civil action so that it cannot now be said that any such action constitutes an action on the part of Clark County and/or its Board of County Commissioners.

The Grand Jury of Clark County undoubtedly was well advised of its powers and duties with respect to the removal of county officers, including the hospital trustees, and had such Grand Jury desired the services of the District Attorney of the county and caused the removal of such trustees to be had by such officer acting in the District Court, such Grand Jury could well have proceeded under sections 10691-10704, N. C. L. 1929, by filing accusation in writing against the trustees, which would have been followed by a jury trial and, if the evidence so

warranted and the jury so found, the trustees could have been removed from office without the stigma of being charged with a penal offense or found guilty of crime.

It appears that the Grand Jury did not desire to follow such procedure, but, contrary thereto, it suggested that a private individual bring the action under the summary removal procedure before the court without a jury. A close examination of the law of this State fails to disclose any power in the Board of County Commissioners to employ an attorney or to pay such attorney to act for the individual in the instant matter. If no statutory authority can be found to empower the Board of County Commissioners to so act, then it is clear that such power does not exist and if such action is brought by the individual and an attorney is employed by him, such attorney must look to such individual for his fee.

It is interesting to note that in section 4861 it is provided that, if it shall appear that the charge or charges of the complaint are sustained, the court shall enter a decree that the party complained of shall be deprived of his office, and shall enter a judgment for \$500 in favor of the complainant and such costs as are allowed in civil cases. It seems clear that the Legislature itself, by such language, has divorced the Board of County Commissioners and the county from participation in such action. Otherwise, the penalty and the costs would have been provided so as to go to the county.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

611. Vital Statistics--Child Born Prior to Divorce Decree Becoming Final Must Be Registered in Married Name of Mother.

CARSON CITY, April 20, 1948.

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 dated April 17, 1948, received in this office April 19, 1948. Your statement is to the effect that a married woman obtained an interlocutory decree of divorce in Utah, which decree will not become final until July 27, 1948, gave birth to a child in this State on March 5, 1948. The mother states that her husband is not the father of the child, and the child's birth certificate has been filed in your office under the name of the putative father. You inquire under what name this child's birth should be recorded, the name of the mother's husband, the mother's maiden name, or the name of the putative father.

We are of the opinion that for the purpose of registration of the child's birth certificate it

should be recorded in the married name of the mother as the marriage of the mother was not dissolved at the time of the birth of the child.

17 American Jurisprudence, section 436, page 363, recites:

An interlocutory judgment or decree of divorce does not sever the matrimonial bonds; only a final decree or judgment if effectual to dissolve the marriage and restore the spouse to the status of single persons and render each competent to marry again.

The same volume, section 440, page 365, holds as follows:

As a general rule, the party obtaining the interlocutory decree may by subsequent misconduct lose the right to an absolute decree. Adultery by the petitioner in a divorce action; pending the running of the decree nisi period, will justify the vacation of the decree nisi and thereby prevent entry of a final decree.

Presumption from birth in wedlock is expressed in 7 Am. Jur., section 14, page 636, as follows:

No principal of law is more firmly established than the principal that every child born in wedlock is presumed to be legitimate.

Section 9047.06, N. C. L. 1931-1941 Supp., under specifications of conclusive presumptions, subsection 5, reads:

The issue of a wife cohabiting with her husband who is not impotent, is indisputably presumed to be legitimate.

Chapter 87, Statutes of 1923, sections 3405-3443, N. C. L. 1929, is an Act relating to children born out of wedlock and fixes a penalty for the failure of the father, without lawful excuse, to support the child where the same is not in his custody, and where paternity has been judicially established, or has been acknowledged by him in writing.

As stated in *Frank v. State*, 161 So. 540, the general rule is that the admissions of husband and wife concerning children born in wedlock are inadmissible to establish illegitimacy of children. Highest proof is necessary to overcome presumption of legitimacy, and children will be held illegitimate only where there is no judicial escape from conclusion.

In the present case suit for divorce was filed on November 26, 1947, and a decree of divorce will become final on July 27, 1948. The child was born on March 5, 1948. The child was born before the marriage was dissolved and is therefore presumed to be a legitimate child of such marriage, unless it be established that it is impossible that the mother's husband could have been its father on a trial of the issue as to its legitimacy.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

612. Public Employees Retirement Board--Basis of Compensation.

CARSON CITY, April 23, 1948.

VIRGIL H. WEDGE, Esq., City Attorney, City Hall, Reno, Nevada.

DEAR VIRG: Your letter dated April 20 was received here April 22, 1948.

You quote from page 6 of the Interpretation of the Public Employees' Retirement Act printed in pamphlet form and adopted as a draft of rules subject to a hearing and further action May 3, 1948, as follows:

Upon retirement from the service of the State or one of its political subdivisions after twenty or more years of service, a member of the retirement system will receive a "monthly service retirement allowance," which will be 50 percent of the average monthly salary during the last five years of public employment, payable during his lifetime.

You inquire in view of section 19, subd. 1 and 2 of the Act what statutory basis exists for the statement quoted above.

We find that the provisions of sections 14, 15, 16, as well as section 19, are pertinent to the subject matter.

Section 14 outlines the "objective" of the Act, as embracing the provision of a disability retirement allowance (to be determined) and a "total service retirement allowance."

The amount of the latter is "approximately one half his average salary during the last five years of service." Note this is the total actual salary. This applies to policemen and firemen at least 55 years old who have at least 20 years of service, and other employees of like term of service who are at least 60 years old. A proportionate rate of allowance is provided for employees entering the system after the age of 35.

On this basis and the actuarial tables approved by the board, the actuary shall ascertain (in advance) for each member of the system the percentage of his compensation earned after July 1, 1948, and before the compulsory retirement age (55 or 60) which, with interest, is necessary to provide one-half of the benefits. That percentage shall be currently deducted from his pay and placed in a fund.

The statute does not fix this percentage in figures, but contemplates that it may possibly be more than 5 percent. In that event the employee may pay 5 percent only in which event his

benefits will be reduced accordingly. An employee contributes ordinarily a percentage of his total salary if it is more than \$200 per month or he may contribute a percentage on \$200 per month only.

The board has fixed a base percentage for employees at 5 percent which, when paid on a monthly salary not exceeding \$200, is calculated to secure for the employee the annuity benefits of the Act.

By section 15 the employer is required to contribute monthly a percentage of each employee's monthly salary which when applied to \$200 per month will match the employees annuity payments.

The board has added 50 cents per month for administrative expense to be paid by the employee and a like amount to be paid by the employer.

The board contemplates computing this 5 percent on the gross salary (not on a salary of \$200 or less).

Section 19 in question defines the (compulsory) service retirement allowance as comprising two factors: (1) An annuity earned by the premiums paid by the employee with their interest accumulations, and (2) a pension earned from the premiums paid by the employers, which pension shall be equal to the annuity (1) which annuity shall be earned from accumulated premiums collected on a salary not exceeding \$200 per month. There is also provided a third factor for prior service contributions but this third factor does not come into operation until July 1, 1949.

By section 14 the allowance is "approximately one-half of the average salary during the last five years." This contemplates that the employee shall have reached the compulsory retirement age.

Under the Act power is delegated to the board in view of the objective to fix the percentages of contributions on the basis of actuarial tables *approved by the board*.

In the light of the interpretations and rules promulgated, it is to be assumed that the percentages so fixed are calculated on the basis of actuarial tables approved by the board.

We may add that the pamphlet printed is a "final draft" and that before the rules are officially adopted and filed with the Secretary of State, a public hearing will be had and the board on May 3, 1948, will sign, date, and file the same with such modifications as it may deem called for after the hearing.

You state also:

In reading the Act it is my opinion, in view of sections 8 and 9, that it will not be necessary for the city of Reno to make an election prior to May 1, 1948, in order to avoid being blanketed into the Act. The employees of the city of Reno are anxious to

make such an election if the same is necessary, and in view of the fact that only a short time is left, I would appreciate it if your office could give me an answer to the above two propositions at your earliest convenience.

Section 8 of the Act states exceptions to the rule as to participation in the Act as follows:

(1) An employee who is a member of, or eligible for membership in, a retirement system established by a public employer prior to the time this Act takes effect may not become a member of the system established by this Act until the previously established system is integrated with the system established by this Act pursuant to the procedure provided by this Act.

Section 9 supplies procedure for such integration. Two-thirds of the employees and their public employer apply to the State board in writing for such integration, and the State board may make such integration upon terms set forth in a contract between the board and the employer. The contract shall not be effective until a hearing is held pursuant to section 6 as in the case of rules.

If the city of Reno has a retirement system already in effect, as we assume to be the fact, it will not be integrated into the State system without a written application, action thereon, public hearing, etc., as provided in section 9. This is one of the exceptions to the application of the usual provisions of the Act, as enumerated in section 8.

If the city system falls short of a retirement system in effect prior to the Act, then acceptance will be presumed unless written notice of rejection is sent by the city to the board not later than May 1, 1948, in accordance with subd. 3, section 8 of the Act. In order to reject the Act, two-thirds of the employees and the governing board of the city must elect to reject the Act, after which the city board must notify the State board of such rejection not later than May 1, 1948.

If this does not fully answer your questions, please advise. We are enclosing an extra copy of this letter for your convenience.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy

Attorney General.

613. Corporations--Municipal--Ordinances Adopted by Unincorporated Town Remain in Effect Upon Incorporation Thereof Until Repealed or Otherwise Modified.

CARSON CITY, April 26, 1948.

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

DEAR MR. EVANSEN: Receipt is hereby acknowledged of your letter of April 22, 1948, wherein you request the opinion of this office upon the following question:

Would ordinances applying to unincorporated towns remain in effect upon the incorporation of the town?

OPINION

We think your inquiry is directed to the proposition of whether ordinances in effect at the time of the incorporation of the town of Hawthorne continue in effect until modified, amended or repealed by the town council of such town.

The town of Hawthorne was incorporated under the General Incorporation Act, the same being sections 1100-1212, N. C. L. 1929. It is to be noted that section 1110 provides as follows:

All ordinances and resolutions in force in any city, when it shall become organized or change its class under the provisions of this Act, shall continue in full force and effect until repealed or amended, notwithstanding such organization or change of class; and such organization or the making of such change of class shall not be construed to effect any change in the legal identity of such city; *provided*, such ordinances and resolutions do not conflict with the provisions of this Act.

We think there can be no doubt that such section is controlling in the instant matter, and that previous ordinances continue in effect until changed as hereinabove stated.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

614. Nevada State Prison--Sale of Prison-Made Goods.

CARSON CITY, May 8, 1948.

MR. RICHARD H. SHEEHY, Warden, Nevada State Penitentiary, Carson City, Nevada.

DEAR WARDEN SHEEHY: This will acknowledge receipt of your letter of April 23, received in this office on April 25, 1948. You ask two questions:

(1) Is it legal for the prison store to sell prison-made goods to anyone who comes to the store to purchase these goods?

(2) Is it legal for prison-made goods to be sold in bulk to anyone who comes to the store to purchase these goods when the prison officials here are aware that these goods will be offered for resale?

Examination of the Supreme Court Reports of this State discloses that these questions have not been passed upon by that court. The general law provides in effect that unless there is a prohibition contained in the State law that the making and sale of prison-made goods is not contrary to law, except when transporting in interstate commerce into another State where the sale of prison made goods is prohibited or seriously curtailed. 41 Am. Jur. 919, sec. 46.

Section 11458, Nevada Compiled Laws 1929, inter alia, provides as follows:

On the application of any prisoner, whose record for the preceding six months shall be reported by the warden as excellent, the board may on application in such form as it may prescribe, issue a written permit to such prisoner to employ his own time not within the working hours of the day in the manufacturing for sale by the state as his agent and for his account, of such goods and materials as, when fabricated, shall not enter into competition with any free labor or any manufactories in the State of Nevada.

Subsection A. On the application of any prisoner who has committed no breach of the prison rules for a period of three months preceding the date of said application, and whose application is endorsed by the warden, the state board of prison commissioners may issue a permit, revocable at any time, permitting said prisoner and none other to employ his own time not within the working hours of the day in the manufacture and the sale by the state on his account, of such goods and materials as when fabricated shall not enter into competition with any free labor or any manufactures in the State of Nevada.

Subsection B. The purpose of this act is to prevent competition of prisoners with free labor and industry in the State of Nevada, except where such labor and industry inures to the direct benefit of the State of Nevada.

The foregoing statute undoubtedly is the authority for a prisoner on his own time to manufacture goods which can be sold by him through the prison officials or store so long as the manufacture and sale of such prison-made goods does not enter into competition with any free labor or any manufactures in the State of Nevada. It would seem that if the manufacture and sale of certain prison-made goods entered into competition with free labor and industry of the State, that then the prohibition against the sale thereof would follow. On the other hand, if it is shown that the manufacture and sale of such goods does not enter into competition with free labor and manufacture thereof in the State of Nevada, then Query No. 1 is to be answered

in the affirmative.

Query No. 2 presents a little different situation. The sale of prison-made goods, while the same may comply with the Nevada law, still if such goods are sold in bulk to some party outside of the State for resale or otherwise in some other State and the law of that State prohibits the sale and disposition or receipt of convict-made goods, the Federal law would intervene and stringent penalties are provided for the transportation into the State in which the laws prohibit the receipt, sale, or other disposition of convict-made goods.

Section 60 of title 49 FCA apparently was the original statute enacted by Congress prohibiting the transportation for use, consummation, sale, or storage of convict-made goods contrary to the law of the State or Territory into which such goods were shipped. Section 61 of the same title made it illegal for any persons knowingly to transport or cause to be transported in any manner or means whatsoever or to aid or assist in obtaining transportation for or in transporting any convict-made goods contrary to section 60. The penalty for so doing was a fine of not more than \$1,000 and a forfeiture of the convict-made goods to the United States. The foregoing statutes were enacted in 1929 and 1935. In 1941 Congress reenacted the law as found in said section 60 above mentioned and placed the same in the Federal Penal Code and such section is now section 396a of title 18 FCA. Congress likewise placed sections 61, 62, and 63 of title 49 in the penal code and the same are now sections 396b, c, and d.

Although the foregoing Federal statutes do not expressly provide that the prison or prison officers may not cause the sale of convict-made goods in bulk to persons whom they know will transport them to another State for resale, still there is a grave possibility that if such practice is indulged in that such officers might be charged as accessories before the fact and cause them considerable trouble.

We believe that if the sale of convict-made goods is had to parties not known to be Nevada residents who are purchasing such goods for resale in some other State, that it would be wise for you to ascertain whether or not the laws of such other State prohibit the bringing into such State of convict-made goods for sale or other disposition. By exercising this precaution, we believe that serious difficulties in the future might be avoided.

Very truly yours,

ALAN BIBLE, Attorney General.

615. Public Schools--Integration of Public School Teachers Into Retirement Plan and Public Employees Retirement System.

CARSON CITY, May 11, 1948.

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

DEAR MISS BRAY: We have received your letter of May 5, 1948, by J. R. Warren, Office Deputy, also copy of letter dated May 4, 1948, by Kerwin Foley, Executive Secretary of the Public Employees Retirement Board on the same subject.

Your questions relating to the interpretation of the Public Employees Retirement Act (chap. 181, Stats. 1947) and our answers thereto follow:

1. There are now 81 teachers retired under the Public School Teachers Retirement Plan. If the two systems are integrated, will these retired teachers become participating members under the new plan?

The answer is in the affirmative by reason of the accrued and vested rights of such teachers.

2. Would the employer's contribution be paid directly into the Public Employees Retirement System by a State fund earmarked for such, or would the respective school districts be responsible for the employer's contribution?

The respective school districts would be the employers responsible for the contribution required by law. There is no State appropriation for that purpose, nor is there any provision for collecting the contributions and acting as a central agency for the payment of them.

3. What disposition will be made of the assets of the Public School Teachers Retirement Plan upon integration of the two systems?

The law makes no provision for this (except that section 9 protects the membership of a pre-existing system from any impairment of benefits received under the pre-existing systems after integration in the State system). The disposition of the assets referred to would be a proper subject of contract between the State board and the employer respecting the integration of pre-existing systems with the State system.

4. Is there any provision under the Public Employees Retirement System wherein payments might be increased to teachers retired prior to the integration of the two systems?

Upon integration the monthly allowances under the State Act would apply, except, if the previously existing system provided greater current benefits, the State benefits would be increased to that level.

5. Would retirement dates become effective immediately upon the integration of the two systems?

Yes, if the integration was accomplished on or after July 1, 1949.

6. Has the proposed plan of contribution to the Public Employees Retirement System been checked by a qualified actuary to prove its financial soundness?

Yes. A qualified actuary passes on all such problems as a member of the working staff of the State board.

7. (a) If a member withdraws from the Public Employees Retirement System within less than ten years, will he be refunded the full amount of his contribution?

Yes, under the present provisions of section 16(2) of the Act.

(b) Will he be paid interest on the amount contributed to the time of withdrawal?

Although section 10(2) requires the board to keep each member's account showing his contributions and the interest they have earned, it does not specify what shall be considered "credited" to his account.

8. If the Teachers Retirement Plan integrates with the Public Employees Retirement System, will teachers be given credit for out-of-State service? If so, how much credit?

No, except that any vested rights already accrued shall not be disregarded. After integration is effected the allowance will be based on service within the State alone.

9. Respecting "Integration of system, when." Section 9 of the Public Employees Retirement System Act states "whenever two-thirds of them and their employer, etc."

Exactly which teachers are considered in the "two-thirds?" Are retired teachers included or excluded in the "two-thirds?" Does the "two-thirds" include active teachers who are now contributing to the State Teachers Retirement Plan? Does the "two-thirds" include teachers who are inactive, but who have an equity in the State Teachers Retirement Plan Fund?

All teachers, actively contributing, retired or not so dormant as to have lost all claim upon the previously existing system (for benefits) should be considered as part of the whole number of which two-thirds are required to petition for integration. However, those dormant members entitled only to a refund of contributions standing to their credit would not be included.

10. What is the status of elective and appointive officials in the State Department of Education?

If State elective or appointive officers are already members of a previously existing retirement system, they are automatically excluded from the Act until that system is integrated with the State system (sec. 8, subd. 1). If a State educational or other elected or appointed officer is not a member of a pre-existing retirement system, he will be excluded from the State system unless within thirty days after he takes office or within thirty days after July 1, 1948, he gives the

State board written notice of his desire to become a member.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

cc: Kerwin L. Foley.

616. Admission Day--Date To Be Observed.

CARSON CITY, May 11, 1948.

HON. VAIL PITTMAN, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR PITTMAN: This will acknowledge receipt of your letter dated May 4, 1948, received in this office May 7, 1948.

You quote from a letter received from the Ormsby County Ministerial Association which contains a request that you proclaim Monday, November 1, as the day of Statewide celebration of Nevada's admission to the Union, and you request advice as to the legality of such a course under the provisions of section 3308.01, 1929 N. C. L. 1941 Supp.

Section 3308.01, 1929 N. C. L. 1941 Supp., reads as follows:

The 31st day of October of each and every year is hereby designated as "Nevada Day." All state, county, and municipal offices, and the state university shall close on this day. The governor of the State of Nevada is hereby authorized and directed to issue annually, at least thirty days prior to the 31st day of October, a proclamation requesting the people of the state to observe Nevada day by appropriate exercises and ceremonies, commemorating the admission of the State of Nevada into the Union. If the 31st day of October shall fall on a Sunday, the Monday following shall be observed as a holiday.

The statute makes provision for a holiday on which the people of the State may observe by appropriate exercises and ceremonies commemorating the admission of the State to the Union, and provides when the date of this holiday falls on Sunday the following Monday shall be observed.

The 31st day of October, 1948, falls on Sunday. This is the date designated by statute as Nevada Day. The holiday proclaimed by statute which will be observed is the following Monday, November 1.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

617. Public Schools--Discontinuance of a Branch County High School.

CARSON CITY, May 14, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated May 3, 1948, received in this office May 4, 1948.

You request advice as to what procedure would be required under the law for the White Pine County Board of Education to close the Lund branch county high school. As shown by your letter, this branch high school was regularly established, has maintained the required number of pupils, and now has approximately twenty-five in number. As stated in your letter the discontinuance of the branch high school and the transportation of the pupils to the county high school at Ely will effect a saving in taxes, and improved educational facilities. You state that the problem is referred to this office as the statutes are silent on how a branch county high school may be discontinued.

We are of the opinion that the statute clearly defines the conditions under which a branch county high school is discontinued.

Section 135, chapter 21, Statutes of 1947, provides how branch county high schools are authorized. The first part of this section reads as follows: "The board of county commissioners of any county in the state having a county high school or schools may establish a branch county high school, and it shall be the duty of the board of county commissioners to do so whenever the county board of education of such county shall certify that the conditions named in the immediately following section of this chapter exists and are complied with * * *."

Section 136 provides: "Whenever a school district in a county having a county high school or county high schools is in need of and desires county aid for securing or maintaining full high school instruction and privileges for its children, it may, through its board of trustees, petition the County Commissioners to establish in the district a branch county high school. The petition shall set forth the following facts:

1. That said district has already in attendance in its high school twenty (20) or more properly qualified high school pupils and full high school work is being done.

2. That the income of the district from county and State apportionments is insufficient for giving such pupils necessary high school instruction, and that its assessed valuation is too small for it to raise the needed funds from special district taxation;

3. That the district is situated forty (40) miles or more from the county high school, and that the parents are unable to send their children to the county high school;

4. That the district is able to and will provide the necessary rooms or buildings for all the high school work;

5. That the district asks for the establishment therein of a branch county high school under the management and the control of the County Board of Education.”

This section is a re-enactment of section 5916 N.C.L. 1929 without change.

Section 135, chapter 21, Statutes of 1947, the first part of which was quoted above, was re-enacted and a proviso for the discontinuance of a branch county high school was added as follows: “*provided*, that, when the average daily attendance of such high schools falls to five (5) or less such high school shall be discontinued until the deputy superintendent of the district shall certify to the county board of education that the prospects are that there will be at least eight (8) actual resident students of high school grade in attendance at said high school for the ensuing school year.”

The amendment expresses distinctly under what conditions a branch county high school shall be discontinued. It names all that it contemplates. No other or different means can be implied from any language in the chapter.

Section 137 provides: “Any branch county high school that may be established under the provisions of this chapter shall be under the full control and management of the county board of education and such board shall have the same duties and powers with regard to branch county high schools it has with regard to county high schools.”

There is nothing in this section that can be construed to change the provisional circumstances under which an established branch county high school shall be discontinued.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

618. Fish and Game--Prosecution for False Statement as to Residence Must Be Had in County Where License Was Secured Unless Law Specifically Provides Otherwise.

CARSON CITY, May 14, 1948.

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

Attention: S. S. Wheeler, Director.

GENTLEMEN: Reference is hereby made to your letter of May 12, 1948, inquiring whether a man arrested for making a false statement in regard to residence in purchasing a hunting or fishing license has to be prosecuted in the county where he bought that license.

OPINION

Section 52 of the 1947 Fish and Game Act provides "that any person who shall make any false statement with regard to his place of residence or citizenship in applying for a hunter's, angler's, or trapper's license shall be guilty of a misdemeanor."

The law further provides that such licenses are to be purchased from the County Clerk of each county, although the licenses when secured may be used in any county of the State, and further provides that nonresidents of the State may procure licenses in any county. It is apparent from your letter that a nonresident purchased a resident fishing license in Clark County and was arrested for the use thereof in Washoe County.

The obtaining of a resident fishing license by a nonresident of the State if he made a false statement with respect to his place of residence, that is to say, claiming residence in the State of Nevada, then he violated section 52 of the law. This false statement constitutes an offense known as the obtaining of a license by false representation and pretense (section 10407 N. C. L. 1929), the penalty for which is provided in section 52 of the Fish and Game Act as a misdemeanor.

An examination of the general law discloses that the offense is completed immediately upon receipt of the license by the person making the false representation. According to your letter, the offense was then committed in Clark County, and unless the State law specifically provides that such offense can be prosecuted in any other county, the prosecution must be had in the county in which the license was secured under false representation and pretense. 22 Am. Jur. 491, sec. 87.

An examination of our State statutes fails to disclose that the obtaining of property of any kind under false representation and pretense is triable in any other county except the county in which the very Act was consummated. Section 10709 N. c. L. 1929, providing that "when a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county," has no application in the present case for the reason that while the license may have been used in Washoe County, the use of the license after the securing of the same by false representation and pretense has no bearing on the offense of so securing it.

We are of the opinion that the offense charged in your query should be prosecuted in Clark County.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

619. Hospitals--Cooperative Agreement Under Hospital Survey and Construction Act--Nevada has no Enabling Legislation.

CARSON CITY, May 14, 1948.

DR. D. J. HURLEY, State Health Officer, Carson City, Nevada.

DEAR DR. HURLEY: This will acknowledge receipt of the State Plan which was submitted to this office several weeks ago, under which plan Nevada would enter into a cooperative agreement with the Federal Government under the Hospital Survey and Construction Act, Public Law 725, 79th Congress. This plan has been given our very careful study and examination.

The Nevada Legislature has twice spoken on the question of enabling legislation and has twice rejected two different Acts, either of which would have given the State Board of Health sufficient authority to comply with the Federal requirements of Public Law 725. It is obvious that this office cannot by judicial interpretation write legislation which runs counter to the clear positive action of the law-making body. In face of the Legislative refusal to enact enabling legislation, it is clearly necessary that the matter again be submitted to the Legislature for its expression and possible action.

The rule applied to the construction of statutes will not permit the reading into a statute something beyond the manifest intention of the Legislature as evidenced by the policy of that body in relation to the same subject matter.

The legislative history on this subject discloses that during the 1945 session Assembly Bill No. 163, designed to meet the Federal requirement, was introduced. This was an Act to designate the Nevada State Board of Health a State agency for hospitals, to make a survey of hospitals and health center facilities in the State, to provide for a State advisory council concerned with the operation, construction and utilization of hospitals, and to provide an appropriation therefor. This Act was substantially the same as adopted by many States. The bill was passed by both houses, but on March 26, 1945, it was vetoed by Governor Carville and deposited with the Secretary of State, accompanied by his veto message. The message stated:

The title of this Act expressed its general purpose and the Act authorized the State Board of Health to cooperate with approved Federal agencies and to accept Federal assistance in what is purely county or local matter.

I believe the great majority of the people of Nevada feel as I do, that it is to the best interest of the State and its subdivisions that we retain untrammelled control of such

purely local matters and that we should not be led by the bait of Federal aid to surrender any part of that control.

I would like to see each community, city, and county of the State handle its own affairs, as they know best the particular conditions that obtain in their respective localities.

The bill was presented to the Assembly with the Governor's veto on January 22, 1947, and the veto was sustained by a vote of thirty-seven to four.

During the 1947 session Assembly Bill No. 109, "An Act to require the State Board of Health to license, inspect, and regulate hospitals and related institutions as herein defined; to provide for regulations, enforcements, procedures, and penalties," was introduced by Assemblymen Frey and Chapman on February 27, 1947. This bill was proposed in order to meet the requirements of the Hospital Survey and Construction Act, Public Law 725, 79th Congress, which necessitates participating States enacting legislation prior to July 1, 1948, providing for minimum standards of maintenance and operation (to be fixed in the discretion of the State) of Federally aided hospitals. This bill was passed by the Assembly on March 20, 1947, sent to the Senate where it was read the first time and referred to the Committee on Public Health. No further action on the bill is recorded.

In view of the attitude of the Legislature on this subject, we cannot read into the statute that which would constitute satisfactory evidence that the State Department of Health under the present statutes has authority to carry out such plan in conformity with the Federal Act, and that there is an appropriation from which the expense of administration may be paid. Such authority, in our opinion, as noted above, will require legislative action.

Your attention is directed to section 623(d) of the Act respecting States which have not enacted certain legislation prior to July 1, 1948. This matter was taken up with the U.S. Public Health Service at Washington, D.C., and its legal division reaffirmed the statement that unless, prior to July 1, 1948, a State has legislation "providing that compliance with minimum standards of maintenance and operation shall be required in the case of hospitals" which receive Federal aid, then such State will forever after be barred from accepting benefits from under the Act. It seems inconceivable, however, that this was the intention of Congress in enacting this Act. The Public Health Service, we understand, has drafted an amendment which will provide that such provision would only apply until a State has remedied this defect in its legislation. As far as we can determine, up to this time no action has been taken by Congress.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

Hostilities Date Applicable.

CARSON CITY, May 15, 1948.

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

Attention: Mr. Dwight Dilts.

DEAR MISS BRAY: This will acknowledge receipt of your inquiry of May 14, 1948, relative to the date of the termination of World War II as applied to paragraph three, subsection (d), section 361 of the 1947 School Code, which contains the following language:

If any member of the retirement system shall have interrupted his or her teaching service in public schools to become a person in the military service of the United States of America in time of war or national emergency, such service may be counted as teaching service toward the number of years required for retirement, * * *.

The termination of the war applicable to this section is Proclamation No. 2714 of the President of the United States under date of December 31, 1946, in which the President stated:

Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that the hostilities have terminated. Now therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

621. Public Employees Retirement Board--Employees Nevada State Prison and Department of Parole and Probation Not Classed as Police Officers.

CARSON CITY, May 21, 1948.

MR. KERWIN L. FOLEY, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

DEAR MR. FOLEY: Your letter dated May 19, 1948, was received here May 20, 1948.

You inquire if the employees of (1) Nevada State Prison, (2) Nevada State Police, (3) Department of Parole and Probation should be classed as "police officers" within the meaning of section 14 of the Public Employees Retirement Act of 1947. It seems that if so they would be

eligible for a service retirement allowance at 55 whereas other employees do not become so eligible until they reach the age of 60.

Section 14 provides the allowance for an employee who is a member of the system with 20 or more years to his credit and in the case of "police officers and firemen" has reached the age of 55.

We consider the members of the Nevada State Police and (although inquiry as to them is not made) of the police departments of cities, towns, and counties under the Act to be police officers within the meaning of section 14. The other two classes are not within the meaning of the words used.

In interpreting a law courts look to the commonly accepted meaning of words unless it appears they are used in a more restricted and technical sense. Thus, the phrase "police officer" would be understood to be a member of the police or law enforcement department. A fireman might be one who tends furnaces, but in this case one who assists in extinguishing conflagrations.

We commonly refer to and describe those whose duty it is to preserve the peace as peace "officers" or law enforcement "officers"; a member of the police force, without regard to rank, is described as a "police officer." See *Smith v. Tate*, 143 Tenn. 268 at page 276, 277 S. W. 1026. *Frazier v. Elmore*, 173 S. W. (2) 563 at 565.

In *State v. Edwards* (Mont.), 106 P. 695 at 698, and companion case 106 P. 703, appear the following statements:

The police force of a city is the body of men appointed to preserve the peace and good order of the city. 31 *Cye*. 901. A police officer is "one of the staff of men employed in cities and towns to enforce the municipal police, *i.e.*, the laws and ordinances for preserving the peace and good of the community." *Id.* 902. The term policeman is generic and includes every member of the police force whatever may be his grade or rank. *Id.* 901. See, also, *Words and Phrases*, vol. 32.

We think section 14 ought to be clarified by the Legislature in this respect as well as in others elsewhere discussed. For instance, volunteer firemen are under the coverage of the Industrial Insurance Act, but section 14 leaves the matter uncertain.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy

Attorney General.

622. Legislature--Proclamation by Governor for Special Session--No Time Specified for Giving Notice.

CARSON CITY, May 21, 1948.

HON. VAIL PITTMAN, Governor of Nevada, Carson City, Nevada.
Attention: Alice C. Maher, Secretary to the Governor.

DEAR GOVERNOR PITTMAN: In your letter dated May 21, 1948, delivered to this office the same date, you inquire "if the law provides in issuing a proclamation for a special session (of the Legislature) the time to be allowed in giving notice of the convening of the session to the assemblymen and senators."

The answer is in the negative.

The Constitution, article V, section 9, authorizes the Governor to convene the Legislature "by proclamation" on extraordinary occasions and state to both houses "when organized" the purpose for which they have been convened.

Section 29 of article IV of the Constitution provides that no special session convened by the Governor shall exceed twenty days.

There is no further provision in the Constitution.

It is generally held that the exercise of power by the Governor to convene the Legislature in special session will not be reviewed by the courts. If he is convinced of the existence of an "extraordinary occasion," it follows he should act with appropriate speed. He is not required to lay before the Legislature the legislation desired until "both houses" have been "organized."

It follows that the Governor's proclamation may convene the Legislature to meet at so early a date as he thinks advisable.

Very truly yours,

ALAN BIBLE, Attorney General.

623. Mining--Procedure To Be Followed when License to Operate Hoist Is Not Renewed Due to Applicant's Physical Condition.

CARSON CITY, May 22, 1948.

MR. A. E. BERNARD, Inspector of Mines, Carson City, Nevada.

DEAR MR. BERNARD: This will acknowledge receipt of your letter dated May 20, 1948, received in this office the same date.

You request an opinion as to the action you should take in the matter of renewing a license to operate a hoist under the provisions of section 4260 N. C. L. 1929, as amended by chapter 127, Statutes of 1947, when the certificate of the physician states that the applicant is not physically qualified to operate a hoist. You write that it seems plain that the only thing that can be done is to return the applicant's check for renewal of license with a letter of explanation, and that his license not be renewed.

We are of the opinion that your conclusion is a correct interpretation of the statute.

The Act providing for the issuance of licenses to hoisting engineers requires certain qualifications which the applicant for license or renewal of license must possess in order to obtain such license.

Section 3 of the Act, section 4260 N. C. L. 1929, as amended by chapter 127, Statutes of 1947, reads as follows: "Each applicant for license or for change in class or renewal of his license must file with his application for same a certificate from a licensed physician stating the condition of the applicant's heart, sight, and hearing, and whether in the doctor's opinion the applicant is physically qualified to run hoist."

This section before amendment required only that the physician in his certificate state the condition of the heart, sight, and hearing of the applicant, leaving to the board of examiners the duty to determine from the conditions stated the physical qualifications of the applicant to run hoist.

The Board of Examiners as shown by section 20 of the Act is composed of the Inspector of Mines, or one of his deputies, a qualified engineer, and a general mechanic. It is evident that under the statute before amendment, if the board was able to determine from the condition of the heart, sight, and hearing of the applicant, as expressed in terms used only in the medical profession, that the applicant was not physically qualified to operate a hoist, a license or renewal would not be issued. Placing such responsibility upon the board was a defect in the section that the Legislature intended to cure, and the amendment should then be construed as to eliminate the defect intended to be remedied. Therefore, the responsibility of determining the applicant's physical condition is transferred from the Board of Examiners and by the amendment rests upon the opinion of the physician whose findings as to whether or not the applicant is physically qualified to run hoist is determinative as to the issuance of a license to operate a hoist, change in class, or renewal of such license.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney

General.

624. Planning Board, State--Industrial Insurance Funds May Not Be Used for Construction of State Building--Legislature May Authorize Bond Issue.

CARSON CITY, May 18, 1948.

HON. W. T. HOLCOMB, Chairman, State Planning Board, Carson City, Nevada.
Attention: A. M. Mackenzie, Secretary.

DEAR MR. HOLCOMB: This will acknowledge receipt of your letter dated May 10, 1948, received in this office May 12, 1948.

You request an opinion from this office on the following questions:

1. Would it be possible to use Industrial funds for the construction of a State Office Building by the Industrial Commission with or without special legislation.
2. Could any other State agency such as the Board of Control use Industrial funds for construction of an office building with the aid of proper legislation.
3. Can one State agency collect rent from other State and Federal agencies in order to make the project self-liquidating. If so would the building and property be exempt from taxation.

The answer to question No. 1, in our opinion, is that under the present statutes the Industrial Commission cannot invest any of its funds for the purpose mentioned. The insurance fund is a special fund placed in the hands of the State Treasurer for safe keeping, in trust for employees injured and the dependents of employees who are killed. The Legislature could authorize the investment of this fund if the security of the trust was not impaired.

2. The Legislature could authorize a bond issue, the bonds could be purchased by the commission, and the Legislature could designate a State agency to conduct such construction.

3. If the investment of the fund was authorized by the Legislature, the commission could receive rent from other State agencies and Federal agencies if such agencies had authority to make such payments. If constructed under a bond issue, it would be State property and exempt from taxation by the State.

Section 85, chapter 168, Statutes of 1947, of the Act creating an Industrial Commission provides:

All premiums, contributions, penalties, bonds, securities and all other properties heretofore or hereafter acquired by the commission shall be and constitute, for the purpose of custody thereof, the "State Insurance Fund," and which said state insurance fund shall be held by the state treasurer as custodian thereof, under the name and title of the "Nevada Industrial Commission," for the benefit of employees within the provisions of this act and dependents of such employees and shall be disbursed as herein provided.

No appropriation was made by the Legislature to put into effect the provisions of the Act.

Under a statute substantially the same as Nevada's the Supreme Court of North Dakota, in *State v. Olson*, 175 N. W. 714, held:

It is perfectly clear that the workmen's compensation fund is no part of the state fund, and is, in no sense, public money. It is a special fund, accumulated by the collection of annual premiums from employers, the amount of which is determined and fixed by the Workmen's Compensation Bureau for the employment or occupation operated by such employer, and determined further by the classification rules and rates made and published by the bureau.

The same principle is declared in *State v. McMillan*, 36 Nevada 383.

Under the statutes the Nevada Industrial Commission is not vested with full power, authority, and jurisdiction over the fund as the governing body of a private insurance carrier. Any surplus or reserve of such funds may only be invested as provided in the Act.

Section 88 provides for the investment of any surplus or reserve of said funds and enumerates the class of securities for such investment, as follows: "* * * in bonds and certificates of the United States, bonds of Federal agencies when underwritten or payment guaranteed by the United States, in the bonds of any county of the State of Nevada, or other States, in the bonds of incorporated cities, irrigation and drainage districts, and school districts of the State of Nevada."

The Legislature has expressed a definite class of investments which under the rule of statutory construction excludes all others. *Ex parte Arascada*, 44 Nevada 30--the enumeration of certain cases in a statute is an exclusion of all cases not mentioned under the rule of construction.

Therefore, it would be impossible for the Nevada Industrial Commission, under the provisions of the Act, to invest its funds in the construction of a State building. No other State agency has any authority to use the funds of the Industrial Commission.

The policy of the Legislature as disclosed by the Act is to protect the State Insurance Fund as a trust fund to insure the payment of workmen's compensation benefits, payment of expenses of administering the fund creating a catastrophe surplus, and setting up and maintaining adequate reserves. This is evidenced by restricting the investment of the fund in securities which are not of a speculative nature. The obligation of the trust is recognized by the language in section 98 which provides:

If this act shall be hereafter repealed, all moneys which are in the state insurance fund or the accident benefit fund at the time of the repeal shall be subject to such disposal as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

The Legislature has the power to issue bonds for such purpose and the Industrial Commission has specific authority to invest its funds in such bonds. The proposed office building would then be State property and exempt from taxation.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

625. Fire Protection--Board of Directors of District May Enter Into Contracts for Purchase of Necessary Equipment.

CARSON CITY, May 25, 1948.

MR. WAYNE McLEOD, State Forester-Firewarden, Carson City, Nevada.

DEAR MR. McLEOD: This will acknowledge receipt of your letter dated May 24, received in this office May 25, 1948.

You request an opinion as to the authority of the directors of a fire protection district organized under the Act of 1937, providing for the organization of such districts, to enter into a contract for fire-fighting equipment on an installment basis, when such contract will extend beyond the term of the present board.

We are of the opinion that the board of directors of a fire protection district has the authority under the statute to enter into such a contract and bind the district for the payment of the equipment. Section 8 of the Act, section 1929.08 N. C. L. 1931-1941 Supp., which defines the duties of the board of directors, contains the following language: “* * * to make and execute in the name of the district all necessary contracts, * * * and to perform all other acts necessary, proper, and convenient to accomplish the purpose of this act.”

There is no provision in the Act which forbids the directors to vote on any contract which extends beyond his term. 43 Am. Jur. page 101, “The power of public officers to enter into contracts which extend beyond the term of their offices depends primarily on the extent of their authority under the law. A distinction has been drawn between two classes of power, governmental or legislative and proprietary or business. In the exercise of the governmental or legislative powers, a board, in the absence of statutory provision, cannot make a contract

extending beyond its own term. But in the exercise of business or proprietary powers, a board may contract as any individual, unless restrained by statutory provisions to the contrary.”

The general principal in limiting such contracts is based upon a premise where the making of the contract tends to limit or diminish the efficiency of those who will succeed the incumbents in office, or usurp power which was clearly intended to be given to the successors. Such an agreement to purchase equipment as referred to in your letter would not diminish the efficiency of those who will succeed the incumbents in office if such purchase is necessary and is fairly made.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

626. Public Schools--Admission of Children to First Grade--Age.

CARSON CITY, May 28, 1948.

HON. RICHARD L. WATERS, JR., District Attorney, Ormsby County, Carson City, Nevada.

DEAR MR. WATERS: This will acknowledge receipt of your letter dated May 29, 1948, received in this office May 22, 1948, enclosing a copy of your opinion to the Carson School Board in which you interpreted section 1, chapter 6, Statutes of 1947, the same being the new school code.

We are fully in accord with your opinion.

The statute before adoption of the present code required that any child between the ages of 7 and 18 years should attend the public school. The Legislature in the new code revised this section to provide for the admission of children to the first grade in the event a child will arrive at the age of six years by a definite date, December 31, or February 1 in districts granting mid-term promotions.

The language of the statute is clear and its meaning unmistakable. A construction of the statute which would extend the fixed date one day would be a basis for extending the date any number of days to accord with each particular case, and thus nullify the meaning of the unmistakable language of the statute.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

627. Public Employees Retirement Board--Nonprofessional Employees of School System Eligible.

CARSON CITY, June 2, 1948.

MR. KERWIN L. FOLEY, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

DEAR MR. FOLEY: Your letter dated May 28 was received May 29, 1948.

Your questions and the answers thereto are as follows:

1. Are nonprofessional employees in our school system eligible for participation in the State Retirement Plan?

Answer--Employees of a school district (other than teachers, supervisors, etc.) are not eligible to benefits under the Act relating to salaries and annuities to public school teachers (1929 N. C. L. 1941 Supp., secs. 6077.21-6077.56, inc.). They are, however, eligible for direct membership in the State system if they form part of a group of at least five employees whose positions normally require 600 hours of service per year.

2. If such nonprofessional employees are eligible, what political subdivision will be regarded as their employer, and, consequently, liable for the employer's contribution?

Answer--Such eligibles will be regarded as employees of the political subdivision (including a school district) that hires them and pays them.

3. If such nonprofessional employees are eligible and if school districts, and not counties, cities, or other political subdivisions, are regarded as the employers in such case, must this office follow the procedures of admittance to participation outlined in sec. 8, subd. (2), (3), and (7) of the Act?

Answer--Yes, except that as you will note subd. 7 relates to employees not eligible at present.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

628. Gambling--Governor Has Power to Remove Superintendent of State Police Even Without

Notice--Alleged Violations of Gambling Law Subject to Full Investigation by Grand Juries.

CARSON CITY, June 4, 1948.

HON. VAIL PITTMAN, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR PITTMAN: On Saturday, May 22, 1948, you submitted to me sworn statements by Robert Thomas and other documents, and you asked me to make an investigation and study of the matter set forth in said statements and documents and take the proper legal action.

This matter has had the full consideration of myself and each member of my staff, and we have arrived at the following conclusions:

The law gives to you the exclusive power to appoint and remove the Superintendent of State Police. Section 7437, Nevada Compiled Laws 1929, reads as follows:

The superintendent of state police shall be the ranking officer in the field, subject only to the governor, and shall be removed by the governor at any time, without previous notice.

The exercise of your authority in this respect is an executive function not subject to review.

The charges contained in the affidavits involve alleged violations of the gambling laws of the State growing out of the conduct of so-called roadside museums or zoos, and the alleged misconduct of public officers in connection therewith.

It should be pointed out that whether the charge involves a violation by a State officer or by a county officer, the same method of judicial inquiry should be used in each case, since the trial of the action would be held in the county where it occurred. There is no difference and no distinction drawn in our State laws concerning the two classes of officers, and in my opinion they should both be dealt with exactly alike.

Conferences have been held in my office attended by my staff and the District Attorneys of Clark, Eureka, and Nye Counties. At these conferences it was determined and agreed that the entire information, energies, and resources of the office of Attorney General and of the District Attorneys would be pooled and coordinated for the purpose of conducting a vigorous and thorough inquiry to determine if the charges made by Mr. Thomas are true. It was also agreed that in addition to the efforts of our respective offices the entire matter be immediately referred to the grand juries in Clark and Nye Counties as the basis for a complete and continued investigation.

At the present time no grand jury is in session in Eureka County, but the entire matter will be laid before the District Judge of that county for his study and action.

It is suggested that both Tax Commission investigators and State Police continue their investigations and report their findings to you for transmittal to this office and to the grand juries.

Owing to the blanket nature of the abuses charged, this is a proper case for the complete investigation by the grand jury of the county involved. One reason for this suggested plan is that there are charges and counter-charges, direct allegations and insinuations, original statements and depositions made by the same individual, Robert Thomas, who is at present under charge of operating a gambling game without a license in Nye County. Mr. Thomas has made different statements at different times and places. These charges, even when subscribed by the same person, are in many respects contradictory and at variance with other statements of the same person, and attempt to impeach former statements on the grounds that such original statements were involuntary, and altogether call for such investigational powers and the power of calling witnesses as are vested in the province of grand juries.

Very truly yours,

ALAN BIBLE, Attorney General.

629. Banking--Savings Bank Funds May Not Be Invested in Bonds Issued by International Bank for Reconstruction and Development--Other Funds May Be Invested Under Certain Conditions.

CARSON CITY, June 5, 1948.

HONORABLE GRANT L. ROBISON, Superintendent of Banks, Carson City, Nevada.

DEAR MR. ROBISON: Your letter dated May 26 was received here May 27, 1948.

You propound the following question:

Under existing statutes, is it legal or permissive for a banking institution operating by virtue of having received a State charter to do so, to invest the funds of the institution in bonds issued by the International Bank for Reconstruction and Development?

The answer is in the affirmative in the sense that some but not all such funds may be so invested.

The Bretton Woods Agreement Act (Title 22 U. S. C. A., secs. 286-286K) provides that the United States may accept membership in the International Monetary Fund. The International Bank of Reconstruction and Development under section 288 of said Title 22 and under Executive Proclamation 9751 is entitled to the privileges and immunities of the Act.

The prospectus of the International Bank for Reconstruction and Development and the Booklet of Questions and Answers concerning the bank, which you have also provided for our inspection,

disclose that the bonds of such bank are not obligations of any government (Prospectus page 3). The bank is an "International" bank (Booklet page 8). The bonds are not subject to transfer tax (Booklet page 9). This latter is doubtless due to the privileges and immunities enjoyed under Executive Proclamation No. 9751 referred to above.

The Bank Act of Nevada (Stats. 1933, p. 292) 1929 N. C. L. 1941 Supp., secs. 747-747.88, provides in section 4 (as you point out) that banking corporations organized under the Act are permitted to "buy bonds." No limitation on this privilege is stated in the section. However (as you point out), section 6 of the Act confers power to carry on a savings bank as well as a general banking business. Savings bank funds are closely limited as to investment, and while bonds of the United States are mentioned, no language appears extending this privilege to bonds of instrumentalities of the United States or bonds guaranteed by the United States or bonds of corporations in which the United States has stock participation.

We feel in the absence of positive specification savings funds may not be invested in the securities you refer to.

The last part of section 6 also provides that when the corporation does a savings business as well as a general banking business and the assets are not segregated, the savings funds may be invested only pro rata to the total assets.

Sections 13 and 14 of the Act require a certain cash reserve to be maintained. This would limit the amount available for investment. Section 13 prohibits investment of funds in shares of other banks (except Federal Reserve Bank shares and of Government agencies or liquidating or financial corporations created by Act of Congress), but it does not mention bonds. Whether this omission could be construed in harmony with section 4 so as to permit investment in bonds is not certain but it is highly persuasive.

Our conclusion is that no savings bank funds may be invested in the bonds enumerated. Other funds may be invested in a ratio to which the total assets of the commercial deposit bears to the total assets of the savings department. Provision must also be made to maintain the legal cash reserve.

Very truly yours,

ALAN BIBLE, Attorney General.

By HOMER MOONEY, Deputy Attorney General.

630. Fish and Game--Indians Only Have Right to Sell and Dispose of Cui-ui Fish of Pyramid Lake.

CARSON CITY, June 7, 1948.

FISH AND GAME COMMISSION, P. O. Box 678, Reno, Nevada.
Attention: S. S. Wheeler, Director.

GENTLEMEN: Reference is hereby made to your letter of June 5, 1948, wherein you advise that on March 12, 1948, the State Fish and Game Commission changed the cui-ui fish of Pyramid Lake to game fish. You also advise that it has recently been brought to your attention that while men are soliciting for sale cui-ui in the Fallon area. You also advise you do not know whether such white men are obtaining their fish from the Indians or catching them themselves.

You inquire whether or not, under section 24 and section 33 of the State Fish and Game Law of 1947, such white men are violating the law.

An examination of section 24 of the law discloses that Indians, wards of the United States who are residents of Nevada, shall have the privilege of selling direct to consumers fish they may legally take out of the waters of Pyramid Lake, if the same are delivered by private conveyance between March 1 and December 15 of each year. Apparently from this section Indians who are wards of the United States and residents of this State may taken and sell fish taken from Pyramid Lake, including cui-ui fish now declared to be game fish by the State Fish and Game Commission.

An examination of section 33 of the law discloses it provides that it shall be unlawful, except as provided in this Act, for any person in the State of Nevada to buy, sell, or offer or expose for sale, any variety of game fish at any period of the year excepting, of course, salt water fish that shall have come from outside the State of Nevada.

We think it is apparent from the law itself that only Indians, wards of the United States who are residents of this State, have the right to sell and dispose of cui-ui fish of Pyramid Lake.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

631. Relief, Work Planning and Pension Control, State Board--Does Not Have Authority to Appoint Director with Full Charge of State Welfare Department.

CARSON CITY, June 15, 1948.

MR. J. E. HORGAN, Chairman, State Board of Relief, Work Planning, and Pension Control,
P. O. Box 1331, Reno, Nevada.

DEAR MR. HORGAN: This will acknowledge receipt of your letter dated June 1, 1948, received in this office June 2, 1948.

You present the following questions:

(1) Under the present statutes, does the State Board of Relief, Work Planning and Pension Control have the authority to appoint a director or executive officer who would have full charge of the administration of all departments under the control of the Nevada State Welfare Department? and

(2) If so, under the present statutes does the State Board of Relief, Work Planning, and Pension Control have the authority to draw from existing funds available to the department to pay the necessary administrative expenses, including salary, travel, and other necessary expenses, of such an executive officer?

We are of the opinion that the State Board of Relief, Work Planning, and Pension Control does not have authority under the statutes to appoint a director who would have full charge of the administrative and executive duties and assume the responsibilities of the State Welfare Department.

The answer to your second question is subsequently in the negative.

The State Board of Relief, Work Planning, and Pension Control was created by an Act of the Legislature in 1935. Sections 5151.01 through section 5151.07 N. C. L. 1941 Supp., define the powers and duties of the board.

The Legislature, by an Act approved March 23, 1937, created a State Welfare Department. The statute provides that the State Board of Relief, Work Planning and Pension Control shall serve as the board of the State Welfare Department. The State Welfare Department shall consist of the State Board and such officers and employees as the State board, with the approval of the Governor, may designate. This department is authorized to exercise direct supervision of the administration of old-age assistance or pensions, aid to dependent children, aid to the blind, child welfare, and such other welfare activities and services as may be vested in it by law.

The State board under the 1935 Act is authorized to appoint county boards to advise and assist the State board and to act as its agent. The State board may also appoint an advisory committee. The duties of the State board were again defined in the amendment under chapter 87, Statutes of 1943, and also authorized to supervise and control the administration of the State Orphans' Home.

While the Legislature has delegated authority to the State board to formulate all policies, and adopt all rules and regulations for the government of the State Welfare Department, it has specifically made the Secretary of the State Board the executive officer of the State Department. Section 5154.54, 1929 N. C. L. 1941 Supp., provides:

The secretary of the state board shall be the executive officer of the state department. The secretary shall discharge all administrative and executive duties and

responsibilities of the state department in the interim between meetings of the state board, subject to the approval of the state board.

The secretary shall prepare and submit to the state board for its approval a biennial budget of all funds necessary to be apportioned by the legislature for the state department for the purpose of this act, including in such budget an estimate of federal funds which may be allotted to the state by the federal government for the purposes of this act. He shall prepare annually a full report of the operations of the state department, together with recommendations and suggestions, and such report shall be submitted to the governor of Nevada not later than three months after the close of the fiscal year.

The state board, subject to the approval of the governor, shall appoint such personnel as may be necessary for the efficient performances of the duties prescribed in this act.

The State board is the body charged with the administrative or executive work, and the secretary of the board is named as the officer who shall discharge all administrative and executive duties and responsibilities during the time intervening between the meetings of the board. He is an officer of the board whose duties are created by statute. He is a director by virtue of his office and is a part of the appointed body of officers constituting the executive representatives of the State board and State Department. The personnel appointed by the board are employees necessary to enable the board and the executive officer to perform their duties.

The term "director" when used in connection with a board or executive body of officers has a restricted meaning, as defined in the following cases:

Brandt v. Godwin, 3 N. Y. S. 807: Directors are persons appointed or elected according to law, authorized to manage and direct the affairs of the corporation or company.

White v. State of Oklahoma, 24 P. 968: A "bank director" is an officer who with other directors constitute a board having general control over officers and affairs of bank.

The Nevada statutes designate the State board as the executive board of the State Welfare Department and the secretary of this board as the executive officer of the State Department, and provides that he shall discharge all administrative and executive duties and responsibilities of the State Department subject to the approval of the State board.

This board and the secretary are appointed according to law and cannot delegate this authority and responsibility to another person without legislative authority. Such authority could be clearly, definitely, and positively defined and secured by enabling legislation.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

632. Welfare, State Department--Extent of Responsibility in Licensing Foster Homes.

CARSON CITY, June 15, 1948.

WILLIAM E. ROSE, Director, Division of Child Welfare Services, Room 2, 309 North Virginia Street, Reno, Nevada.

DEAR MR. ROSE: This will acknowledge receipt of your letter dated May 20, 1948, received in this office May 21, 1948.

You request an opinion from this office as to the extent of the responsibility of the State Welfare Department in the licensing of foster homes, and the legal right of that department to delegate the responsibility to a responsible county agency functioning in the same area.

We are of the opinion that the responsibility of the State Welfare Department relative to foster homes for children is to establish reasonable and minimum standards for such homes as come within the definition of the statute. Any foster home that conforms to the established standards so prescribed shall be issued an annual license, subject to the provisions expressed in the statute. The State Welfare Department cannot delegate the authority vested in it by statute to the county, or any other agency.

Section 1061, 1929 N. C. L. 1941 Supp., defines a foster home as any family home in which one or more children under the age of sixteen years of age and not related by blood, adoption, or marriage to the person maintaining the home, are received, cared for, and maintained for compensation or otherwise.

Section 1061.04, 1929 N. C. L. 1941 Supp., exempts from the provisions of the Act homes in which children are placed by their own parents or legal guardians and where the total cost of care is provided by the parents or guardian.

Section 1061, supra, contains the following language:

No person shall conduct a foster home so defined without receiving an annual license to do so from the state welfare department.

The right or privilege of persons operating foster homes that come within the provisions of the Act is subject to regulation by the statute in negative words, and the mode so prescribed is imperative. *Walser v. Moran*, [42 Nev. 111](#). The statutes require the State Welfare Department to establish reasonable and minimum standards for foster homes and to prescribe rules for their regulation to which all foster homes licensed under the Act must conform. No such license shall be issued until an investigation of the home has been made by the department.

The rule expressed in 42 Am. Jur. sec. 73, page 387, is that ministerial functions may be

delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature.

In the case of *McCullough v. Scott*, 109 S. E. 789, the court held that “when the means for the exercise of a granted power are given, no other or different means can be applied as being more effective or convenient.”

The Legislature has delegated to the State Welfare Department the authority to investigate and power to license foster homes that come within the provisions of the statute, and this delegated authority cannot be delegated by the department to some other body or association.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

633. Agriculture--State Agricultural Society--Funds Collected Should Be Deposited with State Treasurer and Credited to Appropriation for Support of Society.

CARSON CITY, June 22, 1948.

MR. E. J. MAUPIN, JR., Secretary, State Agricultural Society, Fallon, Nevada.

DEAR MR. MAUPIN: This will acknowledge receipt of your letter dated June 15, received in this office June 17, 1948.

You request an opinion on the following questions:

(1) Is it within the scope of invested authority for the society to deposit funds it collects for the “use of facilities” at the Reno and Fallon properties in bank accounts to the credit of the State Agricultural Society?

(2) Is it within the scope of invested authority for the society to withdraw said deposited funds in payment for operational expenses, including improvements and repairs to their Reno and Fallon properties?

We are of the opinion that the funds received for the use of facilities of the society should be deposited with the State Treasurer by the treasurer of the society and credited to the appropriation for the support of the society.

Withdrawal of the funds should be made and paid as are other claims against State funds.

Section 315, N. C. L. 1929, provides: “The state agricultural society is hereby declared to be a state institution.”

Section 317, N. C. L. 1929, provides for the organization of the society by the election of one of its members as president, and one as vice president. It further provides: "The board shall also elect a secretary and treasurer, not of their number, who shall each hold office at the discretion of the board."

Section 319, N. C. L. 1929, as amended by chapter 155, Statutes of 1947, provides that the State Board of Agriculture shall be charged with the exclusive management and control of the State Agricultural Society as a State institution; shall have possession and care of its property, and be intrusted with the direction of its business and financial affairs. The section makes a specific appropriation which shall be matched by a contribution on behalf of the people of Churchill County. There is a provision for a reversion of the fund to the General Fund in the event a State fair shall not be held at Fallon during any year. An appropriation is also made under the General Appropriation Act for the support of the society, part of which is apportioned for salaries of watchmen, repair and maintenance of buildings, and general support, and a specific amount for improvement of Reno grounds.

The Agricultural Society is a State institution. All appropriations made by the Legislature, all contributions received, and all funds collected for the use of its facilities become State funds.

Chapter 26, Statutes of 1928, section 7042, N. C. L. 1929, is an Act to require all State officers, commissions, and departments to account for and pay into the State Treasury all moneys received by them.

Section 7029.01, N. C. L. 1931-1941 Supplement, provides for the deposit of State funds in State or National banks and the furnishing by the banks of security for such funds.

Section 7075, N. C. L. 1929, provides for the sale of the products of any State institution and the deposit of the proceeds in the fund or appropriation for the support of such institution, and not in the General Fund.

This section was construed by Attorney General Thatcher, Opinion No. 152, Biennial Report 1913-1914, relative to fees received by the Hospital for Mental Diseases for pay patients. He held that such receipts should be paid into the Treasury and go to the credit of the apportionment for the support of the institution.

The Legislature makes an appropriation for the support of the State Agricultural Society. The money collected for the use of facilities when deposited with the State Treasurer to the credit of the society fund and disbursed as other claims are allowed and paid by the State show the condition of such fund to the Legislature as a basis for the appropriation for salaries, repair, and maintenance of buildings and general support.

The total income collected by the society plus the appropriation made by the Legislature, in our opinion and in accordance with the foregoing, is available to the society for expenditures on the presentation and allowance of claims in the regular manner.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

634. Taxation--Delinquent Taxes--Sale of Property--Delinquent Lists and Notices of Sale Must Be Published--If Publication Required, Must Be in Paper Published in County.

CARSON CITY, June 23, 1948.

GRANT L. ROBISON, State Auditor, Carson City, Nevada.

DEAR MR. ROBISON: This will acknowledge receipt of your letter dated May 20, 1948, received in this office the same date.

You submit the following questions:

- (1) Under the provision of section 6447 N. C. L. 1929, 1931-1941 Supp., how many issues of a newspaper is the treasurer required to insert the delinquent property list.
- (2) Under the provisions of section 6529 N. C. L. 1929 is it necessary to continually advertise for a period of 20 days before the sale date of county-owned property, or may the treasurer insert an advertisement in a newspaper for three issues approximately one week apart.
- (3) If a newspaper exists in a county is it mandatory for the treasurer to advertise in such newspaper or may he merely post notices of sale when county property is being sold under the provisions of section 6529 N. C. L. 1929.

The answer to your first question, in our opinion, is that the publication of the delinquent tax list should be inserted once a week for a period of six consecutive weeks beginning in the first week in August.

Answering your second question, we are of the opinion that the publication of notice of sale of property under section 6529 N. C. L. 1929 should be published once each week for four consecutive weeks before the date of sale.

The answer to your third question is that the statute requires the posting of notices of sale unless the County Commissioners in their order direct publication in lieu of posting.

Section 39 of the revenue Act as amended by chapter 177, Statutes of 1947, provides that immediately after the first Monday in August of each year in all cases where the delinquent tax,

exclusive of poll taxes, penalties and assessments of benefits of irrigation districts, does not exceed the sum of three thousand dollars, the tax receiver shall give the notice in the manner and form provided in the section. Publication in a newspaper is required at least once a week from the date immediately after the first Monday in August until the second Monday in September. This requires a publication once in each week beginning the first week in August and up to the week in which the second Monday occurs.

The statute contemplates the publication of notice once a week for a certain number of weeks.

In the case of *State of Nevada v. Yellow Jacket Silver Mining Co.*, 5 Nevada, page 422, the court held:

Thus, in the case of *Bachelor v. Bachelor* (1 Mass. 256) it was held that “an order to give notice by publishing in a newspaper three weeks successively” was complied with by publishing in such paper in three successive weeks.

RESALE OF PROPERTY ACQUIRED BY TREASURER AS TRUSTEE

Section 40 of the revenue Act, as amended by Chapter 177, Statutes of 1947, provides that the tax receiver shall, pursuant to the notice given as provided in section 39 of the Act, and at the time so noticed make out his certificate authorizing the county treasurer to hold the property described therein for two years after the date thereof, and if not redeemed the title to the property shall vest in the county for the benefit of the State and county.

Section 55 of the revenue Act, as amended by chapter 169, Statutes of 1947, refers to the certificate issued under the provisions of section 39, and provides that the treasurer shall hold such property in trust until the same is sold “pursuant to the provisions of this Act.” Then follows the language, “Any property held in trust by any county treasurer by virtue of any deed made pursuant to the provisions of this Act may be sold and conveyed in the manner hereinafter prescribed.”

Section 1 provides, in part, “The board of county commissioners may make an order to be entered on the records of its proceedings directing the county treasurer to sell the property particularly described therein after giving notice of sale in the same manner as is provided by law for the sale of such property having an assessed value less than five hundred (\$500) dollars * * *.” The notice referred to is found in the supplemental Act to the revenue Act under section 6529 N. C. L. 1929, as amended in 1917. Although section 55 uses the term “any property held in trust” may be sold and conveyed in the manner hereinafter prescribed and then refers to section 6529 for the giving of notice, such notice and sale can only apply to property where the assessed value is less than five hundred dollars.

Section 6529 N. C. L. 1929 before its amendment provided for the sale of such property when the assessed value was less than one hundred dollars. The section provided for the posting of notice, and newspaper publication was not required.

Section 55 of the revenue Act and this supplemental Act was construed by the court in *Lyon County v. Ross*, 24 Nevada 102. On page 110 the court said:

The county became the legal owner thereof, at the time the right of redemption expired, for the benefit of the county and state, under the express provisions of said section 40. The only authority to sell such property, where the assessed value thereof is one hundred dollars or more, is found in section 1949, Gen. Stats., above cited, whereby the board of county commissioners is empowered to sell at public auction, after notice, any property belonging to the county.

The section of the general statutes referred to is now section 1942, 1929 N. C. L. 1941 Supp.

Section 6529 N. C. L. 1929, provides that the County Commissioners by an order entered upon the records of its proceedings may direct the Treasurer to sell such property when the assessed valuation is less than five hundred dollars. Notice of such sale shall be posted in at least three public places, including one at the court house and one on the property, for a period of not less than twenty days prior to the day of sale, "or in lieu of such posting by publication of such notice for a like period of time in some newspaper published within such county, if the board of county commissioners shall by their order so direct." The posting of notice is required, but the County Commissioners may in lieu of such posting direct publication for a period not less than twenty days prior to date of sale. The time of the publication prior to the time designated in the notice is the essential thing.

In *re Hegarty's Estate*, 45 Nevada 145, decided the question of notice when a certain number of days before a hearing was required. The court said:

This court in the *Yellow Jacket* case adhered to the rule that a statute requiring publication once a week for a given number of weeks is complied with when the required number of publications has been made. The statute there construed, and the one under consideration in the instant case, are so essentially different in their requirements concerning the publication of notice that the ruling in the former case is not at all in point.

The statute construed required notice of not less than ten days prior to the time designated in the notice. The time fixed in the notice was February 9, and the first publication was January 31, while the last publication was February 7. The court quoted the statute which requires that the time in which any act is to be done shall be computed by excluding the first day and including the last.

The notice required in section 6529 of not less than twenty days prior to the date of sale indicates that there must be twenty days intervening between the day of publication and the day of sale, that the day of the first publication nor the day of sale may be included in the period of time constituting the twenty days previous notice. See Attorney General's Opinion No. 190,

Biennial Report 1934-1936, which held that notice of sale must be inserted for five weekly publications to comply with a requirement of at least thirty days previous publication before sale of property.

The notice of sale under section 6529 must be inserted once a week for four successive weeks. The same section requires that the notice of sale shall be posted or that the County Commissioners may by their order direct publication in lieu of such posting.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

635. Fish and Game--Office of Justice of the Peace and State Fish and Game Commissioner Incompatible--Office of Sheriff and Commissioner Not Incompatible.

CARSON CITY, June 23, 1948.

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

Attention: S. S. Wheeler, Director.

GENTLEMEN: Receipt is hereby acknowledged of your letter of June 8, 1948, making the following inquiry:

As a matter of clarification, your opinion is requested as to whether or not a person already holding an elective office, such as County Justice of the Peace, Sheriff, etc., could be elected to the State Fish and Game Commission?

OPINION

This opinion is limited to a discussion of whether a Justice of the Peace or Sheriff can legally be elected to the State Fish and Game Commission inasmuch as you did not specify other county officers.

A perusal of the State Fish and Game Act of 1947 discloses that the State Fish and Game Commission is a department of the government of the State of Nevada, that it is an administrative body and, we think, is a part of the executive department of the State and as such is governed by the constitutional provisions relating to the separation of the powers of the State government, which in itself has a direct bearing upon whether a Justice of the Peace may be elected to become a member of the State Fish and Game Commission.

Section 1 of article III of the Nevada Constitution provides:

The powers of the government of the State of Nevada shall be divided into three separate departments--the legislative, the executive, and the judicial; and no person

charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

The Constitution contains no provision permitting the exercise of administrative functions, such as the State Fish and Game Commissioners exercises, by the judicial department of the State.

Section 1 of article VI of the Constitution provides:

The judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace. * * *

Long ago the Supreme Court of this State in *Moore v. Orr*, 30 Nevada 458, held that the foregoing section of the Constitution vests the judicial power in the Supreme Court, District Courts, and Justice Courts. Thus it appears from our Constitution, as construed by our Supreme Court, that Justices of the Peace constitute a part of the judicial power of this State and by a parody of reasoning are prohibited by the provisions of section 1 of article III of the Constitution, above-quoted, from exercising any of the powers properly belonging to the executive or ministerial arm of our State government.

We have examined the general law with respect to this matter and we find that it is universally held that Justices of the Peace are part of State constitutional system having jurisdiction conferred by the Constitution and general laws. 51 C. J. S. 12, sec. 1; *Proctor v. Justice Court* (Calif.) 285 P.312.

We think a quotation from 15 Cal. Jur. 453, sec. 3, is apropos here. There, after summarizing the holdings of the California Supreme Court, it is said:

Justices of the peace form part of the constitutional judicial system of California. In fact, it has been said that they are as much judicial officers as any justices of the supreme court or any judge of the superior court.

We submit that such is the situation in Nevada and that a proper construction of our constitutional provisions follows that of the California courts, if not, in fact, most of the courts of the United States.

A long line of cases found in an annotation in 89 A. L. R. 1115 sustains the foregoing construction of the constitutional provisions. In brief, the holdings of the courts adhere to the proposition that an officer holding a judicial position such as a Justice of the Peace cannot legally hold an executive office while serving as such Justice of the Peace. Otherwise, a violation of the separation of the powers of government, as above-quoted, would be had. We are, therefore, constrained to hold that a Justice of the Peace cannot legally hold and fill the office of a State Fish and Game Commissioner while holding the office of Justice of the Peace.

We have examined the law very carefully with respect to whether the office of Sheriff is incompatible with the office of a State Fish and Game Commissioner. After a thorough examination of the general law on the subject and there being no constitutional prohibition therefor in this State, and neither do we find a statutory provision intervening in the matter, we are of the opinion that the office of Sheriff and the office of State Fish and Game Commissioner are not incompatible.

Very truly yours,

ALAN BIBLE, Attorney General.

By W. T. MATHEWS, Special Assistant Attorney General.

636. Public Schools--District High Schools--Requisite Number of Pupils--Reestablishment Of.

CARSON CITY, June 24, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated May 28, 1948, received in this office May 29, 1948.

The question presented in your letter is the authority of a district high school to continue to function with only four resident pupils attending the school, when the deputy superintendent has certified to the county commissioners that the prospects are there will not be at least eight resident students of high school grade in attendance at said district high school for the ensuing year.

Your question is answered in our opinion given you under date of April 19, 1947, wherein we held that the requisite eight students is a condition to maintain a district high school.

Section 156 of the 1947 School Code provides a method for the education of the students when a high school is discontinued because of small enrollment by written agreement between the governing boards of the high schools. This section provides, when it shall appear practicable that any high school be discontinued because of small enrollment of pupils or because better educational facilities may be provided at other nearby high schools, the governing board of the former may enter into a written agreement with the governing board of the latter high school in the same or any adjoining county for the education of such students. Such agreement must be approved by the boards of county commissioners of the county or counties and by the deputy superintendent. The section provides for the annual renewal of the agreement which shall specify the terms.

The following section provides that each school entering into the agreement shall retain its legal and educational identity.

Section 159 provides the method for the payment to the school in which such students are educated. The fund about which you write could be preserved by following these provisions.

The reestablishment of a district high school is provided for in section 129 of the school code, and in the event that the requisite number of students are present in September this section could be followed.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

637. Nevada Hospital for Mental Diseases--Superintendent Should Receive Persons for Detention When Assured that Formal Commitment Will be Ordered.

CARSON CITY, June 29, 1948.

HON. HAROLD O. TABER, District Attorney, Washoe County, Reno, Nevada.

DEAR MR. TABER: This will acknowledge receipt of your letter dated June 23, 1948, received in this office June 24, 1948.

You submit the following statement relative to the detention at the Nevada Hospital for Mental Diseases of insane persons until a formal order of commitment can be made by the court:

In the past in emergency cases the Superintendent of the Nevada State Hospital has received patients prior to formal commitment, upon the assurance from one of the District Judges that a formal commitment would be issued as soon as the court was able to get into session. These cases arise over weekends and holidays and during the nighttime when it is impossible for the court to hold a formal hearing. The practice has been for the physicians, who are usually appointed by the court, to make an examination of the patient and give an opinion to the court, upon which the Judge then assures the Superintendent that a formal commitment will be issued. This is followed by the filing of a formal complaint, a formal hearing and a formal order of commitment, as soon as the court can hold a hearing.

Judge Maestretti has now been advised by the Superintendent of the Nevada State Hospital that he will not in the future continue to receive patients under the circumstances above outlined. As I understand it, the Superintendent is acting upon advice from your office. If this is true, I am sure that the emergency nature of such commitments was not called to your attention.

The opinion from this office to which Doctor Tillim refers is evidently the opinion under date of September 30, 1947. This opinion was in reply to an inquiry as to the authority of the

hospital board to enter into reciprocal agreements between Nevada and other States for the transfer of insane patients to the Nevada hospital. The agreement contained a provision that all insane, feeble-minded, or epileptics, who have been legally adjudged as such, shall be promptly accepted by the duly constituted authorities of the State of residents. We held that there was no provision in the statute authorizing such agreements. In this connection we cited section 3511, 1929 N. C. L. 1941 Supp., which provides for the commitment by the District Court of persons who are adjudged insane, and that such commitment appears to be the only procedure under which a patient may be received at the hospital. This opinion bears no reasonable application to the detention of a person to await the formal order of the court under the circumstances mentioned in your letter.

In our opinion, under the circumstances mentioned in your letter, the Superintendent of the State Hospital should receive such persons for detention at the hospital when he is assured by the court that a formal commitment will be ordered by the court as soon as a hearing can be held.

As you will note, we are sending a copy of this opinion to Doctor Tillim.

Very truly yours,

ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

cc: Dr. S. J. Tillim.

638. Public Schools--High Schools Not Entitled to Epidemic Relief--Interpretation Section 179, Chapter 63, Statutes 1947.

CARSON CITY, June 29, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated June 18, 1948, received in this office June 19, 1948.

You request an opinion as to whether or not subparagraph (2) of section 179, chapter 63, Statutes of 1947 (the 1947 School Code) will apply to high schools as well as to elementary schools.

We are of the opinion that high schools are not entitled to epidemic relief as provided in subparagraph 2(b) of section 179 of the 1947 School Code.

Section 179 of the 1947 School Code provides for the apportionment of the State Distributive School Fund. Subparagraph (2) provides:

When the attendance of any school or schools of a district is seriously affected by the existence of an epidemic, or circumstances over which the school board has no control, although the schools are not closed because of such condition, the superintendent of public instruction may, in his discretion, allow said district an average daily attendance which shall be the same percent of the total enrollment for that year that the average daily attendance of either the first or second immediately preceding school year was of the total enrollment of said school for said first or second preceding school year as he deems most fair and equitable; or under said condition he may take the six (6) months of highest average daily attendance of the school year in question as the apportionment basis.

Sections 181.01-181.05 of the 1947 School Code define the State High School Fund and the distribution and apportionment of such fund among the several high schools of the State.

The sections that deal with the State Distributive School Fund and the State High School Fund are complete, separate, and independent of each other. There is no reference in the sections governing the apportionment of the State High School Fund to subparagraph 2(b) of section 179 or to epidemic relief.

Epidemic relief was granted to elementary schools and not to high schools before the passage of the 1947 School Code, and if such relief is desirable in the apportionment of the State High School Fund, this is a matter that should be submitted to the Legislature for appropriate action.

Very truly yours,
ALAN BIBLE, Attorney General.

By GEORGE P. ANNAND, Deputy Attorney General.

639. Nevada State Police—Number of Men—Deficiencies in Traveling Expenses.

CARSON CITY, July 8, 1948.

HONORABLE VAIL PITTMAN, *Governor of Nevada, Carson City, Nevada.*

DEAR GOVERNOR PITTMAN: You have asked for our opinion concerning the number of men that can be hired by you under the State Police Act.

You are advised that section 2 of the State Police Act, as amended by chapter 261, page 828, of the 1947 Statutes, provides as follows:

The Nevada state police shall consist of the superintendent of police to be appointed by the governor, one inspector, five sergeants, five subordinate police officers, and two hundred fifty reserves * * *.

Section 14 of the Act sets up the salaries.

At the present time the force consists of one superintendent, one inspector, five sergeants, and one subordinate police officer. As regular police officers you could increase this by hiring four additional subordinate police officers. See Attorney General Diskin's Opinion No. 38, 1923-

1925 biennium, and Opinion No. 176 of Attorney General Diskin, 1925-1927 biennium.

At the present time there is set up in the General Appropriation Act of 1947 the sum of \$24,800 for traveling expense for the 1947-1949 biennium. We are advised that \$10,000 of this amount was spent in the first year of the biennium, and that there now remains something better than \$14,000 in this account for traveling expenses for the following second year of the biennium. This amount can be expended for traveling expenses for the full personnel of the State Police.

In the event that this amount should be insufficient to meet traveling expenses, it would, of course, be necessary to ask the 1949 Legislature, which convenes in January, for a deficiency appropriation to meet the balance of the current fiscal biennial period for traveling expenses.

Section 7051 is the emergency Act to which you refer, and it very clearly could not be used to take care of the deficiency which might occur in the traveling expenses of the State Police. The Act reads as follows:

7051. Nothing in this act shall be held to apply to necessary expenses or costs of suppressing insurrections, or of defending the state, or of assisting in defending the United States in time of war, or in preparing therefor, or for either catastrophes, fires, storms, or acts of God, or in preventing or preparing to prevent great and imminent danger thereof, and for which there is no sufficient appropriation. When the state board of examiners finds, after diligent inquiry and examination, that great necessity and extreme emergency exists for the expenditure of unappropriated money out of the state treasury on account of either or any of such events, such state board of examiners may then, and only then, declare the existence of such an emergency and great and immediate necessity for the expenditure of not to exceed twenty-five thousand (\$25,000) dollars, and set aside or allocate the same out of any unappropriated money in the general fund in the state treasury and pay for such necessary expenses or costs, claims for which shall be prepared, presented, and paid in the manner provided generally for the payment of claims against the state.

The language of the statute is clear and unambiguous and could not, as stated above, be used to meet deficiencies in traveling expenses.

Very truly yours,

ALAN BIBLE, *Attorney General*.

640. Engineer, State—Humboldt Water Distribution Office—Salary and Hours Women Workers.

CARSON CITY, July 9, 1948.

MISS RUTH GUSTAFSON, *Office Humboldt Water Distribution District, Elko, Nevada.*

DEAR MISS GUSTAFSON: Reference is hereby made to your letter of July 3, 1948, wherein you advise that you are employed in the Humboldt Water Distribution District Office and that you are employed by Mr. Hennen, the Water Commissioner appointed by the State Engineer.

You state that you would like to know the answers to certain questions concerning your

employment, that is,

1. What is the minimum salary for women workers employed by the State?
2. What is the maximum number of hours set for women workers?
3. Is Saturday or any part of it to be regarded as a holiday by State workers?

The nature of your employment, as we understand it, is that of clerk-typist. We are of the opinion that you are, in effect, an employee of the State Engineer's office even though stationed at Elko. The provisions of law relating to the State Engineer's office and its employees govern your employment.

Section 2, chapter 218, Statutes of 1947, relating to the Office of State Engineer, provides: "He may also employ necessary stenographers and typists at the rate fixed by the general law."

Section 5 of the same chapter provides that each stenographer, typist and clerk, unless designated under the State Merit System, employed in any of the various offices or departments of the State and not otherwise provided by law, shall receive a salary at the rate of \$1,750 per year during the first two years of employment, plus 10 percent additional thereto as provided in section 6 of the same chapter. Apparently, in your case, your salary would be \$1,925 per year, payable at the rate of approximately \$160 per month.

Now with respect to the number of hours that women workers in the State employ are required to work, we beg to advise there is no general statute on this subject. The eight-hour day for female workers, as provided by law, relates to private employment only. However, section 7904, N.C.L. 1929, provides that the State Engineer shall keep his office open to other public from the hours of 9 o'clock a.m. to 12 o'clock m. and from 1 o'clock p.m. to 4:30 o'clock p.m. each day, Sundays and holidays excepted. We think that this statute would only apply to the Elko office. Apparently under this statute Saturday is not classed as a holiday, either in whole or in part. We are of the opinion, however, that the State Engineer, in his discretion, could establish the office hours within the above statute for the Elko office and could also permit the general custom of closing the office at Saturday noon to be in effect at your office.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

cc: Hon. A.M. Smith, State Engineer.

641. Agriculture—Nevada State Soil Conservation Committee—Personnel.

CARSON CITY, July 13, 1948.

MRS. FLORENCE B. BOVETT, *Secretary Nevada State Soil Conservation Committee, Extension Building, University of Nevada, Reno, Nevada.*

DEAR MRS. BOVETT: We have your letter dated June 30, 1948, and received July 2, 1948.

You inquire whether there is any authority to add a layman or agricultural member to your State committee and how it may be done.

We find no specific authority or words throwing light on your problem. It ought to be solved by legislative amendment.

Section 4 of the Act, subdivision A (1920 N.C.L., 1941 Supp., sec. 6870.04) reads as follows:

There is hereby established, to serve as an agency of the state and to perform

the functions conferred upon it in this act, the state soil conservation committee. The committee shall consist of a chairman and three to five members. The following shall serve, ex officio, as members of the committee: the director of the state extension service; the director of the state agricultural experiment station located at Reno, Nevada, and the state coordinator of the soil conservation service. The committee may invite the secretary of agriculture of the United States of America to appoint one person to serve with the above-mentioned members as a member of the committee. The committee shall keep a record of its official actions, shall adopt a seal, which seal shall be judicially noticed, and may perform such acts, hold such public hearings, and promulgate such rules and regulations as may be necessary for the extension of its functions under this act.

This provides for a committee consisting of a chairman and three to five members. The personnel is made up of four State or Federal officers in their representative rather than individual capacity. These four now serve on the committee and will be replaced when they are replaced in their basic offices. You have a chairman and three other members. While you might have a chairman and four other members, there is no indication as to how the additional person is to be chosen.

Section 4(C) provides as follows:

The committee shall designate its chairman, and may from time to time, change such designation. A member of the committee shall hold office so long as he shall retain the office by virtue of which he shall be serving on the committee. A majority of the committee shall constitute a quorum, and the concurrence of a majority in any matter within their duties shall be required for its determination. The chairman and members of the committee shall receive no compensation for their services on the committee, but shall be entitled to expenses, including traveling expenses, necessarily incurred in the discharge of their duties on the committee. The committee shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property; shall provide for the keeping of a full and accurate record of all proceedings and of all resolutions, regulations, and orders issued or adopted; and shall provide for an annual audit of the accounts of receipts and disbursements.

Your committee undoubtedly has the right to designate or change the chairman who is also a member, and this you have done, but as to adding a fifth member there is no direction as to procedure.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

642. Health—Hospital Survey and Construction Act—Enabling Legislation Necessary.

CARSON CITY, July 13, 1948.

D.J. HURLEY, M.D., *State Health Officer, State Department of Health, Carson City, Nevada.*

DEAR DR. HURLEY: This will acknowledge receipt of your letter of July 7, received in this

office on July 8, 1948, with which you attached a copy of the 1948 amendments to the Hospital Survey and Construction Act (P.L. 725, 79th Congress). You ask this office as to the amount of money available to the State under P.L. 725 as amended.

We have discussed this question with the Chief Counsel of Public Health Service and it is the opinion of the Public Health Service that when and if the State of Nevada passes enabling legislation that it will be entitled to \$100,000 for the fiscal year in which such enabling legislation is passed.

The Public Health Services bases its opinion upon H.R. 4816, which amends section 624 of the basic Act and provides that each State for which a State plan has been approved prior to or during a fiscal year shall be entitled for such year to an allotment of not less than \$100,000. It is the contention of the Public Health Service that this is the controlling section as to the payment of allotments, and that it would control the language found in H.R. 6339.

H.R. 6339 amends section 623 (d) of the basic Act and the pertinent part of the amendment reads as follows:

Upon enactment of such legislation after July 1, 1948, the prohibition in this subsection against further allotments to such State under this part shall no longer be effective and such State shall, subject to other requirements of this part, be entitled to allotments under section 624 for the fiscal year in which such legislation is enacted and for the preceding fiscal year.

This amendment, in our opinion, seems to remove the stringent provisions contained in the prior Act (P.L. 725), and, if and when the Nevada Legislature enacts legislation, it would seem that our

State would be entitled to \$100,000 for the fiscal year in which the legislation is enacted, together with an additional \$100,000 for the preceding fiscal year. Such seems to be the plain language of the amendment, and to hold otherwise would be to give no meaning whatever to the words "for the preceding fiscal year." However, this is not the view taken by the Public Health Service, which agency is charged with the administration of the law. It is our suggestion that the matter be pursued further, with the thought in mind that the views of the Federal Government and the State might be reconciled and that we might be successful in obtaining for the State of Nevada an additional \$100,000 when and if legislation is enacted.

Very truly yours,

ALAN BIBLE, *Attorney General.*

643. Professional Engineers Act—Applicability to Architects.

CARSON CITY, July 13, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. JONES: Reference is hereby made to your letter of June 25, 1948, requesting the opinion of this office concerning the application of the Act relating to professional engineers, particularly to the amendments of such Act found at page 797 et seq. of the 1947 Statutes. You propound the following queries:

1. Does Section 12a prohibits architects from preparing plans, specifications and estimates and supervising the construction of public works wherein the expenditure for the complete project of which the work is a part exceeds the sum of \$2,000?

2. Does this Act in your estimation embrace and include architects?
3. Does the State Board of Engineering have the power or authority to issue licenses to individuals designating these individuals as architects?

OPINION

Your inquiry presents the question of the applicability of the Professional Engineers Act, as amended, to the profession of architects and we think a general opinion will answer your questions without the necessity of dealing with such question specifically.

The problem of whether the Professional Engineers Act relates to architects is one to be solved by the construction of the Act with respect to the intent of the Legislature as found from the language used by the Legislature.

We have found no case which might be deemed in point with the question involved. The cases we have examined concern statutes where either architects were the exclusive subjects of the Act or architects and engineers were joined in the licensing statute, so that, in any event, neither of such subject cases could be said to be authoritative in the instant matter. We are of the opinion that the 1947 amendments, which amendments it is claimed bring architects within purview of the Act, or so ambiguous with respect to the inclusion of architects that it is practically impossible to fathom the intent of the Legislature.

For instance, we call attention to the title of the Act, which was amended in 1947, and the emphasis therein placed upon land surveyors in connection with the provisions of the Act relating to professional engineers, and we also call attention to the provisions of the Act itself with respect to land surveyors. It is clear that the Legislature intended that land surveyors, who are not architects by any stretch of the imagination, should be licensed under the Act. However, this in itself does not assist us in arriving at a conclusion as to whether architects are intended to be included in the Act.

An examination of the encyclopedic dissertation on the professions of architecture and engineering can lead one to the conclusion that the professions overlap in many respects, yet, it is to be noted that the encyclopedia deals with the subjects under different and distinct titles, that is to say, under architecture we find definitions and explanations of what an architect is and what he may do and the same is true under the title engineer or engineering, so that it is entirely possible that the definition of a professional engineer as found in section 2 of the amended Act of 1947 would include an architect. However, when we come to examine the balance of the Act we find that the phrase "branches of engineering" shall mean the "recognized branches of professional engineering" shall mean the "recognized branches of professional engineering as determined by the board," which provision is found in section 2 of the aforesaid Act. Here we have a statutory provision which it is plain could be so used by the board as to prevent architects from exercising their profession within the terms of the act if it so desired. A further examination of the Act fails to disclose that any specific provision therein sanctions the architectural profession or provides that such profession shall be learned in any other schools excepting engineering schools and we think it is common knowledge that such profession shall be learned in any other schools excepting engineering schools and we think it is common knowledge that there are architectural schools separate and apart from engineering schools of very high character which prepare their students to be what is known as "architects" as distinguished from engineers.

It is to be noted in section 5 of this Act, with respect to the examination given by the Board for applicants for licenses, that the first qualification is that he be a graduate of an approved course in engineering of four years or more in a school or college approved by the Board and that

he has a specific record of additional four years or more of active practice in engineering work of a character satisfactory to the Board.

We think it follows that the Act in question, as amended, has for its purpose the licensing of engineers who in the main are distinguished from architects and that until the Legislature so legislates as to bring within the purview of the act, or within a separate Act requiring the same or additional qualifications for architects and specifically so provides, we cannot say as a matter of law that the present Act is broad enough to include architects within its provisions.

It was well said in *Goldschlag v. Deegan*, 238 N.Y.S. 3, wherein the question arose with respect to the employment of an architect and whether certain duties should be performed by an architect or by persons who generally call themselves engineers, that:

But I think it may be safely said that, speaking of today, there are many elements of service in the preparation of plans for the construction of a building of whatever type, and the superintendence of construction, that may be more properly left to what we now know as an architect than to what

we know as an engineer. Certainly, an engineer is not to be presumed to be "one who understands architecture." "Architect," *Century Dictionary*.

Nor is he to be presumed to be "a skilled professor of the art of building." "Architect," *Murray's New English Dictionary*. It is to be expected that the regents will shortly provide tests for the determination of what knowledge and experience a man must have in order to practice the profession of architecture. Until they lay down the rule that would permit to act as an architect a man who makes no claim to being an architect, as that term is now universally understood, I think an engineer, as that term is now universally understood, may not hold himself out or act as an architect.

In determining whether statutory requirements are arbitrary, unreasonable, or discriminatory, it must be borne in mind that the choice of measures is for the Legislature, who are presumed to have investigated the subject and to have acted with reason, not from caprice. Legislation passed in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the Legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is any view adapted to the end intended.

* * *

Such, we think, is the condition of the present law in this State on the subject. We are constrained to hold that the Professional Engineers Act, even as amended in 1947, is not broad enough to include architects within its provisions.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

644. Labor—Unemployment Compensation—Strikes.

CARSON CITY, July 14, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada*.

Attention: Roger D. Foley, Deputy.

DEAR SIR: Reference is hereby made to your letter of July 3, 1948, wherein you state that certain carpenters demanded an increase of rate of pay on or about June 17, 1948. That on the

next day and thereafter this group of men did not work by reason of their demand being refused. After ceasing work the carpenters applied to the State Employment Office for unemployment compensation and were advised that they were not eligible to participate therein in what they were engaged in a labor dispute.

You request our opinion upon the applicability of section 2825.05, 1929 N.C.L. 1931-1941 Supp., as amended at 1947 Statutes, page 416. We understand it is your opinion that under the above amendment the men in question are not entitled to unemployment compensation and you request the ruling of this office thereon.

OPINION

Your letter does not state that the question of whether the carpenters involved were entitled to unemployment compensation had been submitted to the Executive Director of the Employment Security Department. We assume that such question was not so presented to such Director.

An examination of the 1947 amendment discloses that the Executive Director is vested with the power and it is his duty to examine into the exact question and to determine the facts in each particular case wherein the particular section is called in question. In brief, the Executive Director is required to find the facts in each case and therefrom arrive at his determination as to whether the facts disclose that the applicant for unemployment compensation is or his not eligible by reason of the conditions imposed in the statute. We think it is imperative in the first instance that the problem be submitted to the Executive Director. Such is, in our opinion, the mandatory requirement of the statute. In brief, the Executive Director is to construe the statute in accordance with the facts submitted to him in the first instance.

We, therefore, respectfully suggest that the entire matter be submitted to the Executive Director, preferably by the carpenters directly involved.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

645. Bonds—Waterworks Improvement Bonds—Sewer Improvement Bonds—City of Lovelock—Valid.

CARSON CITY, July 15, 1948.

MR. DWIGHT F. DILTS, *Executive Secretary, Public School teachers' Retirement Salary Fund Board, Carson City, Nevada.*

DEAR MR. DILTS: We have examined the transcript of the proceedings in the issue by the city of Lovelock, Nevada, of its Waterworks Improvement Bonds, series of April 1, 1948, in the aggregate principal amount of \$200,000, consisting of 200 bonds in the denomination of \$1,000 each, bearing interest at the rate of 3½ percent per annum, payable semiannually on the first day s of April and October each year, and the Sewer Improvement Bonds of that city, series of April 1, 1948, in the aggregate principal amount of \$100,000, consisting of 100 bonds in the denomination of \$1,000 each, bearing interest at the rate of 3½ percent per annum, payable semiannually on the first days of April and October in each year.

We are of the opinion that the proceedings are in accord with the Statutes of Nevada and the ordinances regularly adopted by said city, and that said bonds constitute a valid and legally binding obligation of the city of Lovelock, Pershing County, Nevada.

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

646. Bonds—Sewer Improvement Bonds—Lovelock—Valid.

CARSON CITY, July 15, 1948.

HON. GEORGE W. FRIEDHOFF, *Chairman, Nevada Industrial Commission*, Carson
City, Nevada.

DEAR MR. FRIEDHOFF: We have examined the transcript of the proceedings in the issue by the city of Lovelock, Nevada, of its Sewer Improvement Bonds, series of April 1, 1948, in the aggregate principal amount of \$100,000 consisting of 100 bonds in the denomination of \$1,000 each, bearing interest at the rate of 3½ percentum annum, payable semiannually on the first days of April and October in each year.

We are of the opinion that the proceedings are in accord with the Statutes of Nevada and the ordinances regularly adopted by said city, and that said bonds constitute a valid and legally binding obligation of the city of Lovelock, Pershing, County, Nevada.

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

647. Public Service Commission—Contract Carrier Has Right to Protest Issuance of Certificate of Public Convenience to Common Carrier in Same Area.

CARSON CITY, July 16, 1948.

PUBLIC SERVICE COMMISSION, *Carson City, Nevada*.

GENTLEMEN: Reference is hereby made to your letter of July 12, 1948, which in effect briefly requests the opinion of this office on the question of whether a contract carrier by motor vehicle licensed under the laws of this State is qualified to protest the granting of a certificate of public convenience to a common carrier by motor vehicle who has made application therefor to the Public Service Commission of this State.

OPINION

We think the answer to such question is found in section 7 of the Motor Carriers Licensing Act, section 4437.06, N.C.L. 1931-1941 Supplement, as amended at 1947 Statutes, page 757. Such section provides that upon the application of any common motor carrier of property and/or passengers to operate as such carrier in intrastate commerce within this State, such applicant shall first obtain a certificate of public convenience from the Public Service Commission. Such section provides that the Public Service Commission, upon the filing of an application for such certificate, shall fix a time and place for the hearing thereon, and shall proceed in the manner according to the provisions of the law of this State made applicable thereto; *provide, however*, before granting a certificate of convenience and necessity to such applicant, the Commission shall take into consideration other existing transportation facilities in the territory for which a certificate is sought. It shall also take into consideration the public necessity and convenience to be accorded by the service and rates offered by such applicant or applicants. It is further

provided in such section that the Commission, in its discretion, may dispense with the hearing on the application, if, upon expiration of the time fixed in the notice thereof, no protest against the granting of the certificate has been filed by or in behalf of any interested person.

From the foregoing provision of the statute, it is clearly apparent that the Public Service Commission shall take into consideration upon the hearing of the application for the certificate of public convenience, the facilities then in existence and useful in the carriage of property and/or persons, whether by common carrier or contract carrier. It follows that if contract carriers, having licenses to perform contract carrier services within a particular area wherein a common carrier seeks to expand its services, they are no doubt vitally interested in the matter and, irrespective of the merits of the application or the granting thereof, we are of the opinion that a contract carrier has the right to protest the issuance of a certificate of public convenience to a common carrier, subject, of course, to the final disposition thereof by the Public Service Commission after consideration of all the facts and circumstances therein involved.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

648. Gambling—Combination Slot Machines—Each Unit Paying in Same Denomination Required To Be Licensed Separately.

CARSON CITY, July 17, 1948.

HON. C.J. McFADDEN, *District Attorney, White Pine County, Ely, Nevada.*

DEAR JUDGE McFADDEN: Reference is hereby made to your letter of July 14, 1948, wherein you express your opinion as to that provision of section 3302.01, 1929 N.C.L. 1931-1941 Supp., relating to the license fee on slot machines, which machines are composed of a combination of units operated by one handle. It is noted that your opinion is that the provision of the statute reading:

Provided, that when a combination of units are operated by one handle the license fee shall be the sum of ten (\$10.00) dollars per month, payable three months in advance, for each and every unit paying in identical denominations operated thereby.

requires the payment of the required license fee for each unit paying identical denominations. We have considered your opinion in connection with the law and we beg to advise that we concur in such opinion and confirm it. We are of the opinion that you are absolutely correct.

A perusal of the original section 2 of the gambling Act of 1931 discloses that the license for slot machines therein provided was simply \$10 per month for each slot machine. Nothing appears therein with respect to the so-called combination machine. However, in 1935 the Legislature amended this particular section to read as quoted. It is absolutely clear that such amendment governs the so-called combination of slot machines, and that each unit paying in the same denomination is required to be licensed separately even though the entire machine is operated by one handle.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

cc: Wm. E. Isaacs.

649. Old-Age Assistance—Maximum Assistance Grant May Be Increased to \$55.

CARSON CITY, July 17, 1948.

MRS. HERMINE G. FRANKE, *Director, Old-Age Assistance, P.O. Box 1331, Reno, Nevada.*

DEAR MRS. FRANKE: This will acknowledge receipt of your letter dated July 6, 1948, received in this office July 7, 1948.

You request an opinion as to the authority of the Nevada State Welfare Department, Division of Old-Age Assistance, under Public Law No. 642 (House Joint Resolution No. 296) which Congress passed June 14, 1948, to increase the present maximum allowance of \$50 to old-age recipients to a maximum grant of \$55 effective October 1, 1948.

We are of the opinion that under the existing appropriation by the Legislature for Old-Age Assistance and the present participation provided by county budgets the Division of Old-Age Assistance has sufficient authority under the Initiative Act of 1945 to increase the maximum assistance grant to \$55.

The opinion from this office under date of August 15, 1946, which held that your department had authority to increase the grant of assistance to \$50, in conformity with the revised Federal provisions for payment and matching, will apply to your present question.

Section 14 of the Initiative Act provides that the counties shall provide a fund sufficient to pay one-fourth of the total amount of Old-Age Assistance to be paid in the county.

According to your report the State and the counties together are paying \$25 of the \$50 assistance grant under the authority of legislative appropriation and county budgets. Section 3 of Public Law 642 increases the Federal grant from \$25 to \$30. This increase should pass to the old-age recipients, and the adjustment can be made without increasing the present payments made by the State and the counties from the funds available.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

650. Nevada State Police—Honorary and Reserve Commissions—Status Of.

CARSON CITY, July 20, 1948.

HON. VAIL PITTMAN, *Governor of Nevada, Carson City, Nevada.*

DEAR GOVERNOR PITTMAN: Reference is hereby made to your letter of July 12, 1948, received in this office on July 14, 1948, wherein you propound the following inquiry and request the opinion of this office thereon:

Numerous honorary and reserve commissions have been made by former Governors under the Nevada State Police Law.

Will you kindly inform me the status of such appointments, which are made "At the pleasure of the Governor." Specifically I want to know if commissions would automatically expire by succession to the office of Governor or if it is necessary for the Governor in office to revoke the commissions.

OPINION

After a close examination of the law with respect to the appointment of police officers under the Nevada State Police statute, we find that there is no constitutional or statutory authority for the Governor of the State to make honorary appointments to the State Police. Neither do we find any authority therefor in any other statute. It seems that it is the universal law that unless constitutional or statutory authority is forthcoming appointments to office cannot be made by the Governor or other appointing authority.

We assume that the Governor, through courtesy, appoints to the State Police certain members known as honorary, which in effect is simply conferring of an honor without service or emoluments upon an individual. "Honorary" means "designating a title or place which is held without rendering service, or without receiving the emoluments or privileges usual to it; also holding such a title or place, as, an honorary member of a society. (Webster's New International Dictionary.)

Such being the status of an honorary appointee, we think it naturally follows that if a former Governor makes such an appointment and does not revoke it during his term of office that his successor in office may revoke the appointment and the commission therefor at any time he sees fit. Therefore, specifically answering your inquiry on this point, it is our opinion that the appointment of an honorary member of the State Police does not lapse with the end of the term of the Governor so appointing, but in order to curtail such appointment by the successor Governor that he revoke such appointment and commission therefor when he shall so desire.

Now with respect to the reserve commissions mentioned in the letter.

We are of the opinion that such commissions occupy an entirely different status than honorary commissions.

The Nevada State Police Act, being sections 7434-7456, N.C.L. 1929, and subsequent amendments as will be noted, provide as follows:

Section 7435, as amended at 1947 Statutes, 829, provides for the appointment of a Superintendent of Police by the Governor, and one inspector, five sergeants, five subordinate police officers, and 250 reserves.

Section 7436, N.C.L. 1929, provides that the Superintendent of Police shall, subject to the approval of the Governor, appoint all officers and members of the Nevada State Police, and may remove any such officer or member without notice. Thus, the appointing power of the members of the Nevada State Police is lodged in the Superintendent of State Police and, also, the removal of such members without notice is vested in the Superintendent.

Section 7442, N.C.L. 1929, provides that the Superintendent of Police shall organize and, subject to the approval of the Governor, appoint the officers and members of the reserve force of the State Police Department. Thus, it is clear under the statute where the appointing power is vested, save and except that the approval of the Governor to such appointments is requisite.

Section 7448, N.C.L. 1929, provides that members of the Nevada State Police, which include the reserve members, shall be required to serve for a period of not less than one year, unless dismissed or discharged, and no officer or member after entering into the service shall be permitted to resign therefrom except with the consent and approval of the Governor.

The question at once arises as to the term or enlistment or service of the Nevada State Police. Under the statute it cannot be less than one year except in the case of dismissal from the service during that period of time. The statute provides no maximum term of service. However, there is

no question but what the service as a member of the Nevada State Police, with the approval of the Governor, can reappoint such members for another four-year term and so proceed thereafter. If such members are not so reappointed, their membership in the police force ceases.

We think the State Police statute does not provide the Governor with the sole power of appointment of members of the State Police, including the reserve members, but that such power is lodged in the Superintendent of State Police, subject to the approval of the Governor, and that likewise the power of revocation of the commissions of such members is vested in the Superintendent of State Police with the approval of the Governor endorsed thereon by his signatures and attested by the Secretary of State over the Seal of the State of Nevada, and also contain the term for which the appointment is made.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

651. Bonds—Mesquite Town Board—Validity Doubtful.

CARSON CITY, July 20, 1948.

HON. VAIL PITTMAN, *Governor of Nevada, Carson City, Nevada*.

DEAR GOVERNOR PITTMAN: Reference is hereby made to the copy of letter of William Harper, secretary of the Mesquite Town Board, dated June 5, 1948, relating to a certain bond election held in Mesquite some ten years ago for the purpose of securing funds for the augmenting of the water supply of such town. Receipt is also acknowledged of copy of your letter to Mr. Harper advising of the submission of the question to this office in order to advise Mr. Harper concerning what may now be done with respect to the securing of additional supplies of water in view of the fact that the bonds which were apparently authorized in an election of some years ago were never sold.

In order that this office could properly advise you, it was necessary to obtain definite information and advice from the District Attorney of Clark County with respect to the action of the Board of County Commissioners in and concerning the bond election so held in Mesquite as stated in the letter of Mr. Harper. Under date of July 15, 1948, the District Attorney furnished this office with the desired information. We are enclosing herewith a copy of the letter from the District Attorney which, in the main, is self-explanatory. It seems that no bids for the purchase of the bonds in question were received. It is also clear that none of the bonds were disposed of, in fact, not even printed.

From an examination of the entire matter, we are inclined to agree with the District Attorney that the validity of the bonds, if they were now issued, would be very doubtful. We question whether any bond house would purchase the bonds under the conditions, that is to say, purchase the remaining thirteen bonds, as there is no question but what seven of the original authorized issue of bonds could not legally at this time, be sold as the date of redemption of such seven bonds has passed.

We respectfully suggest that the interested parties of the town of Mesquite again petition the Board of County Commissioners to call an election for the purpose of issuing bonds, the proceeds of which would be used for securing additional supplies of water. We think this is the only safe method to pursue in order to insure the validity of the bonds when once issued. The

Board of County Commissioners of Clark County, under the direction of the District Attorney, should have no trouble in authorizing a new election as such Boards are authorized to call elections in unincorporated towns for the purpose of securing water systems and such like under sections 132701340, inclusive, N.C.L. 1929, supplemented, of course, by a necessity of the two-ballot box bond election law as provided in chapter 70, Statutes of 1937.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

652. County Commissioners—May Not Contract or Sell to the County After Election.

CARSON CITY, July 21, 1948.

HON. JOHN F. SEXTON, *District Attorney, Eureka County, Nevada*.

DEAR JACK: In your letter dated July 19, 1948, received July 20, 1948, you ask on behalf of A.C. Florio, a candidate for County Commissioner, as follows:

Assuming A.C. Florio is contracting and selling water to the county, or intends to do so after election on a new or continuing contract, may he lawfully do so and retain his right to hold office?

The answer is in the negative. He would be eligible for election, but, if elected, would be prohibited from entering into or continuing such a contract. This prohibition could be enforced by injunction or removal from office.

You are referred to section 1955, N.C.L. 1929, which reads as follows and is self-explanatory:

No member of the board of county commissioners shall be interested, directly or indirectly, in any property purchased for the use of the county, or in any purchase or sale of property belonging to the county, nor in any contract made by the county for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes; *provided*, that the board may purchase supplies for the county, not to exceed thirty dollars, in the aggregate, in any one month, from one of their number, when not to do so would be a great inconvenience, but the member from whom said supplies are purchased shall not vote upon the allowance of said bill, and a violation of this act shall be a misdemeanor, punishable by fine of not less than one hundred dollars and not exceeding five hundred dollars, and shall be cause for removal from office.

Attorney General Diskin, on March 30, 1926, in Opinion No. 231, passed on this question, citing section 1522, Revised Laws 1912, which is the same section quoted above. We enclose a copy of General Diskin's Opinion.

A further section, 4827 N.C.L. 1929, covers public officers generally, including county Commissioners. It reads as follows:

It shall not be lawful for any officer of state, or member of the legislature, alderman, or member of the common council of any city in this state, or for the trustees of any city, town, or village, or for any county commissioners of any county, to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or

the legislature, or either branch thereof, or by or for the aldermen or common council, board of trustees, or board of county commissioners of which he is a member, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

653. Gambling—Interpretation of Section 10ff—Revocation of Existing Licenses.

CARSON CITY, July 21, 1948.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: R.E. Cahill, Secretary.

GENTLEMEN: Your letter dated July 20, 1948, received July 21, 1948, poses the question whether the provisions of section 10ff of the Nevada Gambling Law (added by chapter 223, Statutes 1947, to follow section 3302.22, 1929 N.C.L., 1941 Supp.) apply to the business of renewing a license once granted on current payment of fees or percentages quarterly under the Act.

The answer is in the negative. The new section applies to revocation of existing licenses and not to the renewal of licenses that would otherwise terminate for want of necessary steps to obtain license for the future.

The rule would be the same if the applicant had only to report gross proceeds, as noted in your second question.

The Commission, for want of specific provisions in the law respecting the issuance of licenses, has established rules and regulations and a course of dealing whereby once qualified to receive a license, a licensee may expect current renewals with a minimum of supervision on supplying requisite information such as history of gross receipts, number and character of tables or games, and tender or requisite fees.

If the Tax Commission should for any reason contemplate a refusal to continue a license for any reason other than nonpayment of gross tax charges in advance or failure to make current statement of tables operating, due process would require that the licensee be afforded an opportunity to be heard. This, while without the provisions of section 10ff, is in harmony with the requirements of due process recognized therein.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

654. Counties—Regulation Sentencing Prisoners to County Jail Matter of Legislative Control.

CARSON CITY, July 22, 1948.

MR. BUD ALBRIGHT, *116 South Second Street, Las Vegas, Nevada*.

DEAR BUD: This will acknowledge receipt of your request for information concerning the Nevada statutes, which request was made by you on Tuesday of this week. It is my

understanding that you have talked this matter over with your District Attorney, Robert E. Jones, and he has likewise suggested that it would be well to secure our opinion on this matter. As you will note, I am sending a copy of this letter to Mr. Jones so that he may be advised of our conclusions in the premises.

It is our opinion that the regulation concerning the sentencing of prisoners to the county jail is purely a matter of legislative control as set forth in the governing statutes.

With respect to the allowance of credits for prisoners confined to county jails, we have made a very thorough search of the Nevada statutes and the only section whatever that we can find dealing with this point is section 11539, Nevada Compiled Laws 1929, which provides as follows:

For each month in which the prisoner appears, by the record provided for in section 4 of this act, to have been obedient, orderly and faithful, five days shall, with the consent of the board having power in the premises, be deducted from his term of sentence.

Thus it is seen that five days in each month is the maximum deduction which may be allowed for each month of service in the county jail and this deduction is apparently based upon the prisoner's labor and other tasks performed by the prisoner during the period fixed in the sentence.

The entire law dealing with the employment of inmates of county jails may be found in the 1879 Statutes, page 98, or at sections 11534-11539, Nevada Compiled Laws 1929.

The general law, as noted above, is to the effect that the shortening of sentences by good conduct statutes is entirely dependent upon the statute conferring it (41 Am. Jur. 914, sec. 41).

Very truly yours,

ALAN BIBLE, *Attorney General*.

cc: Honorable Robert E. Jones, District Attorney, Clark County, Las Vegas, Nevada.

655. Taxation—Publication Delinquent Taxes—Necessary Delay Excused.

CARSON CITY, July 23, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

Attention: A.W. Ham, Jr., Deputy.

DEAR SIR: This will acknowledge receipt of your letter dated July 17, 1948, received in this office July 19, 1948.

You call attention to our opinion given Mr. Grant L. Robison on June 23, 1948, relative to the construction of section 39 of the Revenue Act as amended by chapter 177, Statutes of 1947, wherein we held that publication of the list of delinquent tax property is required at least once a week, beginning in the first week in August and published once a week, beginning in the first week in August and published once each week until the second Monday in September. You state that the County Treasurer has informed you it will be impossible to comply with this, as it requires a period of between a week and ten days to compile the list and the newspaper requires at least three days after receiving the list before publication. You ask if it would be possible for the Treasurer, in view of the vast amount of work involved, to postpone publication until the second week in August.

You ask if our opinion is based on the 1948 calendar or is intended to carry over into subsequent years, for example, if the first Monday in August occurs on the 7th of the month. Our opinion,

especially in specifying publication for six weeks, was based on the calendar of the present year as the first Monday in August falls on the 2d and the second Monday in September on the 13th, which, in our opinion would require six publications beginning with the first publication in the first week in August. This would comply with the language in the section of at least once a week from the date thereof until the second Monday in September. Circumstances which make it impossible for a County Treasurer to prepare and start publication of the notice during the first week require an interpretation of the term “immediately after” as used in the section.

Our opinion is that, after due and reasonable diligence in preparing the list of delinquent taxes, the first publication of notice is delayed until the second week in August, this would not invalidate the sale of property for delinquent taxes. The circumstances you mention in your particular county make a case excusing some necessary delay.

If it is believed that publication as required by this section places an undue burden on the County Treasurers, the matter should be referred to the Legislature for appropriate action under their power to modify this provision.

The construction given generally by the courts to the words “immediately,” when applied to the absence of time between two events, is that the Act referred to should be performed with due and reasonable diligence without unnecessary or unreasonable delay. See Words and Phrases, Permanent Addition, Vol. 20.

The case of Barron et al. v. Eason et al., 25 So.(2) 188, was one in which the statute required the list of lands sold to the State by the Tax Collector to be immediately filed with the clerk. The sale was made on September 2d and the list filed September 7th. It was contended that the sale was void by reason of the delay and three decisions by the courts of the same State were presented in support of the contention. The court said: “The first case was decided on demurrer, and it is not clear how many days elapsed before the filing of the deed. In the Fairly case there was a delay of thirty-four days, which the court held invalidated the sale. In the Gee case there was a delay of nine days. The deputy sheriff testified that he could have made out his list in four five hours and there was no excuse for the delay, the court saying, ‘No reason or excuse is shown for the delay of nine days’, and held the sale void.” The court held that the filing of the list within five days under the circumstances where two hundred and twenty-nine sales were made did not violate the statute.

Section 39 of the Nevada Act, as amended, does not require publication where the delinquent property consists of unimproved real estate assessed at not to exceed twenty-five dollars, and in addition to the publication of notice and posting requires that a copy of the same be sent by registered mail to the persons listed as the taxpayer to the last address, if known, and also a copy shall be sent not less than sixty days before the expiration of the period of redemption. With these additional provisions it appears that the term “immediately” should be liberally construed and a reasonable delay in publishing the notice resulting in a lesser number of publications would not be construed as the taking of property without due process of law.

The section in question, before the amendment by chapter 99, Statutes of 1933, contained the provision that such notice shall be published or posted at least twenty-five days prior to the date of sale.

A notice of sale delinquent tax property which did not comply with this provision was so characterized by the Supreme Court of this State in *Menteberry v. Giacometto*, [51 Nev. 7](#), but in view of another section of the law insufficiency was declared not fatal. The County Treasurer caused to be published a notice of the sale of property to be held on July 25, 1924, which

appeared in the newspaper on June 28th, July 1st, and July 8th. Upon discovery of the error in the date of sale, which, under the law, had to be on the 21st instead of the 25th, notice was corrected and published July 12th, 15th, and 19th. It was contended that the sale was void because the giving of notice was not in compliance with the statute as the first publication of the corrected notice was July 12th, hence the required twenty-five days prior to the sale had not been given. The court said that this statute was evidently taken from the California Code and agreed with the construction given by these courts which was that publication for a time less than the period prescribed by statute was not sufficient to authorize a sale. On page 14 the court said:

“What we have said would dispose of the matter, but for the fact that our statute contains a further provision that has never been construed.” The court then cited the language contained in section 41 of the Revenue Act, which language is now contained in the same section, section 6449, 1929 N.C.L., 1941 Supp., as follows: “No tax heretofore or hereafter assessed upon any property, or sale thereof, shall be held invalid by any court of this state on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of any other irregularity, informality, omission or mistake or want of any matter of form or substance in any proceeding which the legislature might have dispensed with in the first place if it had seen fit so to do, and that does not affect the substantial property right of persons whose property is taxed * * *.”

The court held in view of this section as follows: “However, notice of sale was actually published. It was published for a length of time which would have been sufficient did the provision relative to due process require published notice (referring to the case of Hagar v. Reclamation Dist., No. 108, 111 U.S. 701) and the statute in the first instance had provided for such a notice. This being true, the curative provision to which we have referred (section 41) would have remedied the irregularity, had there actually been one, in the publication of the notice.”

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

656. Nevada State Prison—State Emergency Fund Cannot Be Used to Pay Guards for Death Watch.

CARSON CITY, July 24, 1948.

MR. RICHARD H. SHEEHY, *Warden, Nevada State Penitentiary, Carson City, Nevada*.

DEAR DICK: This letter is in answer to your request of July 21, 1948, asking that the State Board of Examiners create an emergency to provide sufficient money for a death watch at the State Penitentiary from August 31, 1948, until the close of the next biennium.

The law setting up the Emergency Fund, insofar as it relates to your problem, provides that the Emergency Fund can be used only to pay the necessary expenses or costs of suppressing insurrections, or in repairing injury done to State property by catastrophes, fires, storms, or acts of God, or in preventing or preparing to prevent great imminent danger thereof. A deficiency created in the amount appropriated for the death watch does not in our opinion come within any of these particular classifications.

It is our further opinion that the proper method to be followed by you in paying for the guards for the death watch is to make claims for these guards directly against the salary item as set up in section 30 of the General Appropriation Law of 1947, chapter 278, at page 861 of the 1947 Statutes.

If we can be of any further assistance, please let us know.

Very truly yours,

ALAN BIBLE, *Attorney General*.

657. Counties—Vacancy in Office—Commissioners to Appoint.

CARSON CITY, July 26, 1948.

HONORABLE PETER BREEN, *District Attorney, Goldfield, Nevada*.

DEAR PETE: This will acknowledge receipt of your day letter reading as follows:

Amy Roberson, County Clerk, resigned. My opinion commissioners shall appoint successor to serve until successor elected at coming November election; also, that respective County Central Committees may name candidate to go on ballot at November election. Desire your opinion in the premises.

This will likewise confirm our telegram to you reading as follows:

Reurtel, your construction of law is correct and supported by opinion September 1946 to Douglas County construing together sections 22 and 25 of the primary election law. Mailing copy of that opinion.

We are enclosing herewith a copy of our opinion of September 30, 1946, dealing with the construction of sections 22 and 25 of the primary election law.

Very truly yours,

ALAN BIBLE, *Attorney General*.

658. Insurance—Partnership, Association, or Corporation in Order to Qualify for License Must Be Specifically Authorized—Agents Required to Qualify as for Individual Licenses.

CARSON CITY, July 28, 1948.

MR. JERRY DONOVAN, *Insurance Commissioner, Office of State Controller, Carson City, Nevada*.

Attention: Mr. G.C. Osburn, Deputy.

DEAR MR. DONOVAN: This will acknowledge receipt of your letter dated July 17, received in this office July 19, 1948, requesting an opinion as to the interpretation of section 2, subsection (h) of section 147 of the Nevada Insurance Act, being section 3656.147, N.C.L., 1931-1941 Supp., as amended by chapter 152, Statutes of 1947.

You write that the question has arisen in regard to automobile dealers being appointed as insurance agents under the amendment requiring an examination to determine the competence of a person to be licensed as an insurance agent. In some cases, the dealers are either corporations or partnerships and the insurance companies have presented the question that, if one member of a partnership or one officer of the corporation is designated to act for the partnership or corporation, license can be issued in the name of the partnership or corporation, and only the one

member or officer designated to act would have to take the qualifying examination.

We are of the opinion that under the provisions of subsection (h) section 147 of the Nevada Insurance Act, as amended by chapter 152, Statutes of 1947, a partnership, association, or corporation in order to qualify for a license in the firm name shall, by its articles of partnership, association, or corporation be specifically authorized to engage in such business, and all members who are named in the application as agent or agents to act thereunder are required to qualify as provided for individual licenses under the amendment.

Sections 145 and 147 of the Nevada Insurance Act as amended by chapter 152, Statutes of 1947, define the procedure for the issuance of licenses to insurance agents. Subsections (b), (c), (d), (e), (f), and (g) of section 145, and subsections (a) to (h) of section 147 apply to the licensing of individuals.

Subsection (h) reads as follows: “Any person, partnership, association, or corporation may be licensed as an insurance agent upon compliance with the requirements of law; *provided, however,* that any articles of partnership, association, or corporation shall authorize the applicant specifically to engage in such business. The application for a license by, and the license issued to, a partnership, association, or corporation shall name all members of such group, the persons, officers, directors, or stockholders thereof who are authorized to act as agent or agents thereunder, and no such license shall be issued unless and until the persons named in the application as being so authorized have qualified for individual licenses as hereinbefore provided.” This subsection (h) was added by the 1947 amendment.

Subsection (a) section 145 reads: “The name and address of the applicant, and if the applicant is a partnership or association the name and address of each member thereof, and if the applicant is a corporation the name and address of each of its officers and directors and of all stockholders designated to act for applicant.” This section and its subdivisions apply to applications for an agent’s license to be filed in the office of the Commissioner.

Section 147 and its subdivisions apply to the issuance of an agent’s license when the applicant has qualified in respect to the provisions of this section. Subsection (h) provides that a partnership, association, or corporation may be licensed as an insurance agent upon compliance with the requirements of law; *provided, however,* that any articles of such organization shall authorize the applicant specifically to engage in such business.

The general rule that a corporation authorized to act as an agent for the transaction of any business which can be carried on by an agent can be licensed as an insurance agent is distinguished by the proviso which requires a special authorization.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

659. Counties—Election Hospital Trustees—Vacancy—Clark County.

CARSON CITY, July 28, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. JONES: Reference is hereby made to your letter of July 22, 1948, received in this office July 24, 1948, wherein you propound certain queries pertaining to the election of County Hospital Trustees and request the opinion of this office thereon.

You state that at present the Board of Trustees consists of four members, as one member of the five-man board has resigned and the vacancy caused thereby has not been filled by appointment.

It appears, from your letter, that of the four remaining members of the Board there are and will be two holdover members whose terms will expire in January 1951, so that aside from the vacancy on the Board two trustees are to be elected at the coming November election.

It further appears that one of the present members, Mr. Baker, a resident of Boulder City, whose term will expire in January 1949, is seeking re-election as a long-term member of the Board. It is also stated that Mr. Wells, a holdover trustee, resides in Logandale.

You state that in addition to Mr. Baker six other candidates for long-term trustees, all residents of Las Vegas, have filed for election to such term, and that five candidates, all residents of Las Vegas, have filed for the two-year term as a hospital trustees.

You specifically inquire as follows:

1. Whether or not the law requires not more than three of the hospital trustees to be residents of Las Vegas wherein county hospital is located?
2. Whether or not Mr. Baker's name should be put on the ballot as running without opposition?

OPINION

It is stated in your letter that "The practice in this county since the first Hospital Board was set up, has been to elect two long-term and one short-term trustee every two years."

Section 2226, N.C.L. 1929, as amended at 1937 Statutes, page 194, i.e., section 2226, 1929 N.C.L., 1931-1941 Supp., provides, inter alia, after providing for the appointment of the first Board of Trustees, "The said trustees shall hold their offices until the next following general election when five (5) hospital trustees shall be elected and hold their offices, three (3) for two (2) years and two (2) for four (4) years, and at subsequent general elections the offices of the trustees whose terms of office are about to expire shall be filled by the nomination and election of hospital trustees in the same manner as other county officers are elected."

We assume, without deciding, that beginning with, and from and after the first election of Clark County Hospital Trustees, that the election of two long-term and one short-term trustees at each election filled the Board to the number of trustees and term requirements thereof set forth in the above statute, and that at the coming election, aside from the filling of the existing vacancy, two long-term trustees and one short-term trustee are to be elected.

Answering query No. 1—Section 2226, 1929 N.C.L., 1931-1941 Supp., provides:

Should a majority of all the votes cast upon the question in each county concerned be in favor of establishing such county hospital, the board or boards of county commissioners shall immediately proceed to appoint five (5) trustees chosen from the citizens at large, with reference to their fitness for such office, all residents of the county or counties concerned, nor more than three (3) to be residents of the city, town or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital.

Then follows the provision for election of trustees as hereinabove quoted. It may be said in passing that both of the quoted parts of section 2226 are as originally enacted. The 1937 amendment simply provides that the office of hospital trustee shall be nonpartisan.

It is most clear that when the County Public Hospital is first established, that in the appointment of the first Board of Trustees not more than three of such appointees shall or can be

residents of the town or city wherein the hospital is located. As to this Board a residential qualification was and is fixed, established and provided by law, and two of such trustees must be residents without the boundaries of such town or city.

Does the statutes provide a continuation of the residential qualification into and concerning the subsequent elections of hospital trustees? We think that it does, particularly so when section 2226 is construed in *pari materia* with section 2229, N.C.L. 1929, which is section 5 of the hospital Act as originally enacted.

In construing statutes the intent of the Legislature is to be sought, first of all, in the language used. It was well said by our Supreme Court in *State v. Sadler*, 25 Nev. at page 170, in dealing with an election matter, somewhat analogous to the instant question, where the interpretation of a section of the Reno charter providing for the election of city councilmen was drawn in question, the Court said:

It is not our duty to legislate, or to destroy legislative intention, except for constitutional reasons, under well-established rules. It is our duty to construe laws and give effect to legislative intention. Under well-settled rules of construction (so well-settled as not to require citation of authority), to the effect that the courts will look into the statute themselves (the language used by the lawmaker in the statutes), and, in order to give effect to all the provisions of the statutes, will consider the various sections thereof together * * *.

It might be said, with some reason, that the section 2226 standing alone only provided residential qualifications for the appointed members of the first Board of Hospital Trustees and that thereafter the electorate of the county could elect all the members of the Board from one town or city. Even so, still no good reason can well be advanced for the Legislature to provide residential qualifications in the first Board and cast it aside as to all subsequent Boards.

However, in our opinion, section 2229, *supra*, removes the doubt as to the intention of the Legislature in the enactment of section 2226. Section 2229 provides:

Vacancies in the board of trustee occasioned by resignations, removals or otherwise shall be reported to the board or boards of county commissioners and be filled in a like manner *as the original appointments*; appointees to hold office until the next following general election in the usual manner. (Italics ours.)

This section of the law is just as prospective in operation as section 2226. Certainly such section contemplates vacancies in the Board of Trustees after an election thereto as well as vacancies occurring in the first appointed Board. If the Legislature had intended that the residential qualification of a hospital trustee was to be dropped upon the first and subsequent election of such trustee, then most certainly there was no need of incorporating in section 2229 the words “in a like manner *as the original appointments*” if such provision was to be meaningless and nugatory. The original appointments required the application given full force and effect in construing section 2226. It would be an absurdity for the Legislature to intend the dropping of the residential qualification in the election of Hospital trustees and to then require the recognition of such qualifications by the Board of County Commissioners in filling a vacancy in the Board after such election.

Entertaining the foregoing views, we are of the opinion, and so hold, that it is mandatory that not more than three Hospital Trustees, elected or appointed, can be residents of the town or city wherein the County Public Hospital is located.

Answering query No. 2—From the foregoing opinion it is clear, we think, that a residential

qualification has been fixed and provided in the law for Hospital Trustees. From the facts as outlined in your letter Mr. Baker is the only nonresident of Las Vegas who has filed for the office of either the long-term or short-term trustee. One other nonresident is a holdover trustee. It follows, we submit, that none of the other candidates for trustees are or can be eligible to run against Mr. Baker. It is, therefore, our opinion that the name of Mr. Baker, as candidate for long-term Hospital Trustee, should go upon the November election ballot as a candidate without opposition. Such is the intent of section 2425, 1929 N.C.L., 1931-1941 Supp., with respect to nonpartisan candidates.

With reference to the practice in your county since the first Hospital Board of Trustees was set-up, which has been to elect two long-term and one short-term trustee every two years, as stated in your letter, see the Nevada case of *State v. Beemer*, 55 Nevada 363.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

660. Elections—Errors or Omissions in Registration—Oath of Nonregistration.

CARSON CITY, August 3, 1948.

HONORABLE ROBERT E. BERRY, *District Attorney, Storey County, Virginia City, Nevada.*

DEAR MR. BERRY: This will acknowledge receipt of your request of July 27, 1948 concerning the following election problem:

On July 19, 1948, Mr. X registered to vote for the first time in Storey County, Nevada. He registered as a Democrat. Later in the same day, Mr. X presented his certificate of nomination by which he attempted to file as an Independent candidate for the office of County Commissioner of Storey County. Mr. X did not state under oath at the time of filing such certificate that he had not, within one year prior to the date of such filing, been registered as a member of any political party. It is clear from the statement of facts that it would have been impossible for him to have made such an oath.

According to the County Clerk of Storey County, Mr. X was advised that he could file either as a Democrat for County Commissioner or that he could file the certificate of nomination as an Independent. The County Clerk states that she read the provisions of chapter 145, page 476, 1947 Statutes, section 3 of which amends section 31 on two different occasions. First, chapter 145 as just noted, and later at chapter 250, page 776 of the 1947 Statutes. The last amendment of this section added to the following requirement for those filing as Independents:

Any candidate filing such certificate of nomination for any office shall be required to state under oath that he has not, within one year prior to the date of such filing, been registered as a member of any political party.

You ask whether or not the statement of facts as given above, Mr. X is entitled to have his name placed upon the general election ballot. If he is so entitled it will be necessary for the two Democratic candidates to have their names placed on the primary ballot, hence it is most important that a very early ruling and decision be made.

At the outset we wish to point out that it is very clear that Mr. X has acted in this matter in absolute good faith and relied upon statements made to him that he was eligible to file either as a

Democrat or as an Independent. It is equally clear to us that the County Clerk also acted in good faith and in giving such advice to the applicant. It is most unusual for the Legislature to amend the same section of the law twice in one session and, although it has done so in the past, it is very rare. Anyone in attempting to give the correct legal requirements might very well overlook the second amendment.

Notwithstanding the unfortunate set of facts which arise in this situation, as a matter of law it is very clear that the certificate of nomination of Mr. X does not comply with the law, since it does not contain his oath of nonregistration with a political party and, as noted in the statement of facts, it is obvious that he could not make this oath. It is, therefore, our opinion that the certificate of nomination is defective and is subject to challenge at any time and might very well invalidate his election if permitted to be placed on the ballot.

The landmark case in Nevada upholding the constitutionality of the direct primary law is the case of *Riter v. Douglass*, 32 Nevada 400.

The Court there said that the Legislature can in regulating primary elections prescribe qualifying classifications for political parties who desire to be represented on official ballots.

The Court also said that the Legislature can add qualifications to electors desiring to become candidates for specified offices if the qualifications are reasonable and constitutional.

Also, see the case of *State v. Brodigan*, 37 Nevada 492.

It might be suggested that Mr. X should be permitted at this time to change his certificate of nomination from that of filing as an Independent and that he be permitted to file a declaration of candidacy as a Democrat. Although this might appear to be a very fair solution, we are still unable to find any statutory authority which permits the County Clerk to either change certificates of nomination or to accept new certificates of nomination after the deadline set by statute for filing.

The only solution that we can suggest to Mr. X is that he present this matter to the District Court for an authoritative and final ruling under the facts of the case, to the end that if allowed to place his name on the ballot and if later elected, there would be no question whatever as to the validity of such election.

Section 27 of the Primary Election Law, being section 2431, Nevada Compiled Laws 1929, provides machinery for the correction of errors and omissions. This section reads as follows:

Any error or omission occurring or about to occur in the placing of any name on the official primary election ballot, or any error, omission or wrongful act occurring or about to or any other officer having to do with the election, registration or canvassing, may be corrected by application of any qualified elector, upon affidavit, to any district court, or to the supreme court any justice thereof. Notice of the hearing of said proceeding shall be given to the officer or person interested, and said hearing shall take precedence over any other business.

It is suggested that you immediately contact Mr. X and inform him of his rights under this section.

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

661. Public Employees Retirement—Delayed Rejection of Provisions Not Authorized.

CARSON CITY, August 6, 1948.

MR. KERWIN L. FOLEY, *Executive Secretary, Public Employee Retirement Board,
Carson City, Nevada.*

DEAR MR. FOLEY: In your letter of August 6, received here August 6, 1948, you advise James B. Tennille, Chairman of the Board of Commissioners of Lincoln County, that you are asking our opinion on the following:

Whether a "delayed rejection" of the provisions of the Nevada Retirement Act is authorized by law or can be accepted by the State Board.

The answer is in the negative. We enclose an extra copy of this letter for transmittal by you to Mr. Tennille.

Section 8 of the Act in subdivision 3 thereof provides for notice of rejection not later than May 1, 1948. It requires both the governing body and two-thirds of the employees to elect not to participate. The second sentence in section 8 states that "All public employers shall participate in, and their employees shall be members of, the system except as follows:"

Then follows provisions for creating such exceptions.

It is conceded in this case that steps to become excepted from the general rule have not been taken by May 1 or at all. A very reasonable explanation of this failure has been stated but the law does not afford relief as no discretion is given to the State Board.

We believe the matter may well be left to wait clarification of the laws by the Legislature.

Section 15(1) of the Act requires public employers to transmit their contributions "at intervals designated by the board." This differs from the time stated for the employees to contribute by deductions from his current pay. The Board has not designated the intervals to govern the employer and as a practical matter possibly it may not issue the first call before July 1, 1949. So there is time to appeal to the Legislature. Prudence, however, dictates that the employees' contributions be deducted currently as of the period beginning July 1, 1948.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General.*

**662. Contracts—Plans and Specifications Must Be Carried Out as Advertised—
Otherwise New Advertisement for Bids Must Be Made.**

CARSON CITY, August 10, 1948.

HON. D.W. PRIEST, *District Attorney, Lander County, Austin, Nevada.*

DEAR DUFFY: Your letter of August 6, 1948, reached this office August 9, 1948.

You advise that your Board of Commissioners intends to reconvene August 16 for the recessed meeting of August 5 in order to determine procedure on the problem outlined.

The problem is whether after advertising for bids on a public building referring to plans and specifications on file a contract might be awarded based on pumice blocks rather than concrete blocks, a substantial variance from the specifications referred to.

The answer is in the negative. A new advertisement for bids must be made and the plans and specifications must show precisely what the bidder undertakes to provide.

The governing statute (Chap. 247, Stats. 1947, page 764) was construed to this effect in our Opinion No. 525, given October 10, 1947, to the District Attorney of Clark County. This

Opinion will be in our forthcoming Biennial Report at page 268. Similar rulings were made in our Opinion No. 542 to the Highway Department, November 19, 1947.

The underlying principle is that the public is entitled to the services of the lowest and best bidder and after the bids are opened the opportunity should not be given to fraud or absence of fair competition by altering the specifications and thus indirectly the character of the bid.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General.*

663. Fish and Game—County Game Management Board—Surplus Hatchery Equipment—Disposal of.

CARSON CITY, August 13, 1948.

MR. S.S. WHEELER, *Director Fish and Game Commission, Box 678, Reno, Nevada.*

DEAR BUCK: Your letter of August 6 was received here on August 10, 1948.

You state that one of the counties in Nevada turned certain fish hatchery equipment over to the County Game Management Board on July 1, 1947, after the amendment of the fish and game law in that year.

You inquire whether the County Game Management Board can now sell this same property as surplus or whether such authority remains in the county or in the State Fish and Game Commission.

It is to be assumed that the hatchery was equipped from the proceeds of license receipts and further that there are no outstanding unliquidated contracts relating to hatcheries between the County Commissioners and the State Fish and Game Commission. This observation is made in view of section 50 of the Act (Sec. 3984, N.C.L. 1929) as amended by chapter 147, Stats. 1945, p. 232. Although the old Act, as amended, was repealed in its entirety by chapter 101, Stats. 1947 at page 383 and following, and other provisions substituted in the new Act, contracts in existence at the time of repeal would nevertheless be subject to the 1945 amendment.

If the hatchery equipment is subject to some preexisting contract with the State Fish and Game Commission, then it is the Board of County Commissioners that has the authority to make the sale of the surplus and superfluous equipment.

Otherwise it is our opinion that the County Game Management Board, unlimited by any action by the County Commissioners or the State Fish and Game Commission, is the proper agency to dispose of the surplus hatchery equipment and place the proceeds in the County Fish and Game Fund (Sec. 47). This will be true except and unless the County Game Management Board has submitted a budget for the approval of the State Board, which budget counts on receipts by way of sale of such property. In the latter case the proceeds would be earmarked according to the budget.

The new law expressly gives the State Board control of all property "belonging to the State of Nevada." With that qualification existing it must be presumed that property belonging to the County Game Fund is at the disposal (now) of the County Game Management Board.

The sale itself may be piecemeal at the best price obtainable, either to other counties or to private individuals. If the amount is considerable, a short-time advertisement might invite bids, but the law does not require this.

Very truly yours,
ALAN BIBLE, *Attorney General*.
By HOMER MOONEY, *Deputy Attorney General*.

664. Welfare—Appointment of Guardian—Adoption.

CARSON CITY, August 14, 1948.

MR. WILLIAM E. ROSE, *Director, Division of Child Welfare Services, Room 2,309 North Virginia Street, Reno, Nevada.*

DEAR MR. ROSE: This will acknowledge receipt of your letter dated August 10, 1948, received in this office August 12, 1948.

Your first question is answered by reference to the general statutes providing for the appointment of guardians and prescribing their duties.

Section 9496, N.C.L. 1929, provides that in order to secure the appointment of a guardian any relative of or any person interested in or befriending a minor may file in the District Court a petition setting forth the necessary facts, and praying for the appointment of some designated person as guardian.

Section 9500, N.C.L. 1929, defines the powers and duties of a guardian and declares such guardian shall have the custody of the minor. Section 9527 provides when a guardian may be allowed to resign. The removal of the car and custody of the child from the parent does not, by a provision in the statute, extinguish all parental rights and obligations. *Lessard v. Great Falls Wollen Co.*, 145 A. 782, the appointment of a guardian does not, ipso facto, revoke the parents' right to the custody of the child. 25 Am. Jur. page 42, "The control of a child by a guardian other than the parent will always be subject to such rights of the parents as have not been forfeited or taken away in the child's interest."

As stated in the same volume on page 7, "The court having jurisdiction of a guardianship matter is said to be the superior guardian, while the guardian himself is deemed to be an officer of the court." It is generally held that guardianship of the person is not assignable. When letters of guardianship are granted and the guardian seeks the right to place the minor for adoption the matter should be submitted to the court for approval.

Your second question as to the obligation of the natural parent to take back a child which the parent had released for adoption and the prospective adoptive persons declined to complete the adoption is one of those problematical questions of human relations difficult to solve by means of a precise principle of law.

Our Supreme Court in the case of the application of Grace Foote Schultz for a writ of habeas corpus on behalf of Baby Boy Schultz, case No. 3483, published May 30, 1947, construed that part of section 3, chapter 246, Statutes of 1947, which amended the Act relating to the adoption of children, and provided when a parent or guardian released a child for adoption to an organization, which relinquishment is recognized by law, it shall not be necessary to obtain the permission of the parent or guardian who has relinquished the child. The Court held that the relinquishment in the case was a valid relinquishment and irrevocable by the mother. The dissenting justice held that the instrument was void because the relinquishment at the time of its execution did not contain the name of the organization.

The facts presented in your question are the reverse of those in the foregoing decision, and

there is no statutory provision respecting such contracts for private placement of children as a basis for construction.

The facts in each particular case would determine the nature and validity of the contract. The principle of law covering executory and executed contracts is expressed in 12 Am. Jur. page 507 as follows: “another distinction between an executory and an executed contract is that the former requires affirmative action for its establishment, but the latter remains in force until disaffirmed, the difference being that in the case of an executory contract the burden of proof is on the party seeking to enforce it. While in the case of an executed contract the promisor, if he appears as the actor, must sustain the burden of proof to set aside the arrangement.”

It appears that the experiment of Solomon to determine the woman to whom a child belonged would not solve the problem presented by the question you have submitted.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

665. Real Estate—Surveyor General May Engage in Private Practice—Board to Determine Qualifications.

CARSON CITY, August 16, 1948.

NEVADA STATE REAL ESTATE BOARD, *No. 8 Arcade Building, Reno, Nevada.*

Attention: Ray P. Smith, Secretary-Treasurer.

GENTLEMEN: This will acknowledge receipt of your letter dated August 9, 1948, received in this office August 11, 1948.

You request an opinion as to the interpretation of section 8, chapter 150, Statutes of 1947, relating to the licensing and regulating of real estate brokers. You call particular attention to that part of the section which reads as follows: “Every applicant for a license as a real estate broker shall have actively served as a licensed real estate salesman within the State of Nevada, or elsewhere, for a period of at least six months next immediately preceding the filing of the application for license.”

Your question is directed to the language, “shall have actively served as a licensed real estate salesman within the State of Nevada.” You also ask how this language should be applied to the Surveyor General, an elected State officer, who holds a real estate salesman’s license and now applies for a broker’s license.

We are of the opinion that this is a question of fact to be determined by the Real Estate Board under the authority granted in sections 21, 22, and 23 of the Act which includes the right in the applicant to appeal to the District Court from a decision by the Board. As a State Real Estate Board you have ample authority to inquire into the application of the Surveyor General and to ascertain by means of a hearing whether or not he has actively served as a licensed real estate salesman within the State of Nevada, or elsewhere, for a period of at least six months next immediately preceding the filing of the application for license.

We find no constitutional provisions or statute prohibiting the Surveyor General from engaging in private enterprise. It is true that he must take an oath, as well as file a bond, for the faithful performance of his duties. The fact that such State officer is now an applicant for a real estate broker’s license is valuable to your Board only insofar as it may be pertinent in

determining whether he has in fact actively engaged in the business of selling real estate. Actively served means that such person must devote a considerable portion of his time as a salesman and not merely rely upon making casual sales from time to time. The word active in its usual meaning means energetic, diligent and busy. The Board obviously has full authority to take into consideration all necessary and pertinent evidence to determine whether or not the Surveyor General has actively served as a real estate salesman and, as noted above, it could well order a hearing in the matter.

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

666. Real Estate—State Board—Powers and Duties.

CARSON CITY, August 18, 1948.

NEVADA STATE REAL ESTATE BOARD, *No. 8 Arcade Building, Reno, Nevada.*
Attention: Ray P. Smith, Secretary-Treasurer.

GENTLEMEN: Reference is hereby made to your letter of August 7, 1948, received in this office August 9, 1948, wherein you request the opinion of this office upon the following quoted queries, submitted to you by the Las Vegas Board of Realtors, with respect to the duties and powers of your Board under the State Real Estate Board Act of 1947, i.e., chapter 150, Statutes of Nevada 1947. You inquire as follows:

1. The power and authority of the State Board to affirmatively (and aggressively) act in investigating facts and procuring evidence to use in the application of its own disciplinary powers and/or to present to the District Attorney in any proper case for prosecution.

2. The duty and obligation of the State Board and the power to employ special counsel and/or special investigators to procure facts and evidence and to assist the District Attorney's office in presenting either the law or the facts upon prosecution for violations of the Act.

3. The duty and obligation of the State Board to diligently investigate and prosecute all violations of the Real Estate Act, and to aggressively insist that the District Attorney prosecute violations.

4. The duty and obligation of the State Board to independently initiate investigations of alleged violations when evidence of such violations are brought before the Board in a manner such as the Las Vegas Board members did at the November 1947 meeting.

5. The power of the State Board to subpoena witnesses and duces tecum in connection with investigations in proceedings both before and after formal complaint has been filed and hearing set.

6. The liability (if any) of the State Board or the individual members thereof for failure to act on information when subsequent damage might have been avoided by speedy and affirmative action and for failure to act on other administrative matters such as publication of reports and dissemination of information especially such as would put the general public on at least constructive notice, particularly on the matter of rejection of license for cause

other than failure to pass the required tests.

OPINION

Before answering the foregoing queries we think it apropos to point out that, in our opinion, the Act providing the State Real Estate Board and incorporation therein certain duties and powers for such Board is in fact a police measure designed to protect the public from acts of dishonest realtors by requiring the licensing of realtors after a searching inquiry into the qualifications and character of applicants for licenses provided in the Act. Such inquiry to be conducted by the State board. That it is such a police measure has been held by our Supreme Court in *Whiddet v. Mack*, [50 Nev. 289](#), in a case arising under the prior Real Estate Board Act.

The Act in question, being a police measure enacted pursuant to the police power of the State for the protection of its inhabitants and the duties and powers of the State Board incorporated therein being designed to effectuate such protection, we are of the opinion that such duties and powers are of serious moment and that careful consideration thereof is necessarily incumbent upon the State Board.

In order that the State Board should be fully conversant with the profession and duties of realtors, the Legislature provided in section 6 of the Act that all appointive members of the Board must have been actively engaged in business as real estate brokers within the State of Nevada for a period of at least three years next immediately preceding the date of their appointment. Thus, in effect, the Legislature has provided for the internal policing of the business and profession has provided for the internal policing of the business and profession of realtors by a board fully conversant with the affairs thereof.

Answering Query No. 1. Since the days of the case of *Roney v. Buckland*, [4 Nev. 45](#), at least, it has been one of the canons of statutory interpretation laid down by our Supreme Court that in interpreting a statute the first thing to be ascertained is the ultimate and general purpose of the Legislature in the enactment of the law, and that such purpose must be ascertained from the whole Act itself, and when so ascertained, then every sentence and section of the law should be interpreted with reference to such general purpose with a view to giving it full and complete effect.

The ultimate and general purpose of the Act in question is to provide, pursuant to the police power of the State, for the policing and supervision of the business and profession of realtors so as to insure the members of the public dealing with the realtors that all such dealings will be had with the utmost honest and integrity and carried on in compliance with the law. To that end the Legislature has throughout the entire Act endowed the State Board and its members with very broad and comprehensive supervisory and investigatory powers, even to the extent of empowering the Board to invoke the injunctive powers of the courts whenever the Board believes, from evidence satisfactory to it, that any person has violated or is about to violate any of the provisions of the Act, or any order, license, permit, decision, demand or requirement of the Board or Act. Section 31 of the Act.

Section 20 of the Act provides, inter alia, that “The board may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection herewith, shall make out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either capacity within this state, * * *.”

Section 1 of the Act contains the following provision: “The Nevada state real estate board may prefer a complaint for violation of this section before any court of competent jurisdiction and said

board, collectively and individually and its counsel, may assist in presenting the law or facts upon any trial for a violation of this section.”

Substantially the same provision is contained in section 20 of the Act. Section 1 of the Act further provides: “It is the duty of the district attorney of each county in the State of Nevada to prosecute all violations of this section in their respective counties in which violations occur.” Section 1 of the Act is the section prohibiting any person, etc., from engaging in the business or acting in the capacity of a real estate broker or real estate salesman without obtaining a license therefor.

It is, therefore, most clear that in the administration of the State Real Estate Board Act, that the State Board is vested with full power and authority to, first, upon its own motion to affirmatively Act in investigating facts concerning alleged violations of the law and/or realtor practices under the law, and to procure evidence relative thereto, either for disciplinary purposes as exercised by the board itself, or for the purpose of prosecution in the courts by the District Attorney, or invoking the injunctive powers of the courts and, second, upon the filing with the Board by any person of a verified complaint coupled with or without evidence of violations of the law or practices submitted therewith, to investigate all the facts and circumstances surrounding such complaint and to thereupon exercise its disciplinary powers or submit the matter to the District Attorney for prosecution in proper cases under the Act, or invoke the injunctive powers of the courts as provided in section 31 of the Act.

We are of the opinion that the action of the Board upon its own motion is to be deemed discretionary, dependent upon the nature of the complaints made to the Board or coming to its attention by means other than a verified complaint in writing. On the other hand, upon the filing of a verified complaint in writing, it then becomes the mandatory duty of the Board to investigate the facts, and initiate such further proceedings thereon as facts, circumstances and the law requires for the protection of the public.

Answering Query No. 2. This office has heretofore, in Opinion No. 470, addressed to your Board, held that the Board had the power to employ an attorney or special counsel. Such opinion is here reaffirmed. However, it is our opinion the employment of special counsel lies within the discretion of the Board.

We think that the Board is vested with the power to employ special investigators to assist it in investigation of alleged violation of the law and/or practices of realtors if and when, in the judgment of the Board, such employment is reasonably necessary in carrying out the provisions of the Act in question. Such is the intendment of section 6 of the Act.

Answering Query No. 3. That the State Board is required to exercise due diligence in investigating alleged violations of the law, we think, is beyond question. Such is the intendment of the law in order that its general purpose may be carried out and that the public generally in its dealings with realtors be protected so far as possible. In all cases of violations of the law and/or practices of realtors which are subject to the disciplinary action of the Board it is the duty of the Board to exercise diligence in investigating such cases in applying the disciplinary measures. In cases wherein prosecution lies in the courts, such as the engaging by any person in the business of or acting as a real estate broker or salesman without first obtaining a license therefor, and such Act is brought to the attention of the Board, it thereupon devolves upon the Board to, without undue delay, lay the matter before the district Attorney for prosecution. Whether the board is mandatorily required to aggressively insist that the District Attorney prosecute such violations is beside the question. The law says it shall be his duty to prosecute all violations of section 1 of

the Act, and we must assume that as a public officer the District Attorney will prosecute any other violation of the State Real Estate Board Act of a criminal nature.

Answering Query No. 4. The answer to this query must be in the alternative, inasmuch as we do not have before us the evidence submitted to the State Board at the November 1947 meeting. If the matter submitted to the State Board at such meeting was submitted by means of a verified complaint in writing, then it was the mandatory duty of the State Board to have further investigated the matter and to have examined any and all facts in connection therewith. If the matter was brought to the attention of the State Board in any matter other than by a verified complaint in writing, it was then discretionary with the Board as to the necessity of an independent investigation on the part of the Board. Such is the intendment of section 20 of the Act.

Answering Query No. 5. Section 22 of the Act, is we submit, a complete answer to the query. It is most clear that such section vests the State Board with the power to subpoena all necessary witnesses and require the production of all books, papers and records pertinent to the inquiry or matter before the Board at any time the Board may require them.

Answering Query No. 6. The query, as submitted, is in the abstract and in view thereof is not susceptible of a definite determination as to the liability of the State Board or the individual members thereof by reason of any assumed action or nonaction thereof. Each case wherein a public board or members thereof are charged with committing a tort compensable in damages must stand or fall on the facts of each particular case which must be concrete in character and tried and determined by a Court.

The State Board is a public administrative board performing governmental functions within the purview of the law creating it. We are of the opinion that in the main its duties and powers are at least quasi judicial in character and, save and except as to ministerial duties wherein the Board or its members can exercise no discretion, the liability of the Board and/or its members for a tort or torts compensable in damages fall within the nonliability rule as applied to such boards and the members thereof. This rule is well stated in 42 Am. Jur. 705-709, sec. 357, supported by a multitude of authorities:

The general rule is stated that an administrative officer is not personally liable in a civil action for damages for his error or mistake in making a determination, where he was acting within his jurisdiction, in the honest exercise of his judgment, without bad faith, malice, or corrupt motives, in a judicial or quasi-judicial capacity, or in a capacity which was not merely ministerial but one in which it was his duty to exercise judgment and discretion. The immunity of the officer depends, and in some cases it has been said exclusively to depend, upon the nature of the officer's duty. When duties which are purely ministerial are cast upon officers whose functions are judicial, and the ministerial duty is violated, the officer, although for some purposes a judge, is still civilly liable for such misconduct. The rule of immunity extends not only to a head of a department, but also applies to those subordinate officers who act in his place and stead carrying out the duties of the department. The officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity, but because such immunity tends to insure zealous and fearless administration of the law. The imposition of personal liability for an erroneous decision is inconsistent with the proper exercise of judicial functions, and usually

there exist remedies for error or mistake other than the imposition of liability on the officer. Some cases applying the rule of immunity have pointed out that the duty of the officer is owed not to the individual, but to the public, and there can be no private action for violation of a duty owed to the public.

The rule of immunity protects an officer from liability for a mistake of fact or an erroneous construction and application of the law, or for an error of judgment in the determination of law or fact, including the officer's duties under the law. Therefore, it is not material whether the officer used reasonable care in ascertaining the facts upon which his judgment was founded. Exemption from liability is unaffected by any subsequent reversal or correction of the administrative judgment.

And, see 43 Am. Jur. 86, sec. 274.

In general, parties aggrieved by rulings and orders of one exercising judicial powers must seek to have errors in the proceedings corrected by appeal or exception. In cases where an official or board acting in quasi-judicial capacity within the scope of its authority errs, commonly the law affords an aggrieved party adequate relief by resort to one of the extraordinary writs, and a tort action does not lie where there is otherwise a remedy for the act by mandamus and where the fact was within the officer's jurisdiction. *Jaffarian v. Murphy*, 280 Mass. 402, 183 N.E. 110, 85 A.L.R. 293.

Whenever duties of a judicial nature are imposed upon an officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility, by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for wrong done to him. *Rochester White Lead Co. v. Rochester*, 3 N.Y. 463, 53 Am. Dec. 316; *Wilson v. New York*, 1 Denio (N.Y.) 595, 43 A. Dec. 719.

An officer whose duty is judicial is no more liable for a mistaken construction of an act of Congress than he would be for mistaking the common law or a state statute. *Tyler v. Cass County*, 142 U.S. 288, 35 L. ed. 1016, 12 S. Ct. 225.

In answer to the abstract query as submitted, we are of the opinion that the State Board and/or its members are not liable in damages, save and except in any case where the duty of the Board and/or its members is ministerial only and where no discretion in the performance thereof is granted in the law. And in this connection with respect to the furnishing of information and the giving or publishing of reports and notices, as mentioned in the query, we are of the opinion that if the Board complies with the provisions of section 25 of the Act, then it has fulfilled the mandatory provisions thereof. Section 25 provides:

shall also be mailed by the board *to any person in this state upon request*. (Italics ours.)

The foregoing opinion is written in answer to queries submitted to you by the Las Vegas Board of Realtors. In addition thereto, you submit the following questions:

First, admitting that the Board has the powers to assist in prosecutions arising under the Act as set forth in section 1 of the Act, and admitting that the Board has the power to investigate the actions of any person assuming to act as a broker as provided in section 20 of the Act, is the Board under any mandatory duty to take

any action involving a nonlicensed person?

Second, insofar as an unlicensed person is concerned, is not the exercise of the powers of the Board herein referred to purely discretionary with the Board?

Third, insofar as an unlicensed person is concerned, does not the principal burden of prosecution rest in the office of the District Attorney's office in the prosecution of violators, in your opinion is the Board under any obligation to:

(A) Employ special investigators for the purpose of securing evidence of violations.

(B) To swear to criminal complaints against alleged violators.

Answering first question. Section 20 of the Act provides:

The board may upon its own motion and shall upon the verified complaint of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection herewith, shall make out a prima facie case, investigate the actions of any real estate broker or real estate salesman, *or any person who shall assume to act in either such capacity within this state * * **. (Italics ours.)

It is clear, we think, that the foregoing section imposes the mandatory duty on the State Board, where a verified complaint in writing is submitted to the Board that some unlicensed person is assuming to act as a real estate broker or salesman, to investigate the matter and if a prima facie case is presented to then submit the matter to the District Attorney of the proper county for prosecution. If the Board on its own motion shall have investigated the matter of an unlicensed person assuming to act as a real estate broker or salesman and thereupon it is not satisfied that a prima facie case can be made out, it is then discretionary with the Board whether the matter shall be prosecuted in the courts.

The board shall at least semiannually publish a list of the names and addresses of all licenses by it under the provisions of this act, and of *all applicants and licenses whose license have been refused*, suspended or revoked within one year, together with such other information relative to the enforcement of the provisions of this act as it may deem of interest to the public. One of such list shall be mailed to the county clerk in each county *as a public record*. Such list

Answering second question. This question is answered in the answer to the first question. Also see answer to "Query No. 1."

Answering third question. It is the duty of the District Attorney of the proper county to prosecute any unlicensed person who assumes prosecution rests on him. However, we are of the opinion that this does not relieve the State Board and/or its members from the duty of submitting to their attention through their own investigations or otherwise. This, we think, is an imperative duty of the Board and its members.

Answering fourth question. (A) The employing of special investigators lies wholly in the discretion of the Board.

(B) Section 1 of the Act provides that "The Nevada state real estate board may prefer a complaint for violation of this section before any court of competent jurisdiction * * *." This provision relates to prosecution of persons acting as a real estate broker or salesman. We think that it is discretionary in effect and that a member of the Board is not mandatorily required to swear to a criminal complaint for violation of such provision. Likewise, we are of the opinion that as to other violations of the Act it is not mandatory that a member of the Board swear to a complaint therefor. However, the question as to whom shall swear to criminal complaints is in

the main for the District Attorney to answer. He has the right, we think, to, in his judgment, require the signing of a criminal complaint, nevertheless, in order to expedite prosecutions for violation of the Act, it is his duty to do so when in possession of sufficient facts to so warrant such signing.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

667. Fish and Game—Tax Money Received March 22, 1947, To Be Retained in County Fish and Game Fund.

CARSON CITY, August 30, 1948.

S.S. WHEELER, *Director, Nevada Fish and Game Commission, P.O. Box 678, Reno, Nevada.*

DEAR MR. WHEELER: Your letter dated August 16, 1948, reached this office August 17, 1948.

You enclose a letter from District Attorney Jeppson of Lyon County dated July 13, 1948, addressed to the Game Management Board for Lyon County. You state that the County Game Management Board and your Board are agreed that a sum approximating \$1,500, raised by taxation levied for the County Fish and Game Fund ought now to go to the State Board.

You state that if we so advise the transfer will be made.

The District Attorney's opinion, given to Mr. Hugh Henrichs, Chairman of the Lyon County Game Management Board, on July 13, 1948, is to the effect that "under the wording of the Act this fund will be required to be placed in the State Fish and Game Fund."

As we have hesitated to give an opinion on this subject without consulting with the District Attorney, we had a telephone conversation with Mr. Jeppson today and outlined our views as follows:

Sections 7, 9, 11, 12 and 47 of the new fish and game law of 1947, being chapter 101, pages 349-385, inclusive, cover various phases of this question.

Section 11, at page 354, contains the following provisions:

Upon the effective date of this act, the county commissioners of each of the several counties of the state shall cause to be made an accounting of the fish and game fund of such county, and shall pay over to the state fish and game fund any unencumbered balance disclosed by such accounting.

The effective date of the Act is March 22, 1947. Mr. Jeppson's letter states that at that time the 1947 tax levy for the County Fish and Game Fund had been made. We assume this tax became delinquent on the first Monday in December 1947, and was payable in four installments, the last one falling due on the first Monday in August 1948. There is no precise statement of what must be done with money coming into the county Fish and Game Fund after March 22, 1947. Section 12 of the Act, beginning at page 354, requires the County Game Management Board, immediately upon its first organization (which presumably was immediately after March 22, 1947) to prepare a budget for the remainder of the year 1947. This budget should have mentioned the tax anticipated up to the first Monday in August 1948. If such a budget was prepared and approved by the State Board, the money afterwards collected might well be sent to

the State Fish and Game Fund now. However, whether a budget was prepared for the particular item was omitted or not, the practical effect would be to send this new money to the State Board followed by the State Board allocating it back to the County Game Management Board to be placed in the procedure it is our advice that any new money received from taxes after March 22, 1947, ought to be retained in the County Fish and Game Fund. Rather than go through this useless procedure it is our advice that any new money received from taxes after March 22, 1947, ought to be retained in the County Fish and Game fund under the control of the County Game Management Board.

Section 47 of the Act provides for the placing of sufficient money in the hands of the County Game Management Board to defray its expenses, but makes no mention of the disposition of any income collected locally.

Section 48 provides that all money from licenses shall be sent direct by the County Clerk to the State Treasury to be placed to the credit of the State Fish and Game Fund.

It is quite evident that the Legislature anticipated that all money remaining in the various County Fish and Game Funds should be sent to the State fund and there allocated back to the counties by the State Fish and Game Board. However, they have seemingly overlooked the contingency here presented arising from the fact that income has been received in the county after the effective date of the Act.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

668. Merit System—Supervisor Not Illegally Receiving His Salary.

CARSON CITY, September 3, 1948.

HONORABLE J.P. DONOVAN, *State Controller, Carson City, Nevada*.

DEAR MR. DONOVAN: You have recently submitted to this office the request of Mrs. Esther B. Bromberg that as State Controller you refuse to pay the salary claim of Claude C. Smith as Merit System Supervisor. Mrs. Bromberg has furnished you with a memorandum setting forth her position her position. In brief, it is her contention that you cannot legally pay Claude C. Smith as Merit Supervisor, since he was not appointed from eligible lists as provided for in section 4, chapter 212 of the 1945 Statutes of Nevada. Mrs. Bromberg further contends that even though Claude C. Smith could have been automatically transferred under section 3 of the 1945 law and could have continued as Merit System Supervisor, it was incumbent upon him to refuse or decline an appointment to the State Merit Board and that by failing to do so he has disqualified himself as a Merit System Supervisor.

It is the opinion of this office that Claude C. Smith is not legally receiving his salary as Merit System Supervisor, and that the contentions made by Mrs. Bromberg are not sufficient legal grounds for your refusal to allow his claim.

The Merit Examination Board was first created under chapter 129, 1937 Statutes of Nevada. Subject to the provisions of this chapter, regulations for merit system and personnel administration were promulgated by the then Governor of the State, the Labor Commissioner, and the three members of the Merit Examination Board. These regulations permitted the appointment of a Supervisor of Examinations with certain prescribed qualifications. These

regulations were promulgated pursuant to a law in October 1937, and the Board appointed Claude C. Smith as a Supervisor of Examinations, a position which he has held under succeeding legislative Acts down to and including the present date. The 1941 Legislature, in chapter 59 reenacted verbatim the provisions of the earlier law creating a Merit Examination Board and providing for a merit system of personnel administration within the Unemployment Compensation Division and State Employment Service of the State of Nevada. This Merit Examination Board has by later legislative Acts been extended to other departments of the state. In 1945, by chapter 212, an independent Act provided for the creation of a State Merit System of personnel administration for various designated departments. This Act became effective on March 26, 1945, and it is the belief of this office that under section 3 of that law, which provides for the transfer of functions and personnel from the older Merit Examination Boards to the newly created State Merit Board, that Claude C. Smith was automatically blanketed in as a Supervisor of Examinations operating under the 1945 law under the new title of Merit System Supervisor. In our opinion section 3 permits of no other possible conclusion. It reads as follows:

SEC. 3. *Transfer.* The functions heretofore exercised by the merit examination board established under the employment security administration law (Stats. 1941, chapter 59) from and after the effective date hereof, shall be exercised by the state merit board. All funds, accounts, records, papers, files, registers, and equipment of whatsoever description, made available or belonging to, or utilized by, said merit examination board, are hereby transferred and made available to, and shall become a part of, the state merit system under the state merit board. All personnel employed by said merit examination board are hereby transferred to said state merit board, without other change in their status or compensation under the merit system.

Thus, as of March 26, 1945, Claude C. Smith was legally constituted member of the personnel formerly employed by the Merit Examination Board, and as such he was entitled to be transferred to the new State Merit Board without change in status or compensation. Such provision of blanketing in all employees on the takeover under a new Act is a standard legal provision.

Because of the fact that Claude C. Smith was blanketed in under the provisions of this section, it is our opinion that it was not necessary for the Board to appoint him from an eligible list, since he already held the very office and performed the very functions given to the Merit System Supervisor under the 1945 law.

It is the contention of Mrs. Bromberg that no register of Merit System Supervisor was ever created, nor were any examinations ever given for the position of Merit System Supervisor. As noted above, in view of the fact that he was transferred by virtue of law, no such examination was required. In this connection it should be very clearly pointed out that when and if a vacancy occurs in the position of Merit System Supervisor, it would in our opinion be necessary in the future to create an eligible list and appoint such supervisor from that list.

A study of the record shows that Claude C. Smith was blanketed in as a Merit System Supervisor under section 3 and he was thereafter appointed as a member of the State Merit Board.

It is Mrs. Bromberg's next contention that the Merit System Supervisor could not at the same time be appointed as a member of the State Merit Board. We find nothing in chapter 212 of the 1945 law which prohibits one person from serving as both Merit System Supervisor and as a

member of the State Merit Board. There is nothing within our State Constitution, nor do we know of any other general State law, which forbids such practice, and, accordingly we cannot as a matter of law decide that the holding by the same individual of these two positions is an illegal exercise of power. If an appeal was to be taken from the decision of the Merit System Supervisor to the State Merit Board, then the Legislature has provided the appellant with adequate remedy as to any possible incompatibility by providing in section 4 as follows:

The board shall have the power and authority to establish rules and regulations for the holding of merit examinations and the hearing of personnel appeals, to hear such appeals, or to establish impartial bodies to conduct such hearings when any member of the board is disqualified, or for other reasons.

In accordance with the foregoing, we repeat that in our opinion Claude C. Smith's claim is a proper legal charge for services rendered as Merit System Supervisor.

Very truly yours,

ALAN BIBLE, *Attorney General.*

669. Bonds—Clark County Airport—Valid Obligations.

CARSON CITY, September 9, 1948.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

Attention: Hon. Geo. W. Friedhoff, Chairman.

GENTLEMEN: This will confirm my recent oral conversation with you concerning the validity of the Clark County airport bonds.

For some reason the Nevada Industrial Commission purchased the Clark County airport bonds, took delivery of the same, and made payment therefor before it requested any opinion of this office as to the validity of such bonds. After making the purchase, Mr. Sullivan, the then Chairman of your Commission, requested our opinion as to the bonds, and particularly directed our attention to the fact that the bonds were in the nature of callable bonds.

Under date of November 7, 1947, we wrote an Opinion calling attention to a number of changes which we thought advisable in the form of the bond. We likewise drew attention to the fact that the bonds were callable in nature and that if it was the desire of the Commission to have a bond that was not callable the language "on or before" certain specified dates should be changed.

Since that time you have written to this office asking further advice as to the correction of the bond, which matter has been called to the attention of the Clark County authorities on several occasions. As we understand it, the Clark County authorities take the position that the bonds have been delivered and payment received therefor; that the bonds are valid, legal obligations; and that as a county they do not feel justified in incurring the expense of reprinting the bonds so as to eliminate the callable feature.

Although it is our opinion that the changes suggested in our letter of November 7, 1947 would have made the bond more nearly conform with the transcript, it is nevertheless our opinion now as it was then that the bonds are legal, valid and binding obligations of Clark County.

Whether or not you desire to insist upon the correction of the words "on or before" so as to make the bonds noncallable, is a matter of policy for your final determination. We believe that the

bonds, even though callable, are still just as valid and binding obligations of the county as they would be if the bonds were made noncallable.

You have likewise advised us that since the delivery of the bonds purchased by the Commission, Clark County has met all of its interest payments and has redeemed \$15,000 worth of bonds at maturity.

As further authority for our holding that the bonds are legal, valid obligations of Clark County, you are cited the cases of *Commissioners of Johnson County v. January*, 94 U.S. 202; *Comanche County v. Lewis*, 133 U.S. 198; *Atchison Board of Education v. DeKay*, 148 U.S. 591; *Rees et al. v. Olmstead*, 135 F. 296; *Mercer County v. Eyer*, 1 F(2) 609; *State Bank of New York et al. v. Henderson County, Ky.* 35 F(2) 859.

The bond warrants and certifies that all acts, conditions and things required by the Constitution and laws of the State of Nevada to exist, happen and be performed, precedent to and in the issuance of this bond, have existed, happened and have been performed in regular and due form, time and manner as required by law, and that the amount of this bond, together with all other indebtedness of said county does not exceed any constitutional or any statutory limitations of indebtedness. The bonds were issued pursuant to a vote of the qualified electors of Clark County at an election duly called and held as required by statute.

It is clear to us that although the printed form of the bond could have been more clearly and accurately drawn, it nevertheless evidences a valid, legal binding obligation of Clark County.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

670. Nevada Hospital for Mental Diseases—Board of Commissioners Has Authority to Contract for the Care of Tubercular Patients Outside the State.

CARSON CITY, September 9, 1948.

SIDNEY J. TILLIM, M.D., *Superintendent, Nevada Hospital for Mental Diseases,*
P.O. Box 2460, Reno, Nevada.

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated August 26, received in this office August 28, 1948. You request advice as to the authority of the Board of Commissioners to contract with a State mental institution of a neighboring State for the purpose of placing psychotic patients with active tuberculosis when the presence of such patient constitutes an emergency hazard to the health and welfare of other inmates, and whether the cost of transportation and care may be drawn from the funds for general support of the hospital.

Where there are no facilities at the hospital for the isolation of such a patient, and the patient was committed to the hospital at the expense of the State, we are of the opinion that the Board of Commissioners has authority under the statute to contract for the care of such a patient outside under the statute to contract for the care of such patient outside the State and pay the reasonable expenses from the Hospital General Support Fund.

Section 3509, N.C.L. 1929, gives the Board of Commissioners for the hospital full power and exclusive control of the inmates of the hospital, also authority for the furnishing of all needful supplies, provisions, and medicines for the care of the inmates, and full charge of all other matters connected with the institution.

Section 3511, N.C.L. 1929, makes provision for the commitment to the hospital of persons adjudged to be insane and cared for at the expenses of the State when such person has no property and no kindred within certain degrees of sufficient means and ability to pay for the care of such patients.

The authority granted the Board under section 3509, N.C.L. 1929, is broad enough to permit the taking of necessary measures to guard the health and welfare of the inmates of the hospital without specifically providing for such particular cases.

A rule of construction approved in *State ex rel. Hinckley v. District court*, 51 Nevada 343, holding that whenever a power is given by statute everything lawful and necessary to the effectual execution of the power is given by implication of law, should be applied to the statute governing the Board of Hospital Commissioners.

Where a person is committed to the hospital at the expense of the State, and such person is infected with active tuberculosis to the extent of being a menace to the inmates, and there are no facilities for the isolation of such patient, it appears that the Board has sufficient authority to arrange for the care of such patient outside the State and at the expense of this State.

The only fund available for such payment appears to be the appropriation to the hospital for general support and extra medical care.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

671. Welfare—City of Sparks Has Right to License Foster Homes for Revenue Purposes.

CARSON CITY, September 9, 1948.

MR. WILLIAM E. ROSE, *Director, Division of Child Welfare Services, 309 North Virginia Street, Reno, Nevada.*

DEAR MR. ROSE: This will acknowledge receipt of your letter of August 25, received in this office on August 26, 1948, in which you ask for an opinion as to the power of the city of Sparks to license orphans homes under a city ordinance.

The foster homes Act, sections 1061-1061.04, N.C.L. 1931-1941 Supp., requires the licensing of foster homes by the Division of Child Welfare Service after investigation by the State Welfare Department. However, no fees are required for licenses issued by the State Board, although a penalty is provided for noncompliance with the Act.

The charter of the city of Sparks relating to the power to license all trades, professions and callings, is found in 1927 Statutes of Nevada, beginning with page 19. The charter provisions are very broad and we are of the opinion that under such provisions the city of Sparks would have the right to license foster homes for revenue purposes even though a State license is a prerequisite requirement.

Such seems to be the general law and we believe that the problem is governed in this State by the case of *Ex parte Siebenhauer*, [14 Nev. 365](#).

As you know, there will be a session of the Nevada Legislature within a very short time, and the problem which you have submitted in your letter might well be presented to the Legislature for clarification.

Very truly yours,

ALAN BIBLE, *Attorney General*.

672. Nevada Hospital for Mental Diseases—Ownership of Piano Not Vested in Hospital.

CARSON CITY, September 13, 1948.

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

DEAR DR. TILLIM: This will acknowledge receipt of your letter dated September 9, received in this office September 10, 1948.

You request advice relative to a demand by Mrs. Caroline G. Matthews for the return of a piano which she installed in the hospital for the use of a patient and has been in the hospital since 1944.

You submit correspondence to make clear the present status.

It appears, from the correspondence that the ownership of the piano is vested in Mrs. Matthews, who purchased the same from the Bell Piano and Organ Company in Reno on a contract dated May 15, 1944, and that she now holds the receipted contract made out to her.

On August 29, 1946, Mrs. Matthews wrote to you stating that the purchase price of the piano was \$525 and aside from donations by a few friends amounting to a little over \$100, she paid the balance of around \$400. In the same letter she offered to sell the piano to the hospital.

The copies of letters from the hospital during the year 1946 show that the offer to sell was not accepted by the hospital.

The letter from Mrs. Matthews dated August 20, 1948 withdraws her offer to sell the piano, and advises that she will remove the same at a time convenient to you.

Your letter of August 25, 1948 is to the effect that the Board would be willing to pay a reasonable price after due deductions of the contributions made by others toward the purchase of the piano, and further that you were "willing to consider a reasonable price to retain the piano on the basis of your own investment of approximately \$400."

Mrs. Matthews on September 7, 1948 refused to accept your offer and attempted to repossess the piano which you refused to release.

The correspondence shows that the offer to sell to the hospital was continued from August 29, 1946, to August 20, 1948, at which the time the offer was revoked. The right to revoke an ordinary offer before acceptance is unquestioned, see 12 Am. Jur. page 527.

The offer made by you on August 25, 1948 was rejected by Mrs. Matthews and was therefore terminated and cannot create a contract. It appears that Mrs. Matthews can show title to the property, and it is not essential that title be absolute. This is true even though a third person may have some interest in the property. 94 A.L.R., page 941.

We therefore advise that the piano be released to Mrs. Matthews according to her demand of September 7, 1948, upon satisfactory showing that she holds a receipted contract from the Bell Piano and Organ Company of Reno, Nevada, vesting title in her.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

673. Elections—Democratic Candidates for Assembly Not Entitled To Be Placed on Ballot to Fill Vacancies on Republican Ticket.

CARSON CITY, September 13, 1948.

MR. ROBERT E. JONES, *District Attorney, Las Vegas, Clark County, Nevada.*

DEAR MR. JONES: Receipt is hereby acknowledged of your letter of September 10, 1948, wherein you request the opinion of this office on the following questions:

Assembly District No. 2 of Clark County is entitled to send four representatives to the State Assembly. Three Republicans filed their nomination as Republican candidates, and seven Democrats also filed. Our County Clerk is in doubt as to how the November election ballot shall be prepared, that is whether the ballot shall list the names of the three Republicans and five Democrats, or whether only four or three Democrats shall be listed.

Would the Democratic candidate who received the highest number of votes in the primary election be virtually elected to that office by reason of the fact that only three Republican candidates filed?

It is the opinion of this office that the question as to the number of Assembly candidates to be placed upon the November election is governed by the case of *Ex rel. Cline v. Payne*, 59 Nevada 127. The Supreme Court in this case construed section 2425, N.C.L. 1929, 1931-1941 Supplement, with respect to an analogous situation then existing in Clark County with respect to the number of Assembly candidates to be placed upon the November election ballot.

The opinion of the Court shows that it decided that in the *Cone* case four Democratic candidates for the office of Assemblyman, plus the one Republican candidate for the same office, should be placed upon the November election ballot. Section 2425 as construed by the Supreme Court, in our opinion, requires that the same construction now be placed on such law and that at the coming November election four Democratic candidates and three Republican candidates for the office of Assemblyman shall constitute such November election ballot for such office.

In reply to the second query, please be advised that the Democratic candidate who received the highest number of votes in the primary election did not by reason thereof necessarily be virtually elected to the office of Assemblyman by reason of the fact that only three Republican candidates filed. Such Democratic candidate stands in the same relation in the November election as the other three Democratic candidates.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

674. Elections—Polling Places Cannot Be Established for the General Election at Points Beyond the Boundaries of a Particular Voting Precinct.

CARSON CITY, September 14, 1948.

HONORABLE HAROLD O. TABER, *District Attorney, Reno, Nevada.*

DEAR HAROLD: This will acknowledge receipt of your request of September 9, 1948 in which you ask whether or not polling places can be established in the city of Reno for the general election at points beyond the boundaries of a particular voting precinct.

It is our opinion that this cannot be done under the present Nevada statutes.

Although it may be desirable to have a consolidation of voting places in the city of Reno, we believe the authority therefor must be had through an enactment of the Legislature.

Section 2439, N.C.L. 1929, is specific upon the point that the Board of County Commissioners shall so arrange and divide the voting places in the respective counties so that no greater number than 400 voters shall vote in one precinct. It is our opinion that such language means that the voters shall vote within the boundaries of such precinct, and that it would be of questionable validity to provide that they vote elsewhere after the voting precinct has been established, as established this year in accordance with the statutes of this State. Among other things, such practice would raise the question as to whether the change in polling places particularly without the precinct, would create a situation where defeated candidates would have ground for complaint in that the voters were not accorded the right to vote within their own particular precinct.

It is interesting to note that in the case of *Stinson v. Sweeney*, 17 Nevada 309, the Supreme Court held "each elector must be registered and vote in the election precinct where he resides."

It is also stated in 18 Am. Jur. 251, sec. 113, that "the polling place should be selected prior to the date fixed for the election, notice thereof should be given to the voters of the district, and the election should be held at the place so designated."

It further held in section 114, supra, that "statutory provisions relative to the place of holding elections are generally considered to be mandatory and it is a firmly established general rule that the holding of an election at a place other than the one regularly appointed is void as regards the votes cast at such place."

A somewhat analogous situation was presented to this office in 1940, whereby the inquiry was presented as to whether in certain precincts in White Pine County registered voters could be divided into two classes or series: those whose names began with the letter "A" and ending with the letter "M" to vote at one polling place, while those whose names began with the letter "N" and ending with the letter "Z" to vote at another polling place within the same precinct. It was the opinion of this office that such could not be legally done, upon the ground that section 2439, N.C.L. 1929, in fact required the Board of county Commissioners to establish election precincts and define the boundaries thereof, and that it also provided that such Board shall arrange and divide the voting places in the respective counties so that no greater number than 400 voters shall vote in one precinct. (See Opinion A-64, June 10, 1940, Report of the Attorney General, 1938-1940.)

Very truly yours,

ALAN BIBLE, *Attorney General*.

675. Public Schools—County Commissioners Have No Authority to Separate One Component Part of Established Consolidated School District, Establish Such Component District as Single District for Purpose of Immediate Joining With Adjacent District in Same County.

CARSON CITY, September 21, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated September 10, 1948,

received in this office September 11, 1948.

You request an opinion as to the authority of the County Commissioners to separate one component part of an established consolidated school district, establish such part as a separate school district, and provide for the immediate consolidation of this separate district with an adjacent school district in the same county to form a new consolidated district.

We are of the opinion that there is no authority granted in the statute under which the County Commissioners could separate one component district of consolidated school district, establish such component district as a single district for the purpose of the immediate joining of such district with an adjacent district in the same county in order to form a new consolidated district.

Section 4 of chapter 6 of the 1947 School code defines a consolidate school district as follows:

“A combination of two (2) or more school districts wherein component school districts completely lose their separate identities, except for apportionment purposes, and merge into one (1) enlarged district with a single board of trustees.”

It appears that Consolidated District No. 4 is an established district within the above definition.

Chapter 11 of the School Code provides the method for the dissolution of any consolidated school district when such district has no outstanding bonded indebtedness.

Section 67 of the chapter provides for a petition of a majority of the registered electors of such district asking that the consolidated district be dissolved or disorganized. The petition shall state into how many and into what school districts the said consolidated district shall be divided, and give the names and boundaries of the new school districts. Upon receipt of such petition the Board of County Commissioners shall cause to be published in a newspaper of general circulation in the county a notice setting forth the facts alleged in the petition and set a time at the next regular meeting of the Board for a hearing on the petition. If a majority of the Board is satisfied that a majority of the registered electors of said consolidated district have signed the petition and that it is otherwise regular, the Board shall grant the petition and make the necessary order to dissolve the district. A certified copy of such order is then filed with the Superintendent of Public Instruction. The Superintendent then provides for the calling of an election of trustees in the separated districts to serve until the next regular election of school trustees. All component school districts formed as provided in the chapter shall be governed by and shall have all the rights and privileges conferred upon other school districts by the general laws governing public schools in the State.

Section 31 of chapter 6, Statutes of 1947, defines a school district as any single school district not combined in any way with any other school district. The chapter provides how school districts may be organized. Section 44 provides that no school district shall receive any portion of the public school moneys in which district there was not taught by a legally qualified teacher a public school for a term of at least six months of the school year ending on the last day of the preceding June, with at least three resident children between the ages of six and eighteen years in actual attendance for as much as 100 days, except when such school district is a newly organized district.

The section then provides when a new district is formed by the division of a district theretofore established, such new district shall be entitled to a share of all school moneys to the credit of the old district at the time such division is made and based upon the proportion that the number of children of school age residing within the new district bears to the total number of school children residing within the old district immediately prior to the effective date of such

division.

The school districts formed as provided in chapter 11, after the dissolution of a consolidated district, would not come under the exception made for newly organized districts. New districts created from an old district, under section 35, chapter 6, require a different procedure than that to dissolve a consolidated district. It is not plain from the language in chapter 6 or chapter 11 the minimum requirement as to resident children to maintain the new district formed by the division of an old district or a component district formed after the dissolution of a consolidated district. The general law governing the qualifications for the existence of a school district would apply.

Upon the dissolution of a consolidated district the component district separated from the consolidation would become a single school district and in order to join with an adjacent district to form a new consolidated district the procedure defined in chapter 9 would have to be followed.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

676. Fish and Game—Proper Search and Inspection of Warehouses and Lockers Will Be Upheld.

CARSON CITY, September 21, 1948.

MR. DON D. ATKIN, *O.P. Skaggs Store, 508 Nevada Highway, Boulder City, Nevada.*

DEAR SIR: Receipt September 14, 1948, is acknowledged of your letter dated September 11, 1948.

You inquire whether it is lawful for a State Game Warden to search the respective lockers in your locker plant rented to customers for the storage of food (presumably fish and game among other commodities) during the month of September or at any time, without a search warrant.

The opinions of this office are required to be given to State and county officers alone. However, inasmuch as you say you are inquiring for the State Game Warden also, we advise as follows:

Chapter 101, Statutes of 1947, is a new Fish and Game Act complete in itself and contains all pertinent to this inquiry.

Section 10 of the Act gives the State Board full general powers to enforce its provisions.

Section 39 reads as follows:

The state fish and game commissioners, the members of the Nevada state police, and every fish or game warden throughout the state, and every sheriff and constable in his respective county, is and hereby authorized and required to enforce this act and to seize any game or fish taken or held in possession in violation of this act, and he or they shall have full power and authority and it shall be the duty of every such officer, with or without a warrant, to open, enter, or examine all camps, wagons, cars, automobiles, stages, tents, packs, warehouses, stores outhouses, stables, barns, and other places, boxes barrels, baskets, and packages where he has reason to believe any fish or game taken or held in violation of any of the provisions of this act is or are to be found, and to seize the same; and to seize and hold for evidence only any fish or game so found and any

guns, ammunition, traps, snares, tackle, or other illegal devices or equipment, when it appears that a violation of this act has occurred; *provided*, that a dwelling house actually occupied can be entered for examination only in pursuance of a warrant.

It will be observed that this section does not require a search warrant except for a dwelling house actually occupied.

The question whether fish or game are taken or held in violation of the Act is given some light by sections 65 and 87. Section 65 outlines a procedure for obtaining a permit to keep game at home or in a "licensed warehouse." Section 87 also provides for a permit to keep fish or game for consumption not more than six months after the closed season begins, but in this event "any state warden shall have authority to examine the fish or game so held."

The constitutional right to immunity from unreasonable searches and seizures is jealously guarded by the law and by the courts. When, however, a practice is considered "illegitimate," such as the depletion of the fish and game or other natural resources, or such practices as dealing in liquors or gambling so that a license or permit is required for exceptions to the rule, it is the theory that by accepting a permit or license the favored party consents to reasonable searches and seizures at reasonable times by way of inspection. This waiver does not extend to dwelling houses nor to visitorial powers exercised in an arbitrary way. Even in the case of a "licensed warehouse" proper search and inspection will be upheld.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

cc: S.S. Wheeler, Director, Fish and Game Commission, Reno.

677. Corporations—The Most Worshipful St. Andrew's Grand Lodge A.F. and A.M. Scottish Rite of California Is Not Entitled to File and Receive Certificate of Qualification.

CARSON CITY, September 22, 1948.

HON. JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

DEAR MR. KOONTZ: This will acknowledge receipt of your letter dated September 3, 1948, submitting copies of articles of incorporation of The Most Worshipful St. Andrew's Grand Lodge A.F. and A.M. Scottish Rite of California, a California corporation, which have been submitted to you for filing.

You request an opinion from this office as to whether or not the same may be file din your office and a certificate of qualification issued by your office, in view of sections 4460-4463, N.C.L. 1929.

We are of the opinion from an analysis of the statutes providing a general corporation law, and the provisions of sections 3276-3281, and sections 4460-4463, N.C.L. 1929, that the fraternal order in question, as shown on the fact of its incorporation papers, is not entitled to file the same and receive your certificate of qualification under the general corporation law of this State.

Section 1600, 1929 N.C.L., 1941 Supp., as amended by chapter 124, Statutes of 1945, which provides to whom the provisions of the Act relating to corporation shall apply, contains the following language: "* * * shall apply to and govern all insurance companies, mutual fire

insurance companies, surety companies, express companies, railroad companies, and public utility companies now existing and heretofore formed under any other act or law of this state; subject, however, to special provisions concerning any class of corporations inconsistent with the provisions of this act, in which case such special provisions shall continue to apply. Neither the existence of corporations formed or existing prior to the enactment of this act, nor any liability, cause of action, right, privilege or immunity validly existing in favor of or against any such corporation at the time of the enactment of this act shall be in anyway affected, abridged, taken away, or impaired by its enactment, * * *.”

Section 4460, N.C.L. 1929, provides: “No person, society, association, or corporation shall assume, adopt or use the name of a military, ex-military, patriotic, benevolent, humane, fraternal or charitable organization, incorporated under the laws of this or any other state, or of the United States, or a name so nearly resembling the name of such incorporated organization as to be a colorable imitation thereof, or calculated to deceive persons not members, with respect to such corporation. IN all cases where two or more such societies, associations, or corporations claim the right to the same name, or to names substantially similar, as above provided, the organization which was first organized and used the name, and first became incorporated under the laws of the United States or of any state in the Union, shall be entitled in this state to the prior and exclusive use of such name, and the rights of such societies, associations or corporations, and of their individual members shall be fixed and determined accordingly.”

The Act to incorporate the Grand Lodge of Free and Accepted Masons, the Grand Lodge of the Independent Order of Odd Fellows, and their subordinate lodges, in this State was approved March 3, 1865. Section 1 (Section 3276, N.C.L. 1929) provides that the grand lodges and their subordinate lodges shall be deemed bodies corporate and politic—the grand lodges from the date of their organization and the subordinate lodges from the date of their charters from their respective grand lodges.

Section 1841, N.C.L. 1929, which provides for the copy of charters to be filed with the Secretary of State of every corporation organized under the laws of another State, which shall enter the State for the purpose of doing business therein, does not directly refer to fraternal organizations.

The Secretary of State may consider the right of the corporation as shown on the face of its articles and be governed by the statute applicable in the particular case without violating the rule adopted in *State v. Brodigan*, 44 Nevada 212, to the effect that the discretion to be exercised by the Secretary of State does not extend to the merits of an application for incorporation.

“Generally, such officer has no discretionary power to look beyond the face of the incorporation papers, and to determine from matters outside of such papers whether or not to file the papers.

He cannot consider extraneous matters.”

The amended articles of incorporation of The Most Worshipful St. Andrew’s Grand Lodge A.F. and A.M. Scottish Rite of California, on page 2, contains the following language: “* * * and which was formed in the United States in 1905 with full rite and warrants of authority to affiliate with all regular A.F. and A. Masons scattered over the face of the earth, regardless of creed or color.”

Section 1 of the Act relating to corporations, section 1600, 1929 N.C.L., 1941 Supp., as amended in 1945, provides that the Act shall apply to and govern corporations, subject to special provisions concerning any class of corporation inconsistent with the provisions of the Act, in which case such special provisions shall continue to apply, and that any right existing shall not be

affected, abridged, taken away or impaired.

The Act of 1865 (section 3276, N.C.L. 1929) grants a charter to the Grand Lodge of Free and Accepted Masons, and their subordinate lodges from the date of their charter from the Grand Lodge.

Section 4460, N.C.L. 1929, protects the Grand Lodge and its subordinate lodges by prohibiting the use of the name, or a name so nearly resembling the same as to be colorable imitation thereof, or calculated to deceive persons not members. The organization which was first organized and first became incorporated shall be entitled in this State to the exclusive use of such name and the rights of such organization shall be fixed and determined accordingly.

The articles of incorporation offered for filing show on the fact thereof a claim of authority to affiliate with all regular A.F. and A. Masons which would indicate that such lodge was subordinate to the authority of the Grand Lodge of Free and Accepted Masons of Nevada, and as a subordinate lodge would be governed by the provisions of sections 3276-3281, N.C.L. 1929.

The exceptions in the Corporation Act reserving the rights of corporations established under special provisions of law and the statutes dealing specifically with fraternal organizations is not such extraneous matter that generally cannot be considered by the Secretary of State. These statutes belong to the very principle and intent of the law governing such matters, and will warrant the Secretary of State in refusing to file the articles of incorporation of The Most Worshipful St. Andrew's Grand Lodge of A.F. and A.M. Scottish Rite of California.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

678. Public Schools—Trustees of Elementary School Districts May Use Balance Remaining in District High School Fund for the Transportation of High School Pupils to Attend a High School in the Same County.

CARSON CITY, September 27, 1947.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated September 11, 1948, received in this office September 13, 1948.

You request an opinion as to the authority of the Board of Trustees of an elementary school district to use the money remaining in a District High School Fund which appears as a balance in such fund, after the district high school had ceased to exist by operation of law, for the purpose of transporting pupils in such elementary school district who are eligible to attend high school to a district high school in the same county. The number of eligible pupils is less than the number required to reestablish the district high school.

We are of the opinion that the trustees of the elementary school district may, with the approval of the Deputy Superintendent of Public Instruction, use such balance in money for the transportation of the high school pupils to attend a district high school in the same county.

Section 50 of the School Code provides when certain school districts may be abolished by the Board of County Commissioners, and section 51 provides that the funds of such abolished district shall revert to the County Reversion School Fund. Sections 151 and 152 provide the

method of establishing a District High School Fund. There is no provision in the statute which directly refers to the reversion of a balance in a District High School Fund when the school is abolished.

Section 182 provides for the reversion of district school funds after certain deductions are made. This section contains a provision that it shall not apply so as to remove from any school district any school district money derived from any source other than by apportionment from the State fund or county fund.

It appears that the district high school in question ceased to exist because of a lack of the requisite number of high school pupils in the district. There is not at this time the requisite ten pupils of high school age in the district to establish a district high school, but there are five or six pupils in the school district qualified to attend high school, and a balance of about \$5,000 in this District High School Fund. The trustees of the district high school are the trustees of the elementary school district as provided by statute. While there is now no district high school there are children in the district qualified to attend high school.

Section 298 vests the Board of trustees with reasonable and necessary powers, not conflicting with the laws of the State, as may be requisite to attain the ends for which the schools are established.

The elementary school district in question now has children qualified to attend high school and the only high school available is situated in another district in the county. The question arises as to the authority of the trustees to expend the money remaining in the District High School Fund to pay for the transportation of these children to the available high school.

Section 160 provides the manner in which transportation may be furnished. Subsection (a) and (b) provide for an election and the levy of a tax. Section 161 provides: "In any and all cases other than those mentioned in subsections (a) and (b) of section 160 of this school code, the furnishing of transportation to such pupils or students shall be entirely optional with and at the discretion of the school board of the district or county affected; *provided, however*, that in districts of the second class any transportation not provided on the basis of an election or petition described in the above-mentioned subsections (a) and (b) of the immediately preceding section must be approved, in writing, by the deputy superintendent of public instruction of the district involved."

Section 87 would govern the attendance of the children in the convenient school and the agreement between the trustees of the respective districts.

There is nothing in the statute, other than the provision in section 182, that would apply to any balance remaining in a District High School Fund.

It appears, therefore, that the use of the balance in the District High School Fund for the transportation of pupils to a district high school in the same county, by order of the trustees of the elementary school district with the approval, in writing, of the Deputy Superintendent of Public Instruction for the district involved, would not be in conflict with the laws of the State.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

679. Insurance—Underwriters, Necessity of License for.

CARSON CITY, September 27, 1948.

HONORABLE JERRY DONOVAN, *Insurance Commissioner, Carson City, Nevada.*
Attention: Mr. G.C. Osburn, Deputy.

DEAR MR. DONOVAN: This will acknowledge receipt of your written request relative to the application from a life insurance company for the approval of a policy form to be issued through a separate underwriting agency. You call attention to the distinction in insurance practice between underwriter and underwriting business by fire and casualty companies. Underwriters are not defined in the statute.

The general definition of underwriters is a membership corporation created by statute. Membership is composed of fire insurance agents created by statute. Membership is composed of fire insurance agents, and its purpose is to establish uniformity among its members in contracts or policies of insurance, and disseminate valuable information relative to insurance.

The insurance law of this Stat followed, generally, the insurance code of the State of Illinois. That code carries provisions relative to underwriters transacting business through Lloyds, and requires a deposit of cash or securities applicable to companies transacting the same kind of business.

There is no provision in the Nevada insurance law that directly applies to underwriters, with the exception of section 3556.59(f) which provides for an annual license fee of \$25 to each underwriter's agency for each company represented in such agency.

Article 11 applies to life insurance companies, but there is nothing in this article relative to a policy form issued through a separate underwriting agency.

If an insurance company wanted to appoint agents in the State to represent an underwriting agency, or permit the underwriting agency to appoint agents, the underwriters would have to be licensed.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

680. Public Utilities—Power and Telephone Companies—Franchise—Application of State Law.

CARSON CITY, September 27, 1948.

HONORABLE ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. JONES: This will acknowledge receipt of your recent letter in which you request an opinion from this office regarding the extent to which the two percent tax provided for under sections 6163-6166 and 3183-3195, N.C.L. 1929, applies to power and telephone companies operating in Clark County.

You submit the following questions:

1. Do the statutes above referred to empower the County Commissioners to grant franchises covering operations within the limits of incorporated cities in the county as well as covering territory outside of incorporated cities?
2. Would the utility companies be required to pay the tax on profits from their operations inside of incorporated cities as well as outside of incorporated

cities?

3. How would this revenue be distributed among the various school districts?

For instance, the only power company within Educational District No. 1 in Clark County, which embraces generally the Moapa and Virgin Valleys at Overton, Bunkerville and Mesquite, is a publicly owned power company organized pursuant to the laws of the State of Nevada. The Southern Nevada Telephone company and the Southern Nevada Power Company do not operate within Educational District No. 1. Would this school district be entitled to participate in the benefits of the 2 percent profits tax?

4. Would the statutes above referred to apply to the Las Vegas Land and Water Company, a privately owned corporation supplying domestic water to the city of Las Vegas, whose operations are wholly within the city limits? Likewise, would the law apply to such companies as the Las Vegas Gas Company which has operations both in the city of Las Vegas and outside of the city limits?

We are of the opinion, in answer to the first question, that there is no authority in the March 23, 1909 Act, sections 3183-3195, N.C.L. 1929, under which the county Commissioners may grant a franchise covering such operations within the limits of incorporated cities.

Second question. The companies would pay the tax on operations in the county and in unincorporated towns. The tax within incorporated cities would depend on the provisions of the franchise granted by the incorporated city.

Third question. The statute provides that the tax shall be paid for the benefit of the school fund of such county. This tax would be distributed to the various school districts regardless of the location of the operations in any one district. The publicly owned utility would not be subject to the tax.

Fourth question. The statutes would not apply to a privately owned utility which operates wholly within an incorporated city. The operations of a privately owned company both within and outside an incorporated city would be governed by the answer to the second question.

Sections 6163-6166, N.C.L. 1929, is the Act passed by the Legislature and approved March 20, 1909. This Act considered companies then engaged in furnishing electric light, heat and power to the inhabitants of any town or city in any county in which a company had filed its acceptance of the terms of chapter 25, Statutes of 1901, and chapter 190, Statutes of 1907, and had since been actively engaged in supplying such utility.

The Act then continued the franchise right to construct and maintain poles and wires on the county roads and highways, in the streets of the said cities and towns, subject to the conditions expressed in the Act. One condition was expressed as follows: "But no person, company, corporation or association shall have the benefits of the provisions of this Act until there has been paid to such town, city or county two per cent of the net profits made in furnishing or supplying such electric light, heat or power since the filing of the acceptance of the terms and provisions of Chapter XXV of the laws of 1901, or since such permit or franchise was received from the Board of County Commissioners, or since such compliance with the procedure authorized by Chapter 190 of the Laws of 1907 * * *."

A further provision in this section is as follows: "*provided*, that any person, company, association, or corporation accepting the benefits of the provisions of this Act as hereinafter provided shall pay annually two per cent of its net profits, made in furnishing such electric light,

heat or power, to the county or counties in which such person, association or corporation is engaged in business * * *.”

The Act applied to companies furnishing electric light, heat or power which operated under the Statutes of 1901 and 1907, and to such companies which desired to accept the terms of this Act of 1909. The condition under which companies then operating under the Statutes of 1901 and 1907 could operate under the March 20, 1909 Act, was that such company had paid to the town, city or county two percent of its net profit. One of the provisions for a company (apparently one that was not operating under the Statutes of 1901 and 1907) was that such company, in order to enjoy the privileges of the Act, must pay the two percent to the county or counties. The language “town or city” was omitted.

Sections 3183-3195, N.C.L. 1929, is the Act passed at the same session of the Legislature and approved March 23, 1909. This Act is an Act authorizing the County Commissioners to grant franchises to construct, install, operate and maintain street railways, electric light, heat, and power lines, gas and water mains, telephone and telegraph lines in the street, alleys, avenues, and other places in any unincorporated town or city in such county, and along public roads and highways of such county, when the applicant shall comply with the terms of the Act. Unincorporated towns and cities is repeated in sections two and nine.

The Journal of the Senate on March 13, 1909, shows that an amendment was carried to insert the words “within the boundaries of unincorporated towns and over public highways.” The Act does not empower the County Commissioners to grant such franchises covering operations within the limits of incorporated cities.

Section 7 of the Act requires the grantee of such franchise to pay annually to the County Treasurer of the county wherein such franchise is exercised, two percent of the net profits made by such grantee. The payment is made, “* * * for the benefit of the school fund of such county * * *.” There is no provision in the Act which requires payment to the district in which the company operates. The money goes to the benefit of the County School Fund and would be apportioned among the various school districts in the county.

The Act specifically repealed chapter 25, Statutes of 1901, and chapter 190, Statutes of 1907. It provides that, “neither this repealing clause nor any other provision of this Act shall be so construed as to deprive the Railroad Commission of Nevada, or any public service commission of the state now existing or hereafter created, of full power to regulate and control, as prescribed by law, the service, practice, regulations and charges subject to the maximum charges fixed by the Board of County Commissioners upon granting the franchise, and subject also to the provisions of Section 7 of this Act, of all public utilities receiving franchises as herein provided.” Section 13 of the Act was added to the original Senate bill as shown by the Journal. This section provides, “This Act shall not be construed in any way to repeal any portion of an Act entitled ‘An Act concerning franchises for furnishing electric light, heat, and power approved * * * 1909.’”

Section 11 of the Act provides that companies conducting any of the operations named in the Act, who or which has not fully complied with the provisions of the Act under which a franchise was granted may, nevertheless, have and enjoy all the privileges of the Act, provided that they shall within six months after the passage of the Act file with the Secretary of State and the County Recorder, a duly executed and acknowledged acceptance of the terms of the Act.”

Section 6163, N.C.L. 1929, provides that no person shall have the benefits of the Act until there has been paid the tax on net profits. The Act applies to companies furnishing light, heat or power. Sections 3183, N.C.L. 1929, includes street railways, electric light, heat, and power lines,

gas and water mains, telephones and telegraph lines. Section 3194 provides that neither the repealing clause nor any other provisions of this Act shall be so construed as to deprive the railroad commission of Nevada, or any Public Service Commission of this State now existing or hereafter created, of full power to regulate and control, as prescribed by law, the service, practice, regulations and charges subject to the maximum charges fixed by the Board of County commissioners upon granting the franchise and subject to section 7 of this Act, of all public utilities receiving franchises as herein provided.

It is evident that the provisions of these old statutes are confusing, and have been disregarded in many cases. As the Legislature will be in session in a few months, this is a matter that should be presented for clarification, or the enactment of a statute to meet the present conditions.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**681. Corporations—Veterans of Foreign Wars—Articles Submitted by United States
Need Not Be Accepted.**

CARSON CITY, September 30, 1948.

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

DEAR MR. KOONTZ: This will acknowledge receipt September 17, 1948, of your letter dated September 16, 1948.

You submit a form of Articles of Incorporation of chartered posts of the Veterans of Foreign Wars Department of Nevada, which was received by you from the State Commander of the Veterans of Foreign Wars of the United States (incorporated by Act of Congress May 28, 1936; 49 Stats. 1930; 36 U.S.C.A. Secs. 111-120).

You inquire whether your department is required or authorized to accept Articles of Incorporation, slanted apparently to meet the definition of charitable, fraternal, scientific and educational associations of a nonprofit nature. Without going into distinctions of this nature it is sufficient to say that the applicants present Articles of Incorporation of a sort and desire a certificate or charter that they are duly incorporated.

The application purports to be made pursuant to and in harmony with chapter 17, Statutes of 1947, whereas, it is quite to the contrary. The title reads: "An Act to incorporate the Veterans of Foreign Wars, Department of Nevada, and all Veterans of Foreign Wars posts within the State of Nevada." Section 1 of the Act reads as follows:

The Veterans of Foreign Wars, Department of Nevada, and all Veterans of Foreign Wars posts within the State of Nevada now in existence or hereafter chartered, shall be deemed bodies corporate and politic upon filing notice of the acceptance of the terms of this act with the Veterans of Foreign Wars, Department of Nevada, from the date of its organization and by its name; the various posts of the Veterans of Foreign Wars from the date of their charters, and by the names and numbers given therein.

This language is plainly ambiguous, but such is the text of both the engrossed and the enrolled bill (AB 3). The section concerns the "Veterans of Foreign Wars, Department of Nevada, and all

Veterans of Foreign Wars posts within the State of Nevada now in existence or hereinafter chartered.”

The context of the above shows that the word “chartered” means chartered by the parent organization and not chartered under the general corporation laws of Nevada. Those posts in existence at the time the law became effective were made “bodies corporate and politic upon filing notice of the acceptance of the terms of this act.” Where that notice shall be filed is left uncertain. Section 5, however, provides for notice of the election of trustees of the Department or persons filing such notices might well certify that the Department or Post, as the case might be, did accept the terms and conditions of chapter 17, Statutes of Nevada 1947, and at worst such a certificate would be deemed mere surplusage.

In point of fact the entire Act and proceedings thereunder may be deemed surplusage. The Veterans of Foreign Wars of the United States was incorporated by the Act of Congress cited above. It was given the exclusive right to that name (Section 7.) The right to repeal the charter was reserved (Section 10). Power was given the national organization to “establish, regulate or discontinue subordinate State and territorial subdivisions and local chapters or posts” (Section 4). The national organization was required to designate an agent upon whom process can be served and file the same with the Secretary of State of the respective States.

This Act is almost identical with the Act incorporating the American Legion (36 U.S.C.A. Secs. 41-51). Under that Act it was held the national organization was doing business in a State where the designation of agent was filed and further that the national organization might be prevented from revoking the charter of a State Post without just cause. *Gallagher v. American Legion*, 277 N.Y.S. 81. The right to charter State Posts and regulate them reasonably was expressly recognized.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

682. Elections—Las Vegas Valley Water District.

CARSON CITY, September 30, 1948.

HON. ROBERT E. JONES, *District Attorney, Las Vegas, Nevada*.

DEAR MR. JONES: Receipt, September 29, is acknowledged of your letter dated September 27, 1948, in which you make the following inquiry:

On September 15, 1948, pursuant to a petition duly filed, the Board of County Commissioners of this county called an election for October 19, 1948, to determine whether or not there shall be created the Las Vegas Valley Water District pursuant to chapter 167, page 553, 1947 Nevada Statutes.

You will note that this statute provides that in the event the election is called, the District shall be divided into seven (7) divisions and that each of the divisions shall constitute an election precinct.

Our County Clerk has raised an objection to following this procedure since it would place so many electors in one precinct that it would be impossible for one set of precinct workers to handle all of the electors appearing to vote. In some instances, there would be six or seven large precincts grouped into one division,

making it very difficult to conduct the election.

The division lines of the District have been so drawn so as not to cut through and divide any of the regular election precincts. In other words, the division lines have followed precinct lines. The County Clerk, if this procedure is permissible, would like to hold the election, having a polling place in each of the regular precincts the same as will be done for the general election.

In our opinion the County Clerk may follow the procedure which you have outlined and provide for polling places within seven divisions, which polling places would correspond with the regular polling places established for general elections.

The Act in question provides for the establishment of a water district in Las Vegas Valley. Section 3 provides for the machinery of the organization.

The Commissioners on deciding to go forward with the plan are directed to divide the territory into seven divisions "as nearly equal in size as may be practicable." The Act does provide that "each division shall constitute an election precinct for the purposes of this act." After the district is organized the trustees may "divide a division into two or more precincts and fix the polling places therein," or may reduce the number of precincts and the polling places therein.

Section 4 contains a saving clause that as near as may be practicable the general election laws shall be followed.

No good reason appears for providing a more rigid rule as to the number of polling places in a precinct at the time of the initial election and organization than at subsequent elections when the district is established and the first Board of Directors installed.

Inasmuch as the directors of the entire district shall be seven in number, elected from the respective seven precincts, it may be well to conform as closely as possible to section 3 of the Act, by adopting as precincts the seven divisions prescribed. However, there is no substantial reason why more than one polling place may not be provided in each precinct to accommodate the voters therein.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

683. Veterans of Foreign Wars—Free Transportation or Reduced Rates to State Officers.

CARSON CITY, October 1, 1948.

MR. C.U. SHIPLEY, *State Service Officer, Veterans of Foreign Wars, 1000 Locust Street, Reno, Nevada.*

DEAR MR. SHIPLEY: This will acknowledge receipt of your letter dated September 20, 1948, received in this office September 22, 1948.

You enclose a clipping from State Veterans' Laws showing transportation privileges concerning free transportation or reduced rates to State officers of recognized military ex-service organizations, and request an interpretation of the statute relative to this subject.

Chapter 45, Statutes of 1947, amends the Act defining public utilities and regulations thereof. Section 21 makes it unlawful for any corporation engaged in business as a common carrier to give or furnish any State, district, county, or municipal officer of this State, or any person, other

than those named herein, any pass, frank, free or reduced transportation, or for any State, district, county or municipal officer to accept any pass, frank, free or reduced transportation. This section contains the following language:

This act shall not be construed as preventing railroads from giving free transportation or reduced rates to contractors under a contract with such common carrier or to employees of contractors employed under such contract, ministers of the Gospel, regularly employed secretaries of the Y.M.C.A. or Y.W.C.A., state officers of each recognized military ex-service organization, including ladies' auxiliaries thereof, not exceeding three from each such organization, constables, college professors, school teachers, students of institutions of learning, students of public schools, disabled or homeless persons, railroad officers, attorneys, directors or employees, or the members of their families, or pensioned or disabled ex-employees, their minor children or dependents, or bona fide ex-employees in search of employment, or to prevent the exchange of passes with officers, attorneys, or employees of other railroads, telegraph or express companies, and members of their families.

The foregoing expressly refers to railroads. The statute does not grant the privilege, it is entirely under the control of the railroads. The section uses the expression that the Act shall not be construed as preventing railroads to give free or reduced transportation in the particular instances.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

684. Public Schools—Religious Instruction—”Released Time” Programs.

CARSON CITY, October 4, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated September 24, 1948, received in this office September 25, 1948.

You submit three questions.

The first two questions are answered in this opinion, and your third question is answered in a separate opinion in order that this opinion may not be unduly lengthened.

1. Have Boards of Trustees authority to dismiss children from school to receive religious instruction for representatives of church groups, religious organizations, or others?

2. Have Boards of Trustees authority to permit religious education to be taught by representatives of church groups, religious organizations, or others on school property: (1) during the time school is in session, or (2) after school hours, before school hours, during the noon hour, or at intermissions?

In answer to your first question, we concur with two Opinions delivered by a former Attorney General of this State. Opinion No. 140, May 27, 1920, Biennial Reports 1919-1920. “I am also of the opinion that upon written request of a parent the children of such parent may be excused

from attendance at school for a brief time for the purpose of attending a certain church specified by the parent.” “Necessarily it is contrary to correct school policy to permit any such courtesy to seriously interfere with the school work. This is something which must be considered by the school authorities in connection with the granting or declining to grant the privilege herein mentioned.”

Opinion No. 79, November 22, 1921. This Opinion used the above language in the first paragraph and added: “The language must not be construed as making it mandatory on the part of school authorities to recognize such written request of a parent. It is discretionary on the part of those controlling school affairs as to whether or not recognition is to be given to such request.

When children enter school the jurisdiction during school hours passes from the parent to the school authorities. Dual jurisdiction would mean the destruction of school discipline.”

The Constitution and statutes of this State have not, in this respect changed since the delivery of such Opinions, and the decision of the United States Supreme Court in the Champaign, Illinois case does not run counter to them.

You cite section 1, chapter 63, Statutes of 1947, the School Code, and call attention to the language which provides: “each parent, guardian, or other person in the State of Nevada, having control or charge of any child between the ages of seven (7) and eighteen (18) years, shall send and be required to send such child to a public school *during all the time such public school shall be in session the school district* in which such child resides; * * *.” (Italics ours.)

Section 325 defines a school month which consists of four weeks of five days each. Section 275 provides that trustees shall provide at least six months of free school, and to maintain at least nine months of school in the district if funds are made available.

Truancy is defined in section 2, chapter 1, of the School Code, meaning a child who shall be absent from school without valid excuse which is acceptable to its teacher or principal of the school.

The statutes do not designate the hours that constitute a school day. The language italicized in quotation from section 1 must be construed to mean the period of time embraced in the school term.

Section 430 provides certain holidays on which no school shall be kept open. Thanksgiving Day and the 25th day of December are included.

Since its beginning in 1914 what has been known as “released time,” has attained substantial proportions. The studies of detail in “released time” programs are voluminous.

The United States Supreme Court in *McCullum v. Board of Education of School District No. 71, Champaign County, Illinois*, 68 Supreme Court Reporter 461, held that the States’ tax supported public school buildings used for the dissemination of religious doctrines and, also, to afford sectarian groups an invaluable aid in helping to provide pupils for their religious classes through the States’ compulsory public school machinery was not separation of Church and State.

A concurring opinion delivered by Justice Frankfurter in which Justice Jackson, Justice Rutledge, and Justice Burton joined, discussed the question of “released time” where the religious teachings were held on church premises and the public schools had no hand in the conduct of these church schools. This opinion, on page 472, contained the following language: “It is only when challenge is made to the share that the public schools have in the execution of a particular ‘released time’ program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system is the specific situation before the Court.”

The Court, on page 475, said: “We do not consider, as indeed we could not, school programs

not before us which though colloquially characterized as ‘released time’ present situations differing in aspects that may well be constitutionally crucial. Different forms which ‘released time’ has taken during more than thirty years of growth include programs which like that before us, could not withstand the test of the Constitution; others may be found unexceptional. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid ‘released time’ program. We find that the basic Constitutional principal of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.”

Justice Jackson also wrote a concurring opinion. The following are excerpts from his opinion: “To me the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements.” “So far as I can see this Court does not tell the State Court where it may stop, nor does it set up any standard by which the State Court may determine that question for itself.” “One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.” The opinion of the Supreme Court did not decide the question of “released time” from school for religious services held in churches, or held outside of school property, in which the schools have no hand in the performance.

Your second question is answered in the negative.

Under the ruling in the Champaign case, *supra*, the school authorities may not permit religious education to be taught on school property at any time.

The Supreme Court in this case held that a program whereby pupils, compelled by States’ compulsory education system to go to school for secular education, were released temporarily from secular study on condition that they attend religious classes conducted in the public school building involved a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith and violated the establishment of religion clause of the First Amendment, made applicable to the States by the Fourteenth Amendment to Constitution.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

685. Public Schools—Bible Reading Forbidden.

CARSON CITY, October 4, 1948.

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

DEAR MISS BRAY: The following is in reply to your letter received in this office September 25, 1948, in which you presented three questions. Two of these questions were answered in our Opinion under date of October 4, 1948.

Your third question is:

How is "sectarian character" as used in section 422, chapter 45, 1947 School Code (chapter 63, 1947 Statutes of Nevada), to be interpreted. Does it include hymns, bible stories, readings from the Bible (King James' or other versions), religious pamphlets, tracts, leaflets, or pictures.

We are of the opinion that the reading of the Bible, the King James' or the Douay version, or any other version, singing of religious hymns, or the use or introduction in the schools of books, tracts, or papers of a sectarian or denominational character is forbidden by section 422 of the School Code, and the Constitution of Nevada.

Section 9, article XI, of the Constitution of Nevada provides: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution."

Section 422 of the School Code provides: "No books, tracts, or papers of a sectarian or denominational character shall be used or introduced in any school established under the provisions of this school code; nor shall any sectarian or denominational doctrines be taught therein; nor shall any school which has not been taught in accordance with the provisions of this section receive any of the public school funds."

Section 2 of article XI of the Constitution, which provides that the Legislature shall provide for a uniform system of common schools, contains this language: "* * * and any such school district which shall allow instruction of a sectarian character may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, * * *."

The word "sectarian" was defined in *State of Nevada v. Hallock*, 16 Nevada 373. On page 385 the Court said: "Webster defines sectarian as follows: 'Pertaining to a sect or sects; peculiar to a sect; bigotedly attached to the tenets and interests of a denomination.' He also defines the word as 'one of a party in religion which was separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state,' and it was argued by petitioner's counsel that the word was used in this sense in the constitution. We do not think so. It was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians."

The word sect according to Webster is from the word "sequi" meaning to follow and is often confused with the word "secare, sectum," to cut.

Reading from the Bible, King James' version, is the subject of cases running into the scores that have been in the State courts of last resort for many years.

A case that has been cited in many subsequent cases is the case of *People v. Board of Education of District No. 24, Illinois*, 92 N.C. 251. The decision of the Court was that the reading of the Bible, singing of hymns, and the repeating of the Lord's Prayer as a part of the public school program was in violation of the Constitutions guaranteeing the free exercise and enjoyment of religious profession and worship without discrimination. The Court said on page 252: "Is the reading of the bible in public schools sectarian instruction. Religion has the soul. Its phenomena are spiritual. It controls external things. Things external cannot control it. * * * IN the very nature of things, therefore, religion, or the duty we owe to the creator, is not within the cognizance of civil government, * * *." The Court on page 254 said: "The various Protestant sects of Christians use the King James' version, of which the Old Testament was published by the English college at Douay, in France, in 1609, and the New Testament by the accept the Douay Bible, * * *. Conversely, Catholics will not accept King James' version. Let us consider the question of the Christian and the Jew. The Jew denies that Christ was the Messiah and

regards him as an imposter. It is not the teaching of sectarian doctrine to his children to read to them daily from the New Testament, * * *.” Continuing the Court said: “The school like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of public school. This is not a judicial question. All stand equal before the law. The Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the freethinker, the atheist.”

As stated by the Supreme Court of the United States in *People v. Board of Education, Champaign County*, 63 S. Ct. on page 469: “It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State.”

Therefore, the reading of the Bible as part of the school program, singing of religious hymns, or the use of introduction in the schools of books, tracts, or papers of a sectarian or denominational character is forbidden by section 422 of the School code and the Constitution of the State.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

686. Pharmacy—Drug Store Defined—Penalty for Failure to Pay State Business License Fee.

CARSON CITY, October 5, 1948.

STATE BOARD OF PHARMACY, *Post Office Box 1087, Reno, Nevada*.

Attention: Mr. W.L. Merithew, Secretary.

GENTLEMEN: Receipt is hereby acknowledged of your letter of September 27, 1948, received in this office September 28, 1948, wherein you request our opinion upon the following queries concerning the application of the State law regulating the practice of pharmacy.

1. Under section 7, may the Board, by regulation, prevent store owners and “general dealers” (Section 18) from using the word “drug” in naming or identifying the business establishment? The Board has in mind a regulation permitting the word “drug” to be used only in connection with stores actually engaging in pharmacy and having, at all times, a pharmacist or pharmacists employed. Does section 18 conflict as in said section it is stated in part “the following drugs, medicines and chemicals may be sold by grocers and dealers generally without restriction, viz: Glauber salts, vaseline,” etc.?

2. What action may the Board take upon the failure of a store to pay the State license as provided in section 24?

Answering Query No. 1. Section 7 of the State Pharmacy Act being section 5046, N.C.L. 1929, while granting broad powers to the State Board, nevertheless, we think, such powers are limited by other provisions of the Act and particularly with respect to the subject matter of the instant query. It is to be noted that section 7 provides, with respect to the powers granted, that the State Board shall have powers to make bylaws and regulations “not inconsistent with the laws of this state, as may be necessary for the protection of the public.” Section 1 of the Act as amended at 1947 Statutes, page 668, provides, inter alia: “Every store or shop where drugs, medicines, or chemicals are dispensed or sold at retail, or displayed for sale at retail, or where prescriptions are

compounded, shall be deemed a 'pharmacy' within the meaning of this act." An examination of the general law discloses that, in the United States at least, the term "drug store" and "pharmacy" are used interchangeably as practically synonymous. (17 Am. Jur. 838, sec. 2.)

In *Carroll Perfumers, Inc. v. State*, 7 N.E. 2d 970, the Court said:

"The appellant contends that the statute does not define the term 'drug store' and does not specify any test or standard by which a general merchant, or any other person, can determine for himself whether or not he is operating a drug store. We do not think there is any such mystery about the term 'drug store'; no more so than a grocery, hardware, or jewelry store. A 'drug store' is a place where drugs are sold. A drug is defined to be 'any substance used as medicine or in the composition of medicines for internal or external use.' Webster's New Int. Dic. 'In this county,' as said in the case of *State v. Clinkenbeard*, 142 No. App. 146, 125 S.W. 827, 829, 'the business of pharmacist, or apothecary or druggist is all one, * * * so that in popular speech all three are used interchangeably as practically synonymous. They are so defined in Webster's New Int. Dic. and pharmacy is defined as 'a place where medicines are compounded or dispensed; a drug store; an apothecary shop.'"

Thus, we think, when the Legislature defined "pharmacy" has hereinabove quoted it brought within the purview of the definition the term "drug store" and intended that every store selling or displaying for sale at retail any and all drugs would be a pharmacy or drug store within the meaning of the whole Act and thus limited the power of the State Board to restrict the use of the word "drug" to only those stores wherein a registered pharmacist was employed. In brief the exercise of the power to so restrict the use of the term "drug" would be inconsistent with the quoted law of the State.

In so holding we are of the opinion that the State Board still has ample power to protect the public from unlawful sales of drugs without restricting the use of the term "drug" or "drug store" to such stores as employ registered pharmacists, by reason of the powers granted in section 18 of the Act as amended at 1947 Statutes, page 670. No doubt the permit issued by the State Board to general dealers in rural districts provides the right to sell only the drugs expressly mentioned in the second paragraph of such section and such other items as the Board may from time to time sanction, under such rules and regulations as the Board deems advisable.

The Legislature has also provided in the last paragraph of section 1, in express language, what drugs, medicines and chemicals may be sold by grocers and dealers generally without restrictions. In the final analysis it is our opinion that the term "drug" is a generic term and may be so used by all persons, firms, etc., in connection with the sale of the drugs, medicines, chemicals and permissive items expressly mentioned in said section 18 and that the Legislature is the only body having the power to prohibit its use in such connection.

Answering Query No. 2. Section 24, providing a State business license for the retailing of drugs, medicines and poisons, or for the compounding of prescriptions was added to the State Act in 1947. An examination of the prior law, i.e., sections 5040-5062, N.C.L. 1929, together with the 1947 amendments thereto, fails to disclose that any penalty of a criminal nature has been written into the law for the failure to pay the said State business license fee. If no such penalty is provided in the law then a criminal action therefor does not lie in the courts. However, section 21 of the prior Act, being section 5060, N.C.L. 1929, which is still in effect, does provide that civil actions may be instituted by the State Board to recover penalties. Such section is applicable to the collection of the business license fee. If a penalty of a criminal nature is desirable the matter should be submitted to the next Legislature.

Very truly yours,
ALAN BIBLE, *Attorney General*.
By W.T. MATHEWS, *Special Assistant Attorney General*.

687. Cigarettes—Sale on Indian Reservation in Violation of 1947 Act—Sheriffs and Peace Officers May Legally Enforce Criminal Laws.

CARSON CITY, October 8, 1948.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Mr. H.S. Coleman, Supervisor, Cigarette Tax Division.

GENTLEMEN: Receipt is hereby acknowledged of your letter of October 6, 1948, wherein you request the opinion of this office upon the following query:

Will your office, as expeditiously as possible, give us a ruling on the rights and prerogatives of a Sheriff of a county entering upon an Indian reservation to make an investigation in his own right, or to check upon the complaint of another as to the compliance with, or the breaking of a State law that is enforceable upon or within the boundaries of such reservation.

It appears from your letter that the inquiry concerns the violation of the 1947 cigarette tax law, in that cigarettes are sold upon the reservation without the cigarette packages being stamped with the required Nevada revenue stamps.

OPINION

The 1947 Cigarette Tax Act provides that “no person shall sell or offer to sell any cigarettes in the State of Nevada unless there be affixed to each of the packages, packets or containers, adhesive Nevada cigarette revenue stamps or a similar stamp affixed by a metered stamping machine * * *.” Section 8, chapter 192, Statutes of 1947. Sheriffs and other police officers of the State are charged with the duty of assisting in the enforcement of the Act. Section 18.

Violation of the Act constitutes a criminal offense. Section 16.

Indian reservations within this State are a part of the State, unless, as the general rule of law provides, the exclusive jurisdiction thereover was retained by the United States at the time of admission of the State into the Union, or by subsequent cession of such jurisdiction by the State to the United States thereafter. No such retention of jurisdiction was had by the United States in 1864, and we are not advised of any cession of *exclusive* jurisdiction by the State over Indian reservations has been had since that time. See *Ex Parte Crosby*, [38 Nev. 389](#). Attorney General’s Opinion No. 247, dated September 28, 1926.

The Legislature of this State has brought Indian reservations within the purview of our criminal laws. Section 9954, N.C.L. 1929, provides:

All the laws of this state concerning crimes and punishments, or applicable thereto, are extended to and over all Indians in this state, whether such Indians be on or off an Indian reservation, and all of said laws are hereby declared to be applicable to all crimes committed by Indians within this state, whether committed on or off an Indian reservation, save and except an offense committed upon an Indian reservation by one Indian against the person or property of another Indian.

This office in 1925 rendered an opinion upon the same question as presented in the instant matter, the same being Opinion No. 208, dated November 12, 1925. We quote:

Can a State Police officer make an arrest of Indians or white persons within the limits of an Indian Reservation in the State of Nevada?

OPINION

The criminal jurisdiction of the State and all criminal laws or laws applicable to crime extend over both Indians and white persons, whether within or without an Indian Reservation, with one exception, that is, for an offense committed on an Indian Reservation by one Indian against the person or property of another Indian.

Sec. 6270, Revised Laws, 1912; *State v. Johnny*, [29 Nev. 203](#); *State v. Buckaroo Jack*, [30 Nev. 326](#); *State v. Crosby*, [28 Nev. 389](#).

Therefore, a member of the State Police would have the right to make an arrest of either an Indian or white person within the limits of an Indian Reservation in this State, provided that the offense for which he made the arrest was not committed on an Indian Reservation by one Indian against the person or property of another Indian.

Further, it was held by former Attorney General Thatcher in Opinion No. 143, dated September 18, 1914, that unless an Indian reservation is expressly excepted from the jurisdiction of a State when admitted, the property of all persons within the limits of the reservation, except that of Indians, is subject to taxation by the State. The goods of an Indian Agent on an Indian reservation and used by him for his personal use in government buildings, upon government land, is subject to taxation.

We concur in each of the foregoing opinions. There has been no change in the applicable laws since their rendition. Sheriffs and other peace officers of this State may legally go upon Indian reservations for the purpose of enforcing the criminal laws of this State, save and except in those cases where offenses are committed upon an Indian reservation by one Indian against another.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

688. Aliens—Right to Take and Own Property in State of Nevada—Chinese Nationals.

CARSON CITY, October 14, 1948.

MR. JACK B. TATE, *Acting Legal Adviser, The Secretary of State, Washington 25, D.C.*

DEAR MR. TATE: Reference is hereby made to your letter of September 23, 1948, to Governor Pittman concerning the applicability of Nevada laws relative to aliens taking and owning property in the State of Nevada, with specific reference being made to Chinese nationals.

At the request of Governor Pittman we are furnishing you the following opinion.

You advise that the question has been presented to the Consulate General in Tientsin, China, concerning the applicability of the Nevada laws as above mentioned. You specifically inquire as follows:

The incoming communication which raises this question referred to a change in the Nevada laws during 1946 or 1947 to permit ownership by Chinese nationals. In reviewing the laws on this subject it was noted that a 194 law (Nevada laws 1947, page 270) authorizes nonresident aliens the same rights as are accorded to citizens with respect to real property. It was further noted in section 9894, 1941 *Supplement to Nevada Compiled Laws*, 1929, that a nonresident alien cannot inherit property or take property under a will unless the country where he resides or of which is a citizen accords such rights to citizen of the United States.

Please be advised that this office has given considerable study to your inquiry and has reached the following conclusions with respect to the proper application of the Nevada laws in question.

In 1879 the Legislature of this State enacted the following statute, the same being section 6365, N.C.L. 1929:

Any nonresident alien, person, or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property, or any interest in lands, tenements, or hereditament within the State of Nevada, as fully, freely, and upon the same terms and conditions as any resident citizen, person, or domestic corporation.

We think it is clear that under such statute any nonresident alien, excepts subjects of the Chinese empire, could take, hold and enjoy real property, or any interest therein, within the State of Nevada as fully, freely, and upon the same terms and conditions as any resident citizen of the State. This section of the law has never received the interpretation of our Supreme Court, but it is reasonable to suppose that with the exception of Chinese any other nonresident alien could have taken real property in this State as devised by will and perhaps have also taken and held such property by descent case under our intestacy laws.

However, in 1941 the Legislature of this State enacted section 9894, N.C.L. 1931-1941 Supplement, as so mentioned in your letter of inquiry. Such statute reads as follows:

The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by descent or inheritance, either under the terms of wills or in cases of intestacy, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories moneys originating from the estates of persons dying within such foreign countries.

We think the enactment of section 9894 placed a limitation upon the effect of section 6365 and that insofar as the inheritance, either by will or descent cast under intestacy statutes, the right of nonresident aliens to take and hold property was limited to those aliens residing in countries and being nationals of such countries that were and are participants in treaties with the United States whereby reciprocal rights were granted to the citizens of the United States dying in such countries, and unless such reciprocal provisions were written into such treaties no right of inheritance insofar as the taking and holding of property in this country could be had by such nonresident aliens.

We think the Legislature in 1941 had in mind the paramount provision of the United States

Constitution with respect to treaties made by or under authority of the United States, shall be the supreme law of the land, notwithstanding the Constitution and laws of any State to the contrary. Section 2, Article VI, United States Constitution.

It appears from the general law over the citation of many authorities that the United States may enter into treaties with foreign countries whereby the disposition of property within the States, insofar as the right thereto is held by aliens, could be abrogated in its entirety and further that the United States could enter into, and no doubt has entered into, numerous treaties placing the reciprocal provisions in the treaties as contained in section 9894 above quoted.

Does the amendment of section 6365, as enacted by the Legislature and found at 1947 Statutes, page 270, supersede or affect section 9894? We are of the opinion that it does not, save and except, the 1947 amendment and section 9894 must be construed in para materia and effect given to both such statutes in view of the fact that no express repeal of section 9894 was incorporated in the 1947 amendment. It is a canon of statutory construction in this State that repeals by implication are not favorable and if there is no irreconcilable repugnancy between the earlier and later statutes, effect must be given to both and both allowed to stand. Applying this rule to the instant question, we think that nonresident Chinese nationals are empowered by the 1947 Statute to take, hold and enjoy any real property, or interest the same time section 9894 will operate to limit their right to take, hold and enjoy real property to the acquiring of such property other than through a devise by will or descent cast under the intestacy laws of the State, save and except, there is a treaty between the United States and the Chinese government granting the same reciprocal rights to the nations of the United States to inherit by will or descent case under the intestacy laws of China as is accorded the Chinese nationals under section 9894. This office is not in possession of or advised as to the contents of any treaty between the United States and the Chinese government.

We have furnished the foregoing opinion, as stated hereinbefore, after considerable search of the authorities. We think that the general law on the subject is well stated in 2 Am. Jur., sec. 28, page 476, to and including section 52, page 492.

Trusting this will answer your inquiry, I am

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

cc: Hon. Vail Pittman, Governor of Nevada.

689. Gambling—Licenses Not Transferable.

CARSON CITY, October 19, 1948.

MR. R.E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. CAHILL: Your letter of inquiry dated October 5, 1948, reached in this office October 6, 1948. Your inquiry is here set out in full as follows:

Facts: On January 16, 1948, the Gambling Tax Division issued a gambling license to James H. Lloyd, dba Golden Operators, for seven games, upon the payment of \$3,000 table fees.

As of June 15, 1948, James H. Lloyd executed an instrument designated as a sublease in which he subleases, demises and sublets all the premises leased to the

said James H. Lloyd by the Golden Securities Company, to Thomas E. Hull. The effective date of the instrument was June 1, 1948.

Section 3 of the instrument requires Thomas E. Hull to pay all rentals required to be paid by James H. Lloyd to Golden Securities company, "and will pay all rates, taxes and outgoings hereafter to become payable by reason of said original lease."

Section 4 of the instrument recites a rental equivalent to 40 percent of Thomas E. Hull's net profit from all operations conducted on or in connection with said premises.

Section 4 of the instrument recites a rental equivalent to 40 percent of Thomas E. Hull's net profit from all operations conducted on or in connection with said premises.

On and after June 1, 1948 all casino games were operated with bank rolls furnished by El Rancho Reno, Inc., the operating unit for Thomas E. Hull.

Is James H. Lloyd the party of prime interest after June 1, 1948? If not, can the license issued to James H. Lloyd be transferred to Thomas E. Hull and/or El Rancho Reno, Inc., without payment of the table tax fee as is set forth in section 10EE of the Nevada Gambling Law?

The parties will be referred to as Golden Securities Company, owner, Golden Operators, tenant, El Rancho Reno, Inc., subtenant. It is understood that the tenant and James H. Lloyd are one and the same, and the subtenant and Thomas E. Hull are practically the same, one being the agent of the other. The tenancy began January 16, the subtenancy June 15 and the agency of the subtenant was in effect from June 1, all in 1948. We are assuming that the tenancy began January 16, although it is not expressly stated in your letter and we take the date as of that of the license issued to the tenant (Lloyd).

(1) It is our opinion that James H. Lloyd dba Golden Operators is the primary and indispensable licensee. It is to him you issued the license of January 16, 1948, and the license cannot be transferred.

Section 3 of the gambling law (1929 N.C.L. 1941 Supp., sec. 3302.02) as amended by chapter 196, Statutes 1947, reads in part as follows:

* * * any license issued under the provisions of this act shall not be transferrable by the licensee to any other person, firm, association or corporation * * *. No license money paid under this act shall be refunded, whether the slot machine, game or device for which any license was issued has voluntarily ceased or has been revoked under the provisions of this act herein provided or for any other reason.

This was in the original Act of 1931 when only the so-called county licenses were required by sections 1 to 5 to be issued by the sheriff. However, by amending and re-enacting the section in 1947 after the State license was a part of the Act by the amendments of 1945 and 1947 adding sections 10, 10A, 10B, 10C, 10E, 10EE, 10F, and 10FF, the intent of the Legislature is evident to include both "county" and "State" licenses within its purview.

It is true that partnerships or associates are often licensed under a fictitious trade name or in the names of one or more persons in interest and that the license remains valid though one or more associates less than all retire during the license period and are replaced by others, but in such case, according to your rules adopted pursuant to powers delegated to you by the Act, it is required that the names of all persons participating and sharing the business be stated on the

original application and that you be notified from time to time of any change in personnel. We do not find that Golden Securities Company did any more than lease the premises without gambling equipment. Lloyd's sublease to Hull not only requires Hull to pay the ground rent to Golden Securities Company but to pay an additional "rental" of 40 percent of Hull's net gaming profits. This would be less than a like share in gross revenue defined by subdivision (c) of section 10 of the gambling law, but it would be some percentage (i.e. 60 percent of the net) to Lloyd for permitting Hull to carry on the games. This is covered by 10A which also requires one conducting a game as "lessee" to obtain a license.

Section 10A also provides that:

It shall also be unlawful for any person, firm, association or corporation to lend, let or deliver any equipment *of any* gambling game, including any slot machine, for any compensation, rental, reward, partnership, interest or any percentage or share of the money or property played, under guise of any agreement whatsoever, without likewise having first procured a state gambling license * * *.

From your statement it does not appear that Hull or El Rancho Reno, Inc. (whether as his agent or separately) has obtained a license. It is conceivable that by supplying additional information Hull and El Rancho Reno could be bracketed under one license with Lloyd on his original license, but as to that we would require additional information if such a request is made.

(2) You next ask whether Lloyd's license of January 16 can be transferred to any one without the payment of the table tax required by section 10EE, payment of the 20 percent tax required by section 10E and the tax required by section 2 of the Act.

The answer is "no," for the reasons hereinabove noted.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

690. Fish and Game—Carrying of Firearms in Lake Mead Recreational Area Prohibited by Federal Statutes and Rules and Regulations.

CARSON CITY, October 20, 1948.

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

Attention: S.S. Wheeler, Director.

GENTLEMEN: Receipt is hereby acknowledged of your letter of September 16, 1948, received in this office September 18, 1948, wherein you inquire as to the power of the United States National Park Service to prohibit the carrying and use of firearms within national parks, particularly in that area between Boulder Dam and the presently constructed Davis Dam on the Colorado River. You advise that there is evidence that the National Park Service would enforce its firearm regulation this year, which regulation permits no firearms within the boundaries of the national park.

This office, after considerable search and request, has received a letter together with the General Rules and Regulations governing parks and forests within the jurisdiction of the National Park Service and beg to advise that such rules and regulations show on their face that they were and are adopted pursuant to applicable Federal statutes governing the National Park

Service and that Rule 2.11 prohibits the use of firearms, explosives, traps, seines and nets within the parks and monuments under the jurisdiction of the National Park Service except upon written permission of the superintendent. We are advised that one of the reasons for this prohibition is that such national parks, particularly recreational areas, are deemed to be game refuges and the killing of wildlife thereon, excepting predatory animals, is prohibited.

This office has been furnished the Modification of Memorandum of Agreement between the National Park Service and the Bureau of Reclamation, wherein the area of the so-called Boulder Canyon Project Recreational Area was extended downstream along the Colorado River to a certain area below Davis Dam, this agreement being entered into on July 18, 1947. It is here pertinent to state that the name Boulder Canyon Project Recreational Area has been officially changed to Lake Mead Recreational Area according to the letter of the Superintendent of the Lake Mead Recreational Area, Boulder City, Nevada. We beg to advise that the land comprising the enlarged portion of such recreational area is government land and has been withdrawn from entry and thus placed within the jurisdiction of the National Park Service by reason of the above-mentioned Memorandum of Agreement.

We are, therefore, of the opinion that within the area governed by the Memorandum of Agreement, including the original Boulder Canyon Project Recreational Area, the use of firearms can be and is legally prohibited by reason of the Federal statutes and rules and regulations above mentioned.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

691. Contracts—State Land—Delinquent Taxes—Effect of Where Contract Abrogated.

CARSON CITY, October 20, 1948.

MR. J.B. CUNNINGHAM, *County Treasurer, Washoe County, Reno, Nevada.*

DEAR MR. CUNNINGHAM: Reference is hereby made to your letter of October 7, 1948, addressed to Assistant District Attorney Gordon Thompson, and which letter in turn was forwarded to this office for an opinion thereon and further reference is made to our letter of October 11, 1948, to you and your reply thereto of October 18, 1948. The correspondence mentioned deals with the problem of the delinquent tax sale of certain lands at the delinquent tax sale on the second Monday of September 1946. The period of redemption concerning such property expired on September 10, 1948, at which time the demand was made for a deed for the parcels of land so sold, whereupon it was found that the land so sold had theretofore been contracted from the State of Nevada as State Contract Land and thereafter assessed to parties who thereupon became delinquent for the payment of taxes thereon. It appears that at the time of the delinquent tax sale the expiration of the period of redemption the State Land Contracts were forfeited for nonpayment of installments thereon and at the time of the expiration of the period of redemption the title to the possessory thereafter no deed or contract of any kind concerning such land would be valid.

Your inquiry is to the point of what can now be done with respect to the furnishing of a deed or in what manner the amount may be amicably and equitably adjusted.

OPINION

A similar situation arose in Ormsby County in the year 1946 and the facts of the case were substantially the same as presented in your matter. This office rendered an opinion thereon and suggested that in all probability it would be incumbent upon Ormsby County to refund to the purchaser of the land all moneys received from such purchaser of and concerning such sale, such Opinion being No. 397, dated December 4, 1946, and reported in full in the recent Report of the Attorney General for the biennium ending June 30, 1948. For your information we are inclosing a copy of such Opinion. We may advise that subsequent to Opinion No. 397 Ormsby County did make a refund of the purchase price of the delinquent property.

We think the situation surrounding the sale of land in Washoe County is substantially the same as that which arose in the Ormsby County case, the only difference being the difference in time. However, an examination of the records of the Surveyor General's office, this date, discloses that the land contract No. 10982 to J.W. Hobson was forfeited May 3, 1947; contract No. 21389 to Annie G. Hobson was forfeited June 12, 1947; and the four contracts, Nos. 22379 through 22382, to C.F. Faragher were forfeited April 15, 1947, and that due notice according to law of such forfeiture was forwarded to the County Assessor of Washoe county and to the County Recorder mentioned concerning each forfeiture. Whether such notice was brought to you as County Treasurer shortly after the receipt thereof by the County Assessor and County Recorder we do not know. In brief, we think that the land in question, or rather the possessory right thereto, was sold by Washoe county at a delinquent tax sale in accordance with delinquent tax sale statutes. However, it appears at the time of furnishing deed thereto that Washoe County could not pass deed to property to which it had no title. We are of the opinion that the equitable manner of settling this particular problem is that Washoe County refund to the purchasers at the delinquent tax sale such money as was paid by them.

An examination of the records in the Surveyor General's office discloses that the lands in question, the contracts for which were forfeited, are still open to contract and sale and if the purchasers at the delinquent tax sale are still interested, they still have full opportunity to contract the land with the State Land Register.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

cc: Hon. Harold O. Taber, District Attorney.

692. Gambling—County Licensing Board Has No Jurisdiction in the Issuance of Licenses Within Incorporated Cities—Duty of County Officers.

CARSON CITY, October 21, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. JONES: Your letter dated October 11, 1948, reached this office October 13, 1948.

You inquire:

- (1) Is it compulsory for the Sheriff and Licensing Board of Clark County to issue a license to any person for operation of a game within the city of Las Vegas where the person has first obtained a license from the City Commissioners?

We are of the opinion that the County Licensing Board has no jurisdiction in the issuance of licenses within incorporated cities.

As to the Sheriff's duty, it is our opinion that if the applicant has first obtained a license from the Tax Commission and a license from the authorities of an incorporated city acting under power given by the city charter, the County Auditor could not refuse to prepare, nor could the Sheriff refuse to issue and deliver, the license provided for in section 2 of the Act (1929 N.C.L., 1941 Supp., sec. 3302.01) on tender of the proper fee.

Section 10ee of the Act, added by chapter 223, Statutes 1947, provides, in the last sentence, as follows:

The sheriff of any county shall not issue the licenses provided for in sections 1 to 5 of this act unless the applicant for such licenses shall have first obtained from the Nevada Tax Commission the licenses provided for in this section.

The license provided for in that section 10ee is (1) so-called table taxes ranging from \$750 annually for 3 games, to \$30,000 for 21 games; (2) the license provided for in section 2 (subdivision third) of the Act covering a monthly charge per table; and (3) the 2 percent gross revenue tax levied by section 10e of the Act as amended by chapter 223, Statutes 1947.

Unless and until the State Tax Commission issues the license mentioned in section 10d of the Act and referred to in section 10ee, no county or city officer would have any power to issue a gambling license of any sort.

The County Licensing Board has jurisdiction to issue licenses only to persons "outside of an incorporated city or an incorporated town," within the county boundaries, covering a gambling game permitted by law. Section 2037, N.C.L. 1929.

Your second question pertains to the powers of the County Licensing Board and you ask whether or not the 1923 law, page 62, creating the County Licensing Board, being sections 2037-2040, N.C.L. 1929, gives the County Licensing Board any legislative powers or is its function limited to merely granting or denying licenses? In short, you state the question as follows:

Does the County Licensing Board have authority to pass an ordinance or merely to make regulations?

In our opinion the sections 2037-2040 do not give the county Licensing Board authority to pass ordinances. The sections of the law dealing with regulatory powers of the County Licensing Board outside of incorporated cities or towns does not extend to legislation.

We do not question the authority of the County Licensing Board to draw up an announcement of general principles to be followed in determining the fitness of the applicants for licenses or being licensed to continue to enjoy the privilege. The power of such Board in granting and refusing such licenses and the further power to revoke is set forth in section 2039, N.C.L. 1929. The penalty for engaging without a license is set forth in section 2040, N.C.L. 1929.

Your attention is further directed to section 1942, 1929 N.C.L., 1941 Supp., and particularly subdivision fourteen thereof, which grants commissioners the power to "impose and collect a license tax on and to regulate all character of lawful trades outside of the limits of incorporated cities and towns." The difficulties which you have voiced concerning the powers of the County Licensing Board might be avoided by using this Act as the basis for the enactment of ordinances for the collection and regulation desired.

We note that the regulations which you have forwarded have already been adopted by your County Licensing Board and when and if any attack is made upon such regulations in the Court, we will be glad to make further legal research with the hope of being of every possible assistance

to you.

Very truly yours,
ALAN BIBLE, *Attorney General*.
By HOMER MOONEY, *Deputy Attorney General*.

693. Gambling—Racing News Service—Tax Commission Without Jurisdiction to Require State License.

CARSON CITY, October 21, 1948.

MR. R.E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada*.

DEAR MR. CAHILL: We acknowledge receipt of your letter of September 1, 1948, respecting the status of those who obtain race news by wire and channel it in territory allotted to them to customers, who use and publish it in their respective gambling establishments.

Your statement of the surrounding circumstances and your inquiry as to the bearing of the gambling law on the facts is quoted as follows:

The Statutes of Nevada legalizes the acceptance of wages on races held outside of the State and provide that the operation of such business shall be licensed as a gambling game. Consequently these operators pay licenses to the Cities and counties on the same basis as operators of other games and obtain a State gambling license from this Commission and pay as a fee 2% of their gross win. These operators receive information as to results, odds, etc. from a race wire service on which they customarily pay a flat fee to the operators of that wire service. Our investigation shows that this service is provided from a national hook-up to individuals or firms who hold the exclusive franchise for tat service in a particular area, and in turn make the service available to the licensed operators at a prescribed fee.

Our query concerning this situation is as follows:

1. Does the operation of the racing news service bring the operators of that service under the gambling laws of the State of and should they be licensed as operators of a gambling device?
2. If the answer to the above question is in the affirmative, how would the license fee to the County and State be determined?

Your inquiries evidently concern the retailers of the wired service rather than the wholesalers who bring the news into the State at large on trunk wires.

We find that an answer to the first question will make it unnecessary to answer the second.

1. We feel that under a reasonable construction of our State gambling law as amended, the Tax Commission is without jurisdiction to require the operators of the "retailed" wired race service to procure a State license.

We are aware that cities under their charters and counties under the 14th subdivision of section 8 of the county government Act (as amended by Stats. 1933, p. 203; 1929 N.C.L., 1941 Supp., sec. 1942, subdiv. 14) have provided for the licensing of such operations as trades and callings for local revenue and police purposes. We do feel that the activities of these retailers of wired race service ought to be subjected to some control and supervision, but that the need and the details must be left to the Legislature. In the absence of a clear mandate to the Tax

Commission in the existing law, we are constrained to answer your first question in the negative.

The theory on which it might be said the existing law requires a State gambling license, is found in the last sentence of section 10a of the law as amended by Stats. 1945, p. 492, being 1929 N.C.L., 1941 Supp., sec. 3302.17, appearing in the 1945 pocket part, and reading as follows:

And it shall also be unlawful for any person, firm, association or corporation to lend, let, or deliver any equipment of any gambling game, including any slot machine, for any compensation, rental, reward, partnership, interest or any percentage or share of the money or property played, under guise of any agreement whatsoever, without likewise having first procured a state gambling license for the same as hereinafter provided.

The receiving of bets or wagers on horse races held without the State of Nevada is a gambling game within the meaning of the particular section of the law relating to the so-called "table tax" (sec. 10-ee of Act as amended by ch. 223, p. 734, Stats. 1947). This reads as follows:

In computing the number of games operated or to be operated by an applicant hereunder, a license authorizing the receiving of bets or wagers on horse races held without the State of Nevada, as authorized and provided for under chapter 57, 1941 Statutes, page 64, shall be construed as and deemed a game within the meaning of this section.

The question remains whether the service thus retailed to the gambler customer constitutes the lending, letting or delivering of "any equipment of any gambling game."

Preliminary to the discussion of this controlling question it should be observed that section 10a of the law as amended by Stats. 1945, p. 492 (1929 N.C.L., 1941 Supp., sec. 3302.17) requires not only any "person" but, also, any "firm, association or corporation" operating any gambling game, to procure a license so to do. Under your rules if the business of receiving bets or waters is participated in by another (such as a retailer of wired race service) on the basis of a percentage of the property played, that other would be a partner of the active gambler and as a partner would be responsible for the license fee whether payable by him individually or by the firm or association of which he is a member. In such case a license must be procured.

Your question therefore does not concern those whose pay is a percentage but only those who receive a rental, compensation or reward for letting, lending or delivering any equipment of a gambling game for a "flat or prescribed fee" as you say.

A percentage-sharing partnership must unquestionably be licensed when it engages in the business of receiving bets on horse races.

Reverting to the controlling question it is understood that "for a prescribed fee the retailer" of wired race service furnishes to the local poolroom operator (who under your statement has a gambling license) the following:

(1) Information of interest to the patrons before the wager is made and decided as well as during the race which is the subject matter of the race, and after the race including the result as to the winners and the final odds.

(2) Machinery for the reception, recording and publication of such information.

With the question as thus narrowed down the inquiry is as follows:

(3) Does the information and machinery so let or delivered constitute "equipment" of any gambling game, including any slot machine?

It would follow that the “equipment” so let and delivered should be an integral part of the game without which it could not be conducted. In other words, it must serve the function of settling the fate of the wager, including the verdict as to what bettors should be paid and how much. When a bet is made on a horse race, the race itself determines the winners and the volume of bets directly or indirectly determines the amount paid to holders of winning tickets. NO information given or machinery provided before, during, or after the race can change the result of the race or the amount paid to holders of winning tickets. It can only report and record history and publish it to eye and ear. That such letting and delivery facilitates or promotes the gambling business is beside the point. The question is does it form an integral part of the business of receiving bets and wagers on horse races. the receiving of such “bets and wagers” necessarily involves the offering, taking, accepting, and settlement of such bets or wagers, the gain or loss to the operator based on the event of the race and the volume of play on each horse in the race.

In the case of *Pennsylvania Pub. v. Pennsylvania Pub.* U. Comm. (1944) 349 Pa. 184, 86 A(2) 777, 153, A.L.R. 457 at 460, 461, 465, it was stated that:

A racing publication conveying information such as does the paper of appellant, though useful to the gambler in placing his wagers, is not a device or apparatus for gambling.

This statement was made in a case where the telephone company denied telephone service to a publisher on the ground that it would be used unlawfully. The Court, on appeal, decided against the telephone company.

In the instant case, if the distribution of racing news by telegraph were substituted for the publisher using the wire facilities, the same principles would be invoked and it would be held that the information and machinery “let or delivered” was not a device, apparatus or equipment for gambling.

The Pennsylvania statute made it an offense for a public utility to furnish a private wire for use in the dissemination of information “in furtherance of gambling.”

In the Pennsylvania case the court, on appeal, found nothing in the record to show appellant was engaged in an unlawful enterprise.

Inasmuch as the instant case contemplates the furnishing of the information and machinery to one licensed to receive bets and wagers on horse races, it cannot be contended that the patrons are engaged on horse races, it cannot be contended that the patrons are engaged in an unlawful enterprise. Gambling is lawful in Nevada when licensed. The same rule that measures the duty of a public utility to transmit intelligence will measure the duty of one sending messages over a public utility. Nothing in the statutes of Nevada expressly prohibits a nonresident or a resident from putting messages on the wire conveying information to a local gambler about horse races or letting or delivering machinery to deliver those messages, unless he obtains a gambling license from the State of Nevada.

In *People v. Brophy* (1942, 49 Cal. Ap. (2) 15, 120 P(2) 946, citing 153 A.L.R., Note 463 at 465, the Court said:

Respondent’s claim that the furnishing of racing news to bookmaking establishments by telephone constitutes an aiding and abetting in a violation of Sec. 337a of the Penal Code is without merit. It is not the transmission by use of a telephone of information concerning the *results or probable results* of horse races that constitutes a violation of the quoted Penal Code section, but it is the use which persons may make of such information in the acceptance of bets or

maintaining places for the reception of bets that constitutes a violation of the law
* * *. (See page 956.)

The case of *Kreling et al. v. Superior Court* (Cal. 1942), 119 P(2) 470, discusses one of the points of the instant inquiry.

On certiorari the court order adjudging Kreling in contempt for violating a restraining order was vacated. The activities of the Annenberg racing news service were involved.

The Attorney General's petition in equity alleged the organization was engaged in furnishing supplies and facilities used in the illegal operation of bookmaking and pool-selling establishments maintained for wagering on horse races. See also *People v. Lim*, 118 P(2) 472. The petitioners were charged, among other things, with disseminating horse racing news and using their communication facilities for such purposes. The Court found the allegations were not sufficiently detailed.

In the case of *In re Teletype Machine No. 33335* 191 A 210 (Penn. 1937):

Under a search warrant a teletype machine was seized at the book-making establishment of David Weller and steps were taken to have it condemned and forfeited as a gambling device. The order was made and, on appeal, reversed. The statute authorized the seizure, forfeiture, and destruction of gambling devices. "Being a penal statute," the court on appeal said, "it must be construed strictly, that is, its effect cannot be extended beyond its plain, ordinary, and usual, meaning applied, however, with common sense. *United States v. Alford*, 274 U.S. 264, 267, 47 S. Ct. 597, 598, 71 L. Ed. 1040."

After quoting the statute, the Court said:

It is clear that the "gaming table device or apparatus" referred to in this section relates to some *article, device, machine*, or apparatus, actually *used or employed to gamble with* or up on, thus embracing in general terms the more particular objects or articles referred to in the fifty-fifth section where they are enumerated as follows:

Any game or device of address, or hazard, with cards, dice, billiard balls, shuffle boards, or any other instrument, article, or thing whatsoever, heretofore or which hereafter may be invented, use and employed, *at which money or other valuable thing may or shall be played for, or staked or betted upon*. (Italics supplied.)

(The Nevada statute says "including any slot machine," indicating that the general words cover instrumentalities similar to slot machines.)

A teletype machine is a telegraph machine, which typewrites the telegram as the message is received instead of requiring an operator to receive it in the Morse code and transcribe it. It is in general use in telegraph offices, and the results of its operation may be seen in the typeritten slips pasted on a telegraph blank when delivered. It is, in no sense, an article, device, or apparatus to win or gain money, or at which money or other valuable thing may be played for or staked or betted upon. It is a machine or apparatus for transmitting or conveying information, not a gambling device or apparatus. The fact that gamblers may use the information thus received in their unlawful business, for the purpose of making bets or wagers or to pay off or collect on such bets or wagers, does not transform the teletype into a gambling machine, device, or apparatus, such as roulette wheels, rouge et noir tables, faro layouts, wheels of fortune, cards, dice, punch boards, slot machine, lottery tickets, "numbers" slips or policy sheets, etc. If the Legislature sees fit to enact a machine or instrument knowingly used to furnish or obtain information to be used in gambling may be seized, forfeited, and condemned along with actual gambling devices so

used, etc., it may, perhaps, do so under the police power, but such authority cannot be inferred from an Act merely authorizing the seizure and destruction of gambling devices and apparatus.

Information of this kind may be furnished, sent, or received by telegraph, telephone, radio, printing press, and newspaper, United States mail, express, private messenger, automobile, and other means. While the information so obtained may be used or employed in connection with gambling operations, the means or instrument by which the information is given or received is not within sections 59 or 60 of or Criminal Code (18 P.S. secs. 1444, 1445). They are limited and restricted to such devices, apparatus, etc., as are used and employed for gambling, in the sense that in using them money, etc., is staked, wagered, won, or lost as a direct result of their employment or operation.

The construction here given is in accord with the prior rulings of this Court and of the Supreme Court, *Rosen v. Supt. of Police*, 120 Pa. Super, 59, 67, 181 A 797; *In re Petition of Supt. of Police*, 113 Pa. Super, 520, 173 A. 753, affirmed Appeal of Mills Novelty Co., 316 Pa. 449, 175 A. 548, on Judge Cunningham's opinion; *Com. Kaiser*, 80 Pa. Super 26, 28; *Com v. Sinn*, 82 Pa. Super. 482, 483; *Ad-Lee Co. v. Meyer*, 294 Pa. 498, 500, 501, 144 A. 540 (slot machine); and it is in consonance with the great weight of authority in other jurisdictions. The term "gambling device" is considered in many cases collated in 27 Corpus Juris 988 et seq., but all of them are in accord with the thought expressed in this opinion. A typical definition is found in *State v. Sanders*, 86 Ark., 353, 111 S.W. 454, 455, 19 L.R.A. (N.S.) 913: "An instrumentality for the playing of a game upon which money may be lost or won." In 12 R.C.L. 725 (Gaming, sec. 26) a gaming device is "interpreted as meaning the tangible thing with which the game, on which money may be lost or won, is played, as distinguished from the game itself." Examples of gambling devices or apparatus are given in *J.B. Mullen & Co. v. Moseley*, 13 Idaho, 457, 90 P. 986 (slot machine); *Frost v. People*, 193 Ill. 635, 61 N.E. 1054, 86 Am. St. Rep. 352 (faro layout, roulette wheel, cards, and dice); *People v. Adams*, 176 N.Y. 351, 68 N.E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675 (policy slips or sheets); *Kite v. People*, 32 Colo. 5, 74 P. 886 (roulette wheel); *State v. Soucie's Hotel*, 95 Me. 518, 50 A. 709 (slot machine); *Woods v. Cottrell*, 55 W. Va. 476, 47 S.E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933 (faro bank and slot machine). In *People v. Engeman*, 129 App. Div. 462, 463, 114 N.Y.S. 174, 177 affirmed 195 N.Y. 591, 89 N.E. 1107, it was said: "A 'device or apparatus for gambling' is a device or apparatus designed for carrying on the actual gambling—for determining whether the player is to win or lose, like a wheel of fortune * * * and contrivances of that sort." It was there ruled that a racing sheet called 'advance information' conveying information as to horses, jockeys, etc., in races about to be run, though useful to the gambler in placing his wagers, was not a device or apparatus for gambling. In *Ives v. Boyce*, 85 Neb. 324, 123 N.W. 318, 25 L.R.A. (N.S.) 157, it was held that a telegraph wire, ticker, and blackboard used in a bucket shop by a broker in obtaining the rise and fall of prices in the New York market were not gambling devices within the meaning of a criminal statute. In *James v. State*, 4 Okl. Cr. 587, 112 P. 944, 34 L.R.A. (N.S.) 515, 140 Am. St. Rep. 693, where a telegraph instrument, telegraph operator, and blackboard were used to secure and convey racing information to a gambling establishment known as turf-exchange, it was held that the telegraph instrument and blackboard were not implements used in gambling, because they were not instrumental in deciding or determining who won or lost, but only supplied information of a race that was run elsewhere, which determined the winners and losers.

The same result was arrived at in *State v. Shaw*, 39 Minn. 153, 39 N.W. 305, 297, which held that betting on horse races is gambling, and that a place kept or maintained for that purpose was a gambling establishment and a nuisance but that lists or announcements used therein giving information of the races, etc., were not gambling devices. The court said, inter alia: "A horse race is not a gambling device, nor are descriptive lists of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same and we are unable to see that the boards and lists or records of the pools sold described in the indictment are anything more. There is no element of chance in their use, which we think is the test. The defendants' methods undoubtedly serve to facilitate gambling, and so does the fact that they keep open a place for gambling, and the same may be said also of the published schedules of races and games, and many other acts and things, which, however, cannot be denominated 'gambling devices' within the meaning of the statute. The betting is on the races exclusively, and the result is in no way determined by the use of the instrumentalities in question, and no additional element of chance is introduced thereby."

Appellant's position is correctly and concisely stated in the following excerpt from the argument of its learned counsel:

"The one-way teletype is not betted upon. It does not receive or transmit the moneys bet. It does not record the bets. It does not determine the winners. It simply receives information, which information enables the gamblers to ascertain the results of the event on which they have wagered. The furnishing or receiving of racing or sporting information is not gambling and is not a crime. Therefore, the mechanical facility which enables such information to be furnished or received cannot be said to be a device or instrument for gambling."

We do not think it necessary to elaborate this opinion further than by reference to the opinion and citations foregoing.

The Pennsylvania decision was followed in 1946 in *Comm. v. Di Orio*, 49 A(2) at 867.

It was cited in two strong dissenting opinions in *Albright v. Muncrief*, 176 SW(2) 426 at 432 (Ark. 1943).

The *Albright* cases, 176 SW(2) 426 and 176 SW(2) 421, are cited in the discussion presented to us as establishing the law contrary to the Pennsylvania case of *In re Teletype Machine*, 191 A 210. In view of the specific Nevada statute and facts presented, we believe the Pennsylvania and allied cases state the majority rule.

A case following similar principles respecting a telephone company as that in the Pennsylvania case first cited 86 A(2) 777 is that of *Hagerty v. Coleman*, 182 So. 776.

We assume the local poolroom operator has a license. If not any one knowingly aiding him to break the law could be prosecuted as an accomplice.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

694. Labor—Minimum Wage and Hour Law for Women—Tips—Employer Chargeable With Deficiency.

CARSON CITY, October 28, 1948.

HON. R.N. GIBSON, *State Labor Commissioner, Carson City, Nevada.*

DEAR MR. GIBSON: You have submitted to me, on October 22, 1948, a letter from John C. Bartlett, Assistant District Attorney of Washoe County, and you ask my advice concerning the same.

One Gloria Stone contemplates making a claim against the Colombo Hotel for compensation not less than the standard minimum rates prescribed by the minimum wage and hour law for women of 1937 (1929 N.C.L., 1941 Supp., secs. 2825.41, 2825.42, 2825.43, as amended by Statutes 1939, page 74, Statutes 1943, page 113, Statutes 1945, page 255). The applicable law can be found in the 1945 Pocket Part of 1929 N.C.L., 1941 Supp. See, also, the Act of 1939 concerning tips (1929 N.C.L., 1941 Supp., sec. 2826.)

It appears the claimant worked as a cashier, checkroom attendant and cigarette girl. Apparently she was not employed, but was permitted to act as cigarette girl.

The employee's compensation for her work as cashier and checkroom attendant was never stated in terms of wages, but was received in the form of tips from patrons only.

The claimant has submitted a record of hours worked over the period July 4-September 4, 1948, covering six days in each week and involving work for seven to ten hours per day but averaging eight hours per day. She has computed the amount due at 50 cents per hour, plus 25 cents for each hour overtime, at \$216.41, which, while approximately up to the minimum standard, was not paid to her by the employer. She claims this sum as wages irrespective of how much of it she may have collected from patrons. It is stated that the tips she did collect do not equal this sum.

The section involved defines the medium or media of payment authorized. This is a provision intended to prevent evasions to excuse substandard wages and should be strictly construed against the employer.

Section 4 of the Act as amended by Statutes 1939, page 74 (1929 N.C.L., 1941 Supp., sec. 2825.44), requires payment in lawful money or lawful checks, but by mutual agreement part payment may be computed for food and lodging not exceeding one dollar per day, a situation not presented here.

There is no provision authorizing payment by mutual agreement or otherwise through the device of permitting employees to retain tips that might otherwise be claimed by the employer and contemporaneously given to the employee.

The Act relating to tips, Statutes 1939, page 13 (1929 N.C.L., 1941 Supp., sec. 2826), requires an employer claiming tips given by patrons to employees, or who "credits the same toward payment of his employee's wages," to post a notice that tips belong to the management. Failure to give such notice is a misdemeanor.

Assuming that the tips collected currently did not equal the minimum standard of 50 cents per hour (or 75 cents per overtime hour in emergencies), the employer would be chargeable with the deficiency. No mutual agreement to the contrary would be valid, but would be contrary to declared public policy.

For general and specific treatment of the problem see 31 Am. Jur. "Labor," secs. 504 and 508 (Cumulative Supplement) citing California Drive-In etc. Assn. v. Clark, 140 P(2) 657 at 662, 147 A.L.R. 1028 and note 1039 (under special statute); and (under Federal Law) Williams v. Jacksonville Terminal Co., 315 U.S. 386.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General*.

695. Elko County Fair—County Commissioners May Budget and Levy Tax For.

CARSON CITY, October 29, 1948.

HON. A.L. PUCCINELLI, *District Attorney, Elko County, Elko, Nevada*.

DEAR MR. PUCCINELLI: Reference is hereby made to your letter of October 20, 1948, received in this office October 22, 1948, wherein you request the opinion of this office concerning the applicability of sections 2027-2029, both inclusive, N.C.L. 1929, to the proposition of whether the Board of County Commissioners of Elko County may levy a tax pursuant to such sections, which sections relate to the exploiting and advertising of the resources of the counties, for the purpose of exploiting and advertising such resources through the medium of the Elko County Fair which is held each year in conjunction with the Nevada State Livestock Show.

OPINION

Sections 2027-2029, N.C.L. 1929, were superseded by chapter 181, Statutes of Nevada 1937, page 395, which said chapter is, in effect, a new Act concerning the power of the Boards of County Commissioners for the purpose of taking care of, preserving and promoting the agricultural, mining and other resources and advantages of the counties, and providing ways and means for such purposes. An examination of chapter 181 discloses that it appertains to the same matters provided in the previous law and does provide the power in the Board of County Commissioners to budget in their yearly budget sums of money for the purpose of exploiting, promoting and publishing to home seekers and the public at large, by any means in their judgment calculated to accomplish the purpose of promoting the agricultural, mining and other resources, progress and advantages of respective counties.

It is our opinion that chapter 181 provides the power in the Boards of County Commissioners to budget in their yearly budgets a sum of money for the above purposes and may direct that it be used in any manner which, in their opinion, will serve the purposes of the statute and to provide the sum of money so budgeted the County Commissioners have the power to levy a tax at a rate not to exceed that provided in the statute.

Therefore, it is our opinion that the Board of County Commissioners of Elko County may in its 1949 budget set up a sum to be used for the purposes detailed in said chapter 181 and thereupon levy the tax of not to exceed the rate provided in the statute in order to provide the money for the budgetary purpose.

However, we feel it incumbent to advise that the present Board of County Commissioners is not eligible to enter into any contracts concerning the expenditures of the aforementioned sum of money by reason of the fact that the incoming Board of County Commissioners in January 1949, will be composed of two new members. In brief, a new Board of County Commissioners will come into existence and the term of office of two of the members of the present Board will have expired. Sections 1973 and 1947, N.C.L. 1929, prohibit any member of the Board of County Commissioners voting on any contract which extends beyond his term of office.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General.*

696. Welfare—Orphans Home—Cost of Maintenance for Half-Orphans, Dependent or Neglected Children Paid by Count and State—Full Maintenance of Whole Orphans Charge Against State.

CARSON CITY, October 30, 1948.

MR. WILLIAM E. ROSE, *Director, Division of Child Welfare Services, 309 North Virginia Street, Reno, Nevada.*

DEAR MR. ROSE: This will acknowledge receipt of your letter dated October 22, 1948, received in this office October 23, 1948.

You request an interpretation of section 7592, N.C.L. 1929, which empowers the State Board of Directors to set maintenance rates for dependent and neglected children committed to the institution at a rate not less than one-half the cost of such maintenance by the State. You ask if the Board is empowered to set this rate at any figure it desires up to the maximum cost per capita maintenance.

You also ask for an interpretation of the statutes governing the Orphans' Home respecting the responsibility of the State for the maintenance of whole orphans committed to the home.

We are of the opinion that the cost of maintenance at the Orphans' Home for half-orphans, dependent or neglected children committed to that institution, should be a reasonable rate fixed by the Board of Directors, one-half of which is paid by the State and not less than one-half to be paid by the county from which the child is committed, unless the Court may order the parent or guardian to reimburse the county for the amount of such maintenance.

In answer to your second question, we are of the opinion that the full maintenance of whole orphans committed to the institution is a charge against the State.

Several of the sections of the Act for the government and maintenance of the State Orphans' Home have not been amended since its reenactment in 1873. Section 7 of the Act, section 7586, N.C.L. 1929, is one of these sections. This section deals with the procedure for the commitment of whole orphans, which proceeding is within the jurisdiction of the District Court. The term "whole orphan" is used throughout the section. The only mention of expenses is in the last sentence of the section which reads: "The expenses of the proceedings herein provided for, and of the transportation of orphans to the home, shall be a county charge."

Section 12 of the original Act provided that the Board of Directors might receive any half-orphan from its living parent upon such terms as the Board may determine, and that they might require the living parent of any half-orphan to contribute such sum to its support as they may require. The only reference to half-orphans found in the present statutes is in section 7583, N.C.L. 1929, section 2 of the original Act which has not been amended, and that is set out under duties of the Board in the following language: "* * * they shall submit to the legislature, during the second week of each session, a biennial report, showing the amount of receipts and expenditures, the condition of the home, the number of orphans and half-orphans admitted and discharged during the interval between the regular sessions of the legislature * * *."

Sections 12 and 13, being sections 7591 and 7592, N.C.L. 1929, have been amended four times.

The statutes of 1903, page 62, amended section 12, omitting the term half-orphan and substituting a provision that any child, in the discretion of the Board of Directors, might be

received from its resident parent, parents, or guardian, and that the Board could require the payment for its support from such parents or guardians. The amendment of this section by the Statutes of 1913, page 367, contained the same provision and organized the Orphans' Home as a home for dependent or neglected children in addition to the other purposes for which the institution was established. The Statutes of 1915, page 390, in amending this section followed the former amendment, and added the provision, "or any other children as may be committed to the care of said institution by any district court of the state." The last amendment in the Statutes of 1919, page 378, omitted the expression "or any other children" and added that dependent and neglected children "shall be subject to all the conditions of the act of March 24, 1909, relating to dependent and neglected children." The term "half-orphans" as used in the original section was merged into the term "dependent or neglected children" by the amendment to sections 12 and 13, but the provision respecting whole orphans remains the same as in the original act.

Section 13 of the original Act referred to half-orphans and made their admission to the Home subject to the conditions as fixed by the Board. The subsequent amendments of this section, up to 1919, referred to section 12 and provided for the commitment of such children by the District Court in the absence of the District Judge by the County Commissioners. The entire expense of transportation and maintenance of such children was made a charge against the county from which such child was committed. The last amendment, in 1919, which is now section 7592, N.C.L. 1929, changed the full charge for the maintenance of such children from the county in the following language: "* * * that the expenses, transportation, and maintenance of such children when committed to this institution by any district court or board of county commissioners of the state shall become a charge against the county from which such children are committed, such charge for maintenance to be a reasonable rate to be fixed from time to time by the board of directors of said orphans home; provided, that such rate shall not be less than one-half of the cost of such maintenance by the state."

It is evident from a consideration of the amendments to these sections 12 and 13 that the intention of the Legislature is to place half-orphans, dependent and neglected children in the same class, and that the county instead of paying the full charge should pay not less than one-half of the cost of such maintenance to the state. There is no implied authority under which the board could fix the rate up to the maximum cost to the state. Such action could nullify the latest provision in this section leaving it to read the same as before amendment.

In the event more definite provisions are required for the classification of half-orphans, dependent and neglected children, and the distribution of the cost of maintenance, the subject should be submitted to the Legislature which will be in session in a few months.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

697. Notary Public—Signature of Woman Marrying During Term of Commission—No Provision in Law Requiring Issuance of New Commission.

CARSON CITY, November 18, 1948.

MISS ALICE C. MAHER, *Secretary to the Governor, Carson City, Nevada*.

DEAR MISS MAHER: Reference is hereby made to your letter of November 16, 1948,

wherein you request the opinion of this office with respect to the proper signature of a notary public, the same being a woman, whose appointment antedated her marriage, but whose marriage took place during her term of office under her commission as notary public. You also inquire whether it would be within the provision of the law to issue a new commission with the same expiration date without the payment of the notarial fee, thus showing the change in name of the notary public.

OPINION

A very similar question was submitted to this office in 1932 concerning the signature of a woman officer of the State who was unmarried at the time she was elected to office, but who married during her term of office, thus changing her surname. It was held by this office, after an examination into the law, that the proper signature of such woman officer in signing official documents would be her unmarried name, followed by a hyphen, and then her married surname. The opinion concerned the Clerk of the Supreme Court of Nevada and, in view of the fact that the opinion became public, we hereby quote the unmarried name of such officer and then quote her official name after her marriage as prescribed by this office—"Eva Hatton" and then her official name after marriage thus "Eva Hatton-Guthrie." The opinion in question is Opinion No. 80, dated June 15, 1932, and found in the official Report of the Attorney General, January 1, 1931, to June 30, 1932.

It is our opinion that the same rule applies with respect to women notaries public and it will be their sufficient signature, in their official capacity, to sign their unmarried name, followed by a hyphen, and then the surname of their husbands.

There is no provision in the law requiring the issuance of new commission in the foregoing situation. It is our opinion that the original commission will be sufficient and sanction the official acts of such notary public after her marriage until expiration of that particular commission.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

698. Fish and Game—Walker River Irrigation District Assessment—Legal Charge Against State.

CARSON CITY, November 19, 1948.

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

Attention: S.S. Wheeler.

Re: Walker River Irrigation District assessment.

GENTLEMEN: Reference is hereby made to the letter of the Fish and Game Commission, dated November 4, 1948, to J.A. Baker, County Treasurer, Yerington, Nevada, wherein you returned to such treasurer his statement for tax assessed on State property, which property was in March of this year purchased by the State Fish and Game Commission for the State. This letter advised the County Treasurer that the Commission was advised that the property should be exempt from taxation under section 6418, N.C.L. 1929, as amended in 1943.

Further reference is made to the letter of W.M. Kearney, attorney for the Irrigation District,

dated November 12, 1948, addressed to this office, with reference to the assessment levied against the lands in question covering the apportionment of benefits on lands lying within the Irrigation District for the retirement of a certain bond issue theretofore made by the District, the amount of the assessment being \$2.89 on 2.024 acres of land within the S½ of the NE ¼ of the NE ¼ of Section 18, T.11 N.C.L., R. 24 E., M.D.B. & M.

Reference is also made to your letter of November 18, 1948, which was in reply to our letter of November 17, requesting advice concerning the purchase of the land in question by the Fish and Game Commission for the State of Nevada. We also refer to the option agreement of the 6th day of January 1948, between Ida E. Allen and John E. Allen, owners of the land, and the Nevada State Fish and Game Commission. We also refer to the bargain and sale deed executed the 16th day of March 1948, whereby the title to said land was conveyed to the State of Nevada by and through the Fish and Game Commission.

An examination of the matter discloses that the land in question has undoubtedly been included in the Walker River Irrigation District for many years and that it became subject to the lien of any bond issues concerning the District. Such lien becomes fixed upon the land and follows the land into subsequent ownership, even though such ownership is vested in the State of Nevada. The assessment in question is not a tax for the support of the government of the State and is not exempted under section 6418, N.C.L. 1929, because the assessment is now made upon State-owned land. Section 6418, as amended, relates to taxation for the support of the government of the State and has no relation to assessments for the retirement of bond issues, the lien of which is fixed upon the land.

We find no reservations whatever concerning this matter in the option agreement and/or in the deed conveying title to the State. We are, therefore, of the opinion that the assessment against the land for the retirement of the bonds in question is a legal charge against the State and should be paid from the funds of the Nevada Fish and Game Commission.

We are herewith returning the bargain and sale deed and the option agreement furnished us with your letter of November 18, 1948.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

cc: W.M. Kearney.

699. Public Schools—New District Created in Unorganized Territory—Private Funds Used Not Counted on Teacher's Salary..

CARSON CITY, November 20, 1948.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated November 4, 1948, received in this office November 5, 1948. You submit a statement of facts, of which the following is a summary, and two questions which are quoted below.

Facts presented are as follows: Families with children moved into unorganized school territory after opening of the school term. There will not be the minimum five resident children as required by statute as a basis for a petition to establish a new school district until about the

middle of December when the required three months residence will be established. In one instance these families have opened a school at their own expense, provided a school building, employed a properly certified teacher and followed the course of instruction which would be approved by the Board of Education and have paid the teacher on the basis of \$2,400 per year.

1. May the private funds which these families will have expended in payment of a teacher salary be counted as part of the amount which is required by the minimum salary law?

2. May the days taught prior to the legal establishment of the new school district by the Board of County Commissioners be counted as part of the minimum term of that school district, or must this school district actually operate for the required six school months within the given school year?

You cite sections 34, 36, paragraphs 2(a), 3 and 4 of section 180, and subsection 7 of section 181 of the 1947 School Code.

We are of the opinion that the sections of the 1947 School code governing the establishment of new school districts from unorganized territory, and the sections providing the apportionment of school funds to such districts are plain and unambiguous, and there is no room for a construction to consider a condition such as presented in your statement of facts. The district, when established, will be governed by these sections, and your questions cannot be answered in the affirmative.

Section 34, chapter 63, Statutes of 1947, provides that the Board of County Commissioners is authorized to create new school districts from unorganized territory when there shall be presented to it from the parents or guardians of five or more resident children a certified petition setting forth the facts required in the section.

Section 424, paragraph 1, defines the term "resident children" as children between the ages of six and eighteen years who have resided with parents or guardians in the district for a period of at least three months.

Section 180 makes provision for the apportionment of the State Distributive School Fund. Paragraph 4 provides that newly established districts which have not been in operation for one year and therefore have no average daily attendance during the preceding school year shall be allowed money from this fund on the basis of the number of resident pupils listed on the verified petition for the establishment of the district.

Section 181 provides for the apportionment of the County School Fund, and paragraph 7 reads the same for newly established districts as paragraph 4 of section 180.

Section 44 provides that no school district shall receive any portion of the public school moneys in which district there was not taught by a legally qualified teacher a public school for a term of six months of the school year ending on the last day of the preceding June with at least three resident children in actual attendance for at least 100 days, except when such school district is a newly organized district.

At the time of establishment the school district receives the emergency apportionment provided under chapter 25. At the next semiannual apportionment the new district receives funds on the basis of the number of pupils listed in the petition as provided in paragraph 4, section 180, and paragraph 7 of section 181. If at the time of the second semiannual apportionment sufficient school time has not elapsed to meet the requirements of section 44, then the second semiannual apportionment is made on the same basis as the first semiannual apportionment to that newly created district.

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

700. Public Schools—School Boards Cannot Participate in Financing School Lunch Programs at Private Schools.

CARSON CITY, November 20, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada*.

DEAR MR. JONES: This will acknowledge receipt of your letter dated November 12, 1948, received in this office November 13, 1948.

You request an opinion as to the authority of the school board to permit the Parent-Teachers Association to prepare and serve school lunches, under the Federal-State law relating to the national school lunch program, at the expense of the school board, for the purpose of serving school lunches to a private school.

In your opinion you state that it would appear to be illegal for the public school funds to be used for the purpose of assisting private schools directly or indirectly; that there is no prohibition against the Parent-Teachers organization serving school lunches to a private school as long as the program is not financed to any extent by Federal funds.

We are of the opinion that the school board cannot participate in the financing of a school lunch program which includes the serving of lunches at a private school.

Section 1759, Title 42, U.S.C.A., under the National School Lunch Act makes provision for the apportionment of Federal funds to nonprofit private schools for this purpose in States where the statutes do not permit the educational agency to match or disburse such funds to private schools.

Chapter 180, Statutes of 1947, is "An Act to provide for the establishment, maintenance, operation and expansion of nonprofit school lunch programs in public schools of the State of Nevada and making an appropriation therefor."

Section 1 of the Act under definitions, subsection (b), reads: "School" means any public elementary school and any district and county high school.

Section 2 authorizes the State Board of Education to enter into agreements with any agency of the Federal Government, with any school board, or with any other person or agency as it may deem necessary to provide for the establishment, maintenance and operation of school lunch programs, and directs the disbursement of Federal and State funds in accordance with any applicable provisions of Federal-State law.

Section 4 authorized school boards to operate or provide for the operation of school lunch programs in schools under their jurisdiction, and to use funds disbursed to them under the provisions of this Act.

Congress on June 4, 1946, passed what is popularly known as the National School Lunch Act found under Title 42, sections 1751-1760, United States Code Annotated.

Section 1759, under the title Disbursement to Nonprofit Private Schools reads: "If, any state, the state educational agency is not permitted by law to disburse the funds paid to it under this chapter to nonprofit private schools in the state, or is not permitted by law to match Federal funds made available for use by such nonprofit private schools, the Secretary shall withhold from the funds

apportioned to any such state under sections 1753 and 1754 of this title the same proportion of the funds as the number of children between the ages of five and seventeen, inclusive, attending nonprofit private schools within the state is of the total number of persons of those ages within the state attending school. The Secretary shall disburse the funds so withheld directly to the nonprofit private schools within said state for the same purposes and subject to the same conditions as are authorized or required with respect to the disbursements to schools within the state by the state educational agency, including the requirement that any such payment or payments shall be matched, in the proportions specified in section 1756 of this title for such state, by funds from sources within the state expended by nonprofit private schools within the state participating in the school lunch programs under this chapter. Such funds shall not be considered a part of the funds constituting the matching funds under the terms of section 1756 of this title.”

The Nevada Act provides for the furnishing of nonprofit lunches in public schools of the State. A school is defined as any public elementary school, district or county high school. The appropriation is made out of the State Distributive School Fund.

Section 170 of the 1947 School code provides that no portion of the public school funds shall be devoted to any other object or purpose.

It appears, therefore, that the State educational agency is not permitted by State law to disburse the funds paid to it under the National School Lunch program to nonprofit private schools. Such schools would come under the provisions of section 1759, Title 42, U.S.C.A., quoted above.

As you state in your letter, there is no prohibition against the Parent Teachers organization serving lunches to a private school, but, in our opinion, the Board of Education or school board cannot participate in the financing of a school lunch program which includes a private school under the provisions of Federal-State law.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

701. Mining—Patented Claims—Sale of by County—Deed To Be Executed by County Treasurer as Trustee.

CARSON CITY, November 22, 1948.

HON. GRANT L. ROBISON, *State Auditor, Carson City, Nevada*.

DEAR MR. ROBISON: This will acknowledge receipt of your letter dated November 18, 1948, received in this office November 19, 1948, submitting the following question.

Section 6462, N.C.L. 1929, with amendment thereto, provides that the County Treasurer shall be trustee for the State and county in connection with all real property which has been deeded to the county through the operation of the revenue laws. The same section, as amended by chapter 169 of the 1947 Statutes, provides the method of resale of real property in trusteeship. Section 4309, 1929 N.C.L., 1941 Supp., provides that the County Commissioners shall make and execute deeds conveying title to patented mining claims sold under the provision of said section.

You state that in some counties the Treasurer as trustee continues to make and execute deeds to patented mining claims and in other counties the County Commissioners execute the deeds. You request an interpretation of the statutes to determine whether the trustee or the County

Commissioners should execute such deeds.

We are of the opinion that the deed to such property should be made and executed by the County Treasurer as trustee and the County Commissioners.

Section 6462, N.C.L. 1929, provided when the Treasurer should buy delinquent tax property. The amendment by chapter 169, Statutes of 1947, makes it the duty of the County Treasurer to take certificates to be issued to them under the provisions of section 39 of the revenue Act. Chapter 169 provides: "When the time allowed by law for redemption shall have expired, and no redemption shall have been made, the officer who issued such certificate shall execute and deliver to such Treasurer a deed of the property described in each respective certificate in trust as aforesaid for the use and benefit of the State and county and any officer having fees due them in such cases; and such Treasurer, and his successors in office, upon obtaining a deed of any property, in trust as aforesaid, under the provisions of this Act, shall hold such property in trust until the same is sold, pursuant to the provisions of this Act."

Patented mining claims, upon which the taxes have not been paid, are held under certificate and deed by the County Treasurer as trustee. When the deed is recorded the trustee holds the record title to such property.

Section 4309, 1929, N.C.L., 1941 Supp., as amended by chapter 204, Statutes of 1945, and chapter 39, Statutes of 1947, provides a method whereby patented mining claims which have become the property of the county through operation of the revenue laws of the State may be sold. The affidavit and petition provided for in the Act is required to show that there is belonging to said county, as shown by the official records thereof, a patented mining claim or claims, which has or have become the property of said county through operation of the revenue laws of the State. After the period of exploration of the claims by the petitioner the statute provides: "* * * if said petitioner so desires, said county commissioners shall make and execute a deed conveying the title of such county to such claim or claims to said petitioner * * *."

The official records of such property show record title in the Treasurer as trustee.

In *State ex rel. Houlahan v. Douglas*, [55 Nev. 321](#), the interpretation of this chapter was involved, but the form of the deed was not raised or decided.

In the *G.C.C. Mng. Co. v. Getchell*, [58 Nev. 288](#), the same chapter was involved, but the validity of the deed was not questioned.

16 Am. Jur. sec. 73, page 481, relating to the necessity of the grantor's name in a deed, recites that a conveyance naming the beneficiaries of trust property, but not naming the trustee, has been held not to pass title to the trust property, citing *Jason v. Johnson*, 67 A. 42; 122 Am. State Reports 402. In this case the beneficiaries deeded the trust property without naming the trustee in the deed and the Court held that such deed did not pass title to the property.

There is a conflict in the provisions of section 4309, 1929 N.C.L., 1941 Supp., and the section of the revenue Act concerning the resale of property acquired through tax sale. It appears, therefore, that the safer procedure is that an order be made by the Commissioners and entered upon the minutes authorizing and directing the Treasurer as trustee and the chairman of the Board to make and execute the deed to such patented mining claim.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

702. Cities and Towns—Town Ordinance—Liquor License—License Board May Deny Transfer of License.

CARSON CITY, November 24, 1948.

HON. WM. J. CROWELL, *District Attorney, Nye County, Tonopah, Nevada.*

DEAR MR. CROWELL: Reference is hereby made to your letter of November 22, 1948, wherein you request the opinion of this office concerning the application of section 18 of the liquor ordinance for the town of Tonopah, which said section relates to the number of licenses limited and reads as follows:

The total number of bar, retail and/or restaurant liquor licenses within the limits of the unincorporated town of Tonopah, Nye County, Nevada, shall be limited to ten (10) in number, and the number of wholesale, package and/or distributors' liquor licenses within the limits of the unincorporated town of Tonopah, Nye County, Nevada, shall be limited to six (6) in number, provided that nothing in this Act shall be construed to affect the liquor licenses of all types issued prior to the passage and approval of this Act, or to the sale, transfer, assignment or conveyance thereof, but all such license over and above the number thereof limited hereby not renewed for any one quarter shall be held to be surrendered and abandoned by the licensee.

You inquire as follows:

The question involved is as to whether or not a licensee quitting business may transfer his license with the consent of the license board to another party, and such event occurring, whether or not the transferee must continue the license in the former name of the place so licensed, or whether said licensee has the right to effect a change of name in said license in his next application. It is my opinion that the Board has the power to deny the transfer of the license but if it approves the transfer that it does not necessarily follow that the transferee cannot change the former name of the establishment in reapplying for the license.

Please be advised that this office concurs in your opinion. No doubt the license board has the power to deny the application for transfer of the license. However, we agree with you that, if the license board sanctions the transfer of the license, it does not necessarily follow that the transferee cannot change the former name of the establishment in reapplying for the license. We think beyond question that the transferee has the right to change the name of the establishment.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By W.T. MATHEWS, *Special Assistant Attorney General.*

703. Fish and Game—Game Warden Are Not Police Officers.

CARSON CITY, November 24, 1948.

S.S. WHEELER, *Director, Nevada Fish and Game Commission, P.O. Box 678,* Reno, Nevada.

DEAR BUCK: Your letter dated November 22, 1948, was received November 24, 1948.

You state that you feel that game wardens ought to have the same status as “police officers” under the Public Employees’ Retirement Act (Chapter 181, page 623, Statutes 1947) with particular reference to section 14 and section 18, subdivisions 1, 3, and 5 thereof.

These sections give “police officers and firemen,” after 20 years of service, a retirement allowance on attaining the age of 55, whereas, the retirement age of others is 60 years. After June 30, 1953, the respective ages are 50 and 55 for voluntary retirement on a proportionately reduced allowance.

You refer to our Opinion of July 7, 1948, answering an inquiry by Secretary Foley as to the status of game wardens, and particularly to a definition of “peace officers” found at section 10735, N.C.L. 1929. This definition was referred to in that Opinion with the observation that “peace officers” and “police officers” were substantially the same. However, the words in the statute under consideration are “police officers” and we placed a construction on those words in an earlier Opinion given to Mr. Foley May 21, 1948 (See Opinion 621, page 405, Attorney General’s Report for 1946-1948). We held that a police officer is one who is a member of a police or law enforcement department irrespective of rank of the individual. The department of which he is a member is charged with the duty of preserving the peace and good order of the geographical subdivision in which it is located.

We do not find that your department is a police department. While arrests may be made or prosecutions initiated by complaint, it functions more for conservation and preservation rather than in the suppression of violence.

As a remedy for the situation “police officers” might be defined in section 2 of the Act wherein various terms “as used in this act” are explained. This would make unnecessary an amendment of sections 14 and 18 of the Act and would be applied in connection with the Retirement Act alone. However, care in the definition would be required lest purely administrative employees be put in a preferred class.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General.*

704. Planning Board, State—State Cannot Incur Debt in Excess of the Sum of 1 Percent of Assessed Valuation for New Construction—This Amount Cannot Be Exceeded With Legislative Approval.

CARSON CITY, November 29, 1948.

STATE PLANNING BOARD, *W.T. Holcomb, Chairman, Carson City, Nevada.*

Attention: A.M. Mackenzie, Secretary.

GENTLEMEN: This will acknowledge receipt of your letter dated November 16, 1948, received in this office November 17, 1948.

You present the following question: “In preparing our Planning Board’s recommendation for new construction at the State level, we have assumed that the State level, we have assumed that the State cannot incur debt for construction purposes in excess of one percent of property valuations. Are we correct in this assumption or do the present statutes provide that this amount can be exceeded with legislative approval?”

In our opinion your assumption that the State cannot incur debt in excess of the sum of one

percent of the assessed valuation of the State for new construction purposes as contemplated by the Planning Board is correct.

Article IX, section 3, of the Nevada Constitution, provides that the State may contract public debts, "but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one percent of the assessed valuation of the state, as shown by the reports of the county assessors to the state controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned." The section further provides that every contract of indebtedness entered into or assumed by or on behalf of the State, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the State in time of war, or if hostilities be threatened, provide for the public defense.

This section was amended and ratified at the general election of 1934 to add the following:

The state, notwithstanding the foregoing limitations, may, pursuant to authority of the legislature, make and enter into any and all contracts necessary, expedient or advisable for the protection and preservation of any of its property or natural resources, or for the purpose of obtaining the benefits thereof, however arising and whether arising by or through any undertaking or project of the United States or by or through any treaty or compact between the states, or otherwise. The legislature may from time to time make such appropriations as may be necessary to carry out the obligations of the state under such contracts, and shall levy such taxes as may be necessary to pay the same or carry them into effect.

The amendment deals specifically with the power of the Legislature to enter into contracts for the protection and preservation of the State's property and natural resources, or for obtaining the benefits of its resources arising through projects of the United States or compacts between the States. It contemplates the making of appropriations by the Legislature and the levy of a tax to pay the same.

The latter part of this section does not affect the former restriction limiting the public debt to the sum of one percent of the assessed valuation of the State. This restriction refers to debts that are a liquidated and legalized demand against the State. The section provides:

Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed or the taxes postponed or diminished until the principal and interest of said debts have been wholly paid.

The last amendment of the section authorizes the Legislature to make appropriations for the purpose of entering into contracts to protect and preserve its property and natural resources. In this case the appropriation would not be considered a debt against the State as contemplated in the first part of the section, and the amount of such appropriation would not be considered in the aggregate debt of the State. It is not necessary to the validity of such an appropriation that funds to meet it should be in the treasury. The revenue anticipated from the tax authorized to be levied to pay the same is authorized in the section.

In conclusion, it is our opinion that you are correct in assuming that the Legislature cannot authorize you to contract for any of the purposes stated, if the amount contracted to be paid will

bring the total State debt above one percent of the total assessed valuation of taxable property in the State. In other words, your purposes invoke the rule and not to the exception added to the Constitution.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

705. Fish and Game—Posting of Property Against Trespassing Sufficient Under Present Law—Effect of Failure to Prosecute Appeal From Justice Court to District court—Act Provides for Confiscation of Fishing and Hunting Equipment.

CARSON CITY, December 2, 1948.

MR. S.S. WHEELER, *Director, Nevada Fish and Game Commission, Post Office Box 678, Reno, Nevada.*

DEAR BUCK: Under date of November 26, 1948 you submitted to this office three inquiries with the request that we furnish you and answer on them as early as possible. Herewith are your questions and our answers:

1. In case a property owner by posting entirely excludes the public from hunting or fishing on his land, may he at the same time hunt and fish and permit his friends to hunt and fish on his lands? Is this a subject for amendatory legislation?

A. The practice referred to is not legitimate for it has the effect of monopolizing the fish and game resources which are the property of no man but belong the public generally. Reasonable protection against trespassers is afforded by the law but injunction would reach one who made the law a cloak for monopoly of the State resources. I do not think any amendment of existing law is necessary.

2. In a prosecution begun before a Justice of the Peace in White Pine County an appeal to the District court has been taken and the accused was released on bail (of \$500) pending appeal. Considerable time has elapsed and accused has returned to Utah. You inquire what should be done.

A. If the appeal has actually been taken and the record filed with the Clerk of the District Court, the District Attorney ordinarily would move to have the case tried anew without further delay. It may be that by failing to file the transcript in due time the right to a trial in the District Court has been lost. If this is so the District Attorney would ordinarily demand that the sentence of the Justice Court be enforced without further delay. If accused failed to appear either for trial or to carry out the sentence of the Court, the District Attorney would ordinarily apply for the forfeiture of the bail or even request the Governor to cause the accused to be brought back from Utah.

3. You inquire as to the construction of that part of the fish and game law relating to the seizure, holding and confiscation of certain fishing and hunting equipment used in violating the law.

A. Section 39 of the law (Ch. 101, Stats. 1947) provides at page 362 that game wardens and various other officers are authorized and required to seize and hold "For evidence only" any "guns, ammunition, traps, snares, tackle, or other illegal devices or equipment, when it appears that a violation of this act has occurred."

Section 90, paragraph 8, appearing at page 383, Statutes 1947, relates to penalties to be imposed by Courts. In addition to fine or imprisonment the Court on conviction “may in its discretion confiscate any fishing or hunting equipment used in any unlawful taking of fish or game.”

It is apparent that section 39 relates only to the seizure and holding “for evidence only” of the property described. It relates to the power of officers, not Courts. However, it may be of some assistance in construing section 90. It is plain guns and ammunition may be so seized and held for evidence but “traps, snares, tackle” are linked with “other illegal devices or equipment” and it may be intended that is only when they are inherently contraband (such as snag lines etc.) and not merely because equipment lawful in itself is put to an unlawful use (such as hunting or fishing out of season or for protected fish or game).

With this reference to section 39 it appears that the language of section 90 is broader when taken alone. Upon conviction the Court “in its discretion may confiscate any fishing or hunting equipment used in any unlawful taking of fish and game.”

Before confiscation occurs there must be a seizure and holding “for evidence only.” The Court can rule conveniently only on the property brought into Court and it may be that the limitation on seizure will in effect be a limitation on the Courts as to what is meant by “fishing or hunting equipment used in any unlawful taking of fish and game.”

Whatever construction may be placed on the law it is our view that the words “fishing or hunting equipment” ought not be given an enlarged rather a restricted meaning. Beyond fishing rods and tackle, guns and ammunition, an enlarged construction might lead to the inclusion of boots, jackets, boats, automobiles, etc., until the result would be absurd.

We believe the language of these sections might be improved by the Legislature and that there is also a lack of provision as to the disposition of equipment when and if confiscated by order of Court.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

706. Library—Salaries of Assistant Librarians.

CARSON CITY, December 8, 1948.

HON. E. CHAS. D. MARRIAGE, *State Librarian, Carson City, Nevada*.

DEAR MR. MARRIAGE: Receipt is hereby acknowledged of your letter of December 8, 1948, requesting the opinion of this office as to the maximum legal salary that should be paid your Assistant State Librarians. You set forth the employment records of your assistants as follows:

Mrs. Eleanor Glover—July 1923, through 1929, Nevada State Library; July 28, 1948, Nevada State Library.

Mrs. Katherine Raycraft—January 1945, to November 20, 1946, John Marshall Library under city Board of Education, Los Angeles, California; May 5, 1947, to September 15, 1948, inclusive, Nevada State Highway Department; September 16, 1948, Nevada State Library.

OPINION

The salaries of the Assistant State Librarians are provided in and governed by sections 5 and 6 of “An Act providing for the appointment and employment of certain officers and employees of the State of Nevada and fixing their compensation,” the same being chapter 218, Statutes of 1947, and which is the latest expression of the legislative will with respect to the salaries therein provided and superseding all previous statutes on the subject.

Section 5 provides, as to Assistant State Librarians, that for the first two years of employment each said assistant shall receive a salary of \$1,750 per year, for the next two years a salary of \$1,950 per year, and after four years of employment a salary of \$2,100 per year. Section 6 provides additional compensation to that provided in section 5 of ten percent of said stated compensation, which additional compensation automatically will expire June 30, 1949. Thus, under the statute, for the first two years of employment an Assistant State Librarian would be entitled to receive per year the sum of \$1,750 plus \$175 or \$1,925, for the next two years the sum of \$1,950 plus \$195 or \$2,145 per year, and after four years of employment the sum of \$2,100 plus \$210 or \$2,310 per year.

It is to be noted that section 5 provides that employment in any of the classes in any State office or department may be aggregated from March 24, 1931, for the purpose of computing length of employment. This provision, in our opinion, limits the employment service which a State employee within the statute, including Assistant State Librarians, can aggregate, to service in an office or department of the State of Nevada since March 24, 1931, and that service in an office or department of some other State cannot be used in computing the aggregate years of service under the statute in question here.

From the hereinabove-quoted employment service record it is clear, we think, that Mrs. Glover’s employment service under the statute began July 28, 1948, and that the employment service of Mrs. Raycraft dates from May 5, 1947. It is, therefore, our opinion that maximum legal salary that can be paid to Mrs. Glover is at the rate of \$1,925 per year until July 28, 1950, at which time she would be entitled to the two-year raise effective on that date. It is our further opinion that the maximum legal salary that can be paid to Mrs. Raycraft is at the rate of \$1,925 per year until May 5, 1949, at which time she would be entitled to \$2,145 per year, unless the Legislature in the meantime should change the law.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

707. Water Law—Water Users Cannot Legally Be Exempted From Hydrographic Survey Costs and Water Distribution Expenses.

CARSON CITY, December 9, 1948.

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

Attention: Edmund Muth, Deputy State Engineer.

DEAR MR. SMITH: Reference is hereby made to your letter of December 2, 1948, received in this office December 3, wherein you request the opinion of this office as to whether under section 52 of chapter 209, Statutes of 1931, the same now being section 7937, Nevada Compiled Laws 1929, as amended at 1947 Statutes 519, the State Engineer has any right or authority to exclude any water user from being assessed for water distribution expenses, where water for

irrigation is distributed in accordance with the decree of the Court and the water law of this State.

STATEMENT

The water rights of the Quinn River stream system in Northern Nevada were adjudicated in an adjudication proceedings initiated by certain water users in the District Court of the Sixth Judicial District in Humboldt County and a final decree was entered therein on April 9, 1919. Such proceedings were privately initiated and were not had under the law of 1913. It appears in said decree that a stream named Happy Creek was and is set forth as a tributary of Quinn River and water rights to the waters thereof decreed to the users.

Pursuant to the authority provided in chapter 159, Statutes of 1947, which added section 46½ to the water law, the above-mentioned Court in October of 1947, upon petition of certain of the water users of said stream system, entered an order directing the State Engineer to make a hydrographic survey of the stream system and report thereon to the Court so as to determine whether the stream system should, pursuant to such statute, be placed under the administration of the State Engineer for the distribution of water in accordance with the said decree. That thereafter and on or about March 10, 1948, the Court entered its order directing the State Engineer to distribute the waters of the Quinn River stream system in accordance with the decree so made and entered on April 9, 1919, under the supervision and control of the Court, and subject to the provisions of chapter 159, Statutes of 1947, and providing in the order that the owners of all of such decreed rights shall be subject to the provisions of said Act, including assessment of costs for the administration of such rights. The order also stated "that the administration of the water rights in and of the waters of the Quinn River system, by the State Engineer for the State of Nevada, will be for the best interest of all the said water users."

Upon the entry of the aforesaid order of the Court the State Engineer computed the costs of the hydrographic survey of the Quinn River system and paid the same from the Hydrographic Fund, a revolving fund in the State Treasury created by and pursuant to section 7931, N.C.L. 1929. The State Engineer also estimated the costs and expenses of the distribution of the waters of said system for the season of 1948 and furnished a budget therefor to the Board of County Commissioners of Humboldt County. An itemized statement of the costs of the hydrographic survey, which costs were prorated and apportioned to the respective decreed water users, was made and submitted to the County Clerk of Humboldt County for the purpose of the collection of the amounts thereof for the reimbursement of the Hydrographic Fund.

The budget of the estimated expenses of the distribution for the irrigation season of 1948, so furnished the Board of County Commissioners, was itemized and prorated to the respective water users in accordance with section 52 of the water law (section 7937, N.C.L. 1929) as amended at 1947 Statutes, page 519; said budget was approved by the Commissioners and certified to the County Assessor April 5, 1948, and the assessment placed on the assessment rolls of Humboldt County as taxes for the reimbursement of the Water distribution Fund in the State Treasury created and established by the 1943 Legislature in chapter 23, page 34, Statutes of 1943. A water Commissioner was employed for the 1948 irrigation season and he distributed the water during said season.

Since the furnishing of the statement of costs of the hydrographic survey and assessment of costs of water distribution, according to law, a Mr. "D," whose water rights are on said Happy Creek, objects to the payment of such costs and expenses upon the ground that he received no direct benefits from the State Engineer's distribution of water. However, "D" received during the

season all the water to which he was entitled under the decree, irrespective of whether it was necessary for the Water Commissioner to distribute it to him. The question is, can such water user be legally relieved from the payment of costs and disbursements levied against him.

OPINION

Prior to the enactment of section 46½ of the water law of 1913, which said section was inserted in such law by the Legislature of 1947 in chapter 159, page 518, Statutes of 1947, neither the courts of this State nor the State Engineer were empowered to order or to assume the administration of decreed water rights on any stream system in the State, the adjudication of the rights to the use of waters therefrom was not had pursuant to the statutory method provided in the water law. Section 46½ provided the authority and the means whereby water rights decreed in a proceedings initiated by the water users on a stream system themselves, without recourse to the statutory method, could be administered by the State Engineer as though theretofore brought within the statutory method.

Section 46½, in addition to empowering the courts to order the administration of the water rights in the so-called private decrees, also provides that “the owners of such decreed rights shall be subject to all the provisions of the above-entitled Act (the water law of 1913 and as amended) relating thereto including the assessment of cost for the administration of such rights.” The section further provides, “The cost of making the survey and map by the state engineer as herein provided for shall be paid from the hydrographic fund as provided for in section 46 of the above-entitled act.” Thus the Legislature has expressly provided that the payment of the costs of the hydrographic survey and the expenses of water distribution under section 46½ shall be as provided in the water law of 1913 as amended.

The Hydrographic Fund was and is provided in section 46 of the water law of 1913, i.e., section 7931, N.C.L. 1929. A continuing revolving fund of \$5,000 was appropriated in the first instance by the Legislature, reimbursable from time to time by the parties to suits or proceedings where maps and services were and are furnished by and upon the direction of the State Engineer. The fact that such fund is a continuing revolving fund implies, if it does not expressly require reimbursement. It is expressly provided, “The amounts paid by the parties to said suit, on account of said surveys, shall be paid into said hydrographic fund.” The Court in the instant matter ordered and directed the State Engineer to make the hydrographic survey. Section 46½ directs payment of the costs of such survey from the Hydrographic Fund, but such section does not exempt any person liable for his or her pro rata share of such costs from payment thereof, and there is no other statute containing any such exemption. Certainly the Hydrographic Fund must be kept intact by reimbursement thereof. It is our opinion that all water users to whom have been decreed water rights in proceedings where the Court orders hydrographic surveys to be made by the State Engineer are liable for their pro rata share of the costs thereof and that they cannot legally be exempted from the payment thereof.

We come now to the question of the payment of the expenses of water distribution. Section 52 of the water law, being section 7937, N.C.L. 1929, as amended at 1947 Statutes, page 519, is the section of such law providing the method of assessment and determining the mode of collection and payment of such expenses. The amendment section, like its predecessors, spells out how, when, in what manner and by whom the expenses of water distribution by the State Engineer acting by and through the duly appointed Water Commissioners, shall be met. The section provides that the salary of the Water Commissioners shall be paid by the State of Nevada

from the Water Distribution Fund in the State Treasury, which said fund was created by chapter 23, Statutes of 1943, page 34, as a Revolving Fund for the very purpose of paying the expenses of water distribution as provided in said section 52. The Water Distribution Fund being a Revolving Fund is reimbursable from assessments levied on the water users. Section 52, inter alia, provides:

The state engineer shall, between the first Monday of January and the first Monday of April of each year, prepare a budget of the amount of money estimated to be necessary to pay the expenses of the stream system or each water district for the then current year. Said budget shall be prepared and show the following detail: The aggregate amount estimated to be necessary to pay the expenses of said stream system or district; the aggregate water rights in the stream system or district as determined by the state engineer or to the aggregate rights in the stream system or district, and the charge against each water user, which shall be based upon the proportion which his water right bears to the aggregate water rights in the stream system or district; *provided, however,* that the minimum charge shall be one dollar. Upon receipt of such budget by the board of county commissioners, it shall be their duty to certify the respective charges contained therein to the assessor of the county or counties in which the land or property is situate, and it shall be the duty of such assessor to enter the amount of such charge or charges on the assessment roll against said claimants and the property or acreage served. It shall be the duty of the proper officers of the county to collect such special tax as other special taxes are levied and collected, and such charge shall be a lien upon the property so served, and shall be collected in the same manner as other taxes are collected, shall be deposited with the state treasurer of Nevada, in the same manner as other special taxes, in a fund in the state treasury which shall be known as "Water Distribution Funds." All bills against said fund in the state treasury shall be certified by the state engineer or his assistant, and, when so certified and approved by the state board of examiners, the state controller is authorized to draw his warrant therefor against such water distribution funds; *provided,* that no advances shall be made from a stream system fund that has been depleted until such advances are reimbursable from the proceeds of any tax levies levied against the particular stream system or water district for which any claims any claims are presented.

The intent of the water law of 1913 in general and section 52 in particular is, that insofar as the expenses of water distribution are concerned, like the expenses of hydrographic surveys, such expenses are to be borne by the water users in a prorated amount apportioned by the State Engineer as commensurate with their water rights, provided that the minimum charge shall be one dollar. The intent of the law is clear that each and every water user having decreed rights shall pay his proportionate share of the cost of water distribution on the stream system, and this irrespective of whether in any particularly year he receives the amount of water to which he is entitled by reason of shortage of water to serve his priority. The rule of first in time is first in right still applied. In this connection we desire to point out that section 52 as it appears as section 7937, N.C.L. 1929, contains the following language:

Whenever any appropriator by reason of shortage of water shall not receive the amount of water to which he is entitled, or that the water commissioner rendered a materially lessened service than that assessed to such user, he may apply to, and the board of county commissioners shall have authority to make such equalization of the charge made against him as shall be equitable.

However, said section 7937 was amended at 1931 Statutes, page 357, and the foregoing

quoted language was stricken from the statute and in every subsequent amendment of section 52, including that of 1947, no such language has been incorporated. Thus the intent of the Legislature is made clear that every water user should pay his prorated cost of water distribution.

That the statutory method of prorating the cost and expenses of water distribution is equitable cannot well be questioned. No form of taxation can be made exactly equal in every case. It is enough if it bears uniformly on all similarly situated. IN *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371, 54 L.ed. 1074, in a case wherein the decree of a Federal Court ordering and directing the prorating of the salary of a Water Commissioner in a manner similar to that provided in section 52 was objected to by the Montezuma Company, the Supreme Court said:

It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance to legislative provisions enacted in some of the states where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See part 4, Weil's *Water Rights in the Western States*, pp. 590 et seq. The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258, "To be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water."

But because it is within the legislative power to provide administrative machinery to supervise the common use of water in a flowing stream by those having a lawful right to appropriate the water of that stream for beneficial use, it does not result that the decree entered by the court below was in excess of its authority. On the contrary in view of the absence of legislative action on the subject, and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with the decree which, undoubtedly to that extent, the court was authorized to render. We think the action taken by the court did not transcend the bounds of judicial authority, and therefore is not justly amenable to the attack made upon it.

Section 52 providing that the cost of water distribution is a special tax and is to be collected as other special taxes are collected, it follows, we think, that the universal rule embodied in the law of taxation, i.e., that taxation is the rule and exemption therefrom is the exception and that those who seek exemption therefrom must point to a statute that clearly and expressly exempts them from such taxation, is applicable here. There is, we submit, no statutory authorization for the exemption of a water user from payment of the tax for his prorated costs of water distribution. To permit such exemption would serve no other purpose than to increase the burden on other water users.

In the instant matter the water user in question was the decreed owner of a water right on Happy Creek, a tributary of Quinn River and a stream in the Quinn River stream system. His right was included in the Court's order placing the stream system under the administration of the State Engineer with the consequent expense of such administration being governed by the water law and particularly section 52 of that law.

It is, therefore, the considered opinion of this office that neither the water user in question, nor any water user in a like situation, can legally be exempted from the payment of his prorated

costs of water distribution.

Very truly yours,
ALAN BIBLE, *Attorney General*.
By W.T. MATHEWS, *Special Assistant Attorney General*.

708. Taxation—The Standard Appraisal Method Recommended by Commission Is Advisory Rather Than Compulsory Upon the County Assessors—Legislative Action Necessary to Make Mandatory.

CARSON CITY, December 13, 1948.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Mr. R.E. Cahill, Secretary.

DEAR MR. CAHILL: This will acknowledge receipt of your letter of December 8, 1948, in which you ask whether or not the Nevada Tax Commission has authority under the existing law to require and compel assessors to follow the standard appraisal method recommended by the Nevada Tax Commission.

It is true that the existing law, section 6544, N.C.L. 1929, makes it the duty of the County Assessors to adopt and put in practice the rules and regulations prescribed by the Tax Commission. However, an examination of the statutory law of Nevada discloses no effective statutory method of enforcement. The 1947 statute providing for the valuation experts appears to be exploratory in nature, and the most that can be said for it is that the recommendation of such valuation experts is advisory rather than compulsory upon the County Assessors.

In our opinion in order to set up effective methods of enforcement with possible penalties for noncompliance, it would be necessary that not only the Tax Commission Act but the County Assessors Act as well should be amended, if it is desired to make the methods of appraisal of property adopted by the Tax Commission mandatory.

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

709. Corporations—Foreign Trust Companies Buying and Selling Mortgages on Real Estate Must Qualify Under Bank Act.

CARSON CITY, December 17, 1948.

HON. JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

DEAR MR. KOONTZ: This will acknowledge receipt of your letter dated December 14, 1948, received in this office December 15, 1948, enclosing a copy of a letter from Mr. William K. Woodburn relative to the possibility of a New York trust company to qualify under the statutes of this State as an ordinary business corporation for the following limited activities:

The New York trust company proposes to qualify only for the limited purpose of purchasing and selling mortgages on real estate and of purchasing and selling mortgages on real estate and of appointing and maintaining a "servicing agent" to collect the installments of principal and interest and to remit the same, and to look after the insurance policies and the payment of local real estate taxes. It would not engage in any other form of banking business and it would not be party to any original mortgage loan transaction with a mortgagor in any of the foreign States.

If this qualification is possible can the trust the company be qualified in a normal way as an ordinary business corporation?

There is no provision in the statutes which specifically embodies the subject in question, but a consideration of the General Incorporation Law and the Bank Act, and a construction in the light of the purpose sought to be accomplished, in our opinion, will require the New York trust company to qualify under the Bank Act, and it cannot qualify to do the business proposed as an ordinary business corporation under the General Corporation Law.

In an opinion given by this office September 25, 1947 (Opinion No. 515, Biennial Report 1946-1948), it was held that the organization and operation of a trust company was controlled by the applicable provisions of the Bank Act, and that the Bank Examiner is charged with the enforcement of the provisions of the Act whether an exclusive trust business is carried on or whether such trust business is carried on in connection with the banking business.

Section 1603, 1929 N.C.L., 1941 Supp., section 4 of the General Corporation Law, contains the following provisions: "No trust company, or building and loan association, or corporation organized for the purpose of conducting a banking business shall be organized under this act."

Section 747.80a, 1929, N.C.L., 1941 Supp., section 81a of the Bank Act provides:

Any bank or trust company, now or hereafter organized under the laws of this state may, by appropriate declarations in its articles of incorporation, as filed or amended, conduct a mortgage loan business subject to regulation and control by the state board of finance and the superintendent of banks. Any bank or trust company desiring to conduct such a business shall so organize its business and its records that the departments thereof shall be completely segregated as to assets, liabilities, income and expense, except that capital and surplus shall not be segregated. In the event of liquidation of such departments shall be liquidated separately for the benefit of the creditors of the respective departments.

Each department, except the mortgage loan department, shall conduct its business in accordance with this act and other acts of this state applying to banks and trust companies.

The mortgage loan department shall conduct its business as nearly as may be, as determined by the superintendent of banks in accordance with the laws of the State of Nevada as such laws apply to building and loan associations and companies.

Section 970.13, 1929 N.C.L., 1941 Supp. section 14 of the Act relating to building and loan associations provides that no such foreign or domestic company shall sell any securities in this State until it has first submitted forms of securities, contracts and applications therefor to be used in this State, to the Bank Examiner and receive from him a license authorizing the sale of such securities.

Section 16 of this Act provides that no person shall, as agent of any foreign or domestic company, sell or solicit sales for any securities or contract for sale of securities until he shall have been first licensed by the Bank Examiner.

It appears from the statutes that a trust company comes within the provisions of the Bank Act. A trust company may conduct a mortgage loan business subject to the control of the State Board of Finance and the Superintendent of Banks. Such a business shall be conducted in accordance with the laws of the State as such laws apply to building and loan associations, and the Building and Loan Association Act requires a license from the Superintendent of Banks before a foreign

company can do business in this State.

Therefore, the foreign trust company, in order to buy and sell mortgages on real estate in this State, must, in our opinion, qualify under the Bank Act.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

710. Insurance—Western American Life—Permit to Sell Additional Shares of Stock Within Capital Set Forth in Articles Not Required.

CARSON CITY, December 18, 1948.

HONORABLE J.P. DONOVAN, *State Controller, Carson City, Nevada*.

Attention: Mr. G.C. Osburn, Insurance Deputy.

DEAR MR. DONOVAN: The following is response to your request of December 15, 1948, for an opinion relative to the authority, under the statutes, of the Western American Life Insurance, a domestic corporation, to contract for the sale of 15,000 shares of its capital stock upon a commission of twenty percent as set forth in a letter from the president of the company.

It appears that the articles of incorporation of the company provide for 60,000 shares of capital stock at \$10 per share.

The company received its permit to solicit subscriptions to its capital stock as required under section 3656.11, N.C.L., 1931-1941 Supp. The company sold enough stock to meet the minimum requirement of paid-up capital applicable to the class of insurance it intended to write, completed its organization and received the permit to do business. The company now desires to sell more stock within its authorized capital declaration and you request an opinion as to whether the company will need a permit from the Commissioner to sell these additional shares of stock.

We are of the opinion that a permit from the Commissioner on the part of the insurance company, and a permit to its agent or broker to sell additional shares of stock within the amount of capital set forth in its articles of incorporation is not required under the provisions of the statute, in the circumstances presented.

Section 3656.11, N.C.L., 1931-1941 Supp., provides how a company empowered and authorized to do an insurance business in the State may be organized and licensed, and defines the successive steps that shall be followed. Subsection 5(a) provides: "The company shall not solicit subscriptions to its capital stock until it has received a permit therefor from the commissioner. * * *" Then follows the conditions on which the permit shall be issued. The permit shall fix the maximum amount which may be expended for organization expenses which shall not exceed 20 percent of the total amount of paid-in subscriptions. This section further provides that the company shall not enter into a contract with any person to act as broker for sale of its securities unless such person obtain a permit from the Commissioner.

The same section provides: "A stock company shall have power to open books, to receive subscriptions to its capital stock, to keep them open until the whole of such stocks, or much thereof as may be necessary to satisfy the minimum requirement, has been subscribed for * * *."

The company in question received its permit; sold sufficient stock to meet the minimum requirement as to paid-up capital and received its license to do business.

Section 3656.12, N.C.L., 1931-1941 Supp.: “(1) A stock company organized under this article shall have and at all times maintain a paid-up capital of the amount set forth in its articles of incorporation, which amount shall not be less than the minimum capital requirement applicable to the class and clause or clauses of section 5 * * *.”

The provision in section 12 that a stock company has the power to keep its books open to receive subscriptions to its stock until the whole of such stocks, “or so much thereof as may be necessary to satisfy the minimum capital requirements, has been subscribed for,” when read in association with section 3656.12 must be construed to mean that of the amount of capital set forth in its articles, the paid-up capital that was necessary to qualify must be maintained at all times. The statute does not require that the total amount of stock set forth in its articles must be sold before the company can be organized and authorized to do business.

It is not necessary for the company in question to amend its articles providing for an increase in its capital which would bring it under the provisions of section 3656.18, N.C.L., 1931-1941 Supp. and require a permit from the Commissioner under the same conditions as those required of a company being organized.

From the foregoing, it is our conclusion that the provisions in the statute requiring a permit to an insurance company and its agent or broker to sell its stock apply only to the acquisition of capital for the organization of the company preliminary to its authorization to do business, and do not apply when additional stock within the amount set forth in its articles of incorporation are sold.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

711. District Attorney—Qualifications—Vacancy in Office.

CARSON CITY, December 27, 1948.

MR. C.E. SULLIVAN, *Mineral County Commission, P.O. Box 211, Mina, Nevada*.

DEAR MR. SULLIVAN: This will acknowledge receipt of your letter of December 23, received in this office today, December 27, 1948.

You ask whether the Board of County Commissioners appoints or recommends a District Attorney in the case of a vacancy.

You are advised that in the case of a vacancy in the office of District Attorney, the Board of County Commissioners shall appoint some suitable person to fill such vacancy. The Board appoints, not recommends appointment. (Section 2085, Nevada Compiled Laws 1929.)

You further ask as to what qualifications the District Attorney must have.

You are advised that the law provides that no person shall be eligible to the office of District Attorney unless he shall be a bona fide resident of the State of Nevada, and duly licensed and admitted to practice law in all Courts of said State. (Section 2071, Nevada Compiled Laws 1929.)

Section 618 of 1929 N.C.L., 1931-1941 Supplement, likewise deals with the qualifications of a District Attorney as follows:

“No person shall be a candidate for or be eligible to the office of justice of the supreme court, district judge or district attorney unless he shall be a bona fide resident of the State of Nevada and an attorney duly licensed and admitted to practice law in all the courts of this state.”

Thus it is seen that the only residential requirement is that he be a bona fide resident of the State of Nevada and an attorney duly licensed and admitted to practice law in this State.

I trust this is the information you desire, but if we can be of further assistance do not hesitate to let us know.

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

712. Counties—Agricultural Extension Division—Automobile Purchased by and for Extension Agent Remains Property of Agricultural Extension Division.

CARSON CITY, December 28, 1948.

HON. C.H. GORMAN, *Comptroller, University of Nevada, Reno, Nevada*.

DEAR MR. GORMAN: Since our letter to you dated November 29, 1948, you have handed us further correspondence with the Board of Commissioners of Clark County relating to the disposition of the proceeds from the sale of a 1941 Ford automobile represented by check No. 6842 for \$250, dated May 15, 1948, from A.C. Grant to Agricultural Extension Division, Clark County Farm Bureau. The papers include a demand on J.H. Wittwer, County Extension Agent, by the Commissioners of Clark County for the reacquisition of the automobile and its delivery to the county for sale as county property.

Inasmuch as we are not advised of any opinion from the District Attorney of Clark County in support of this demand, in view of our previous letter, we review the history of the matter for your guidance as representing a State agency.

The automobile in question (a 1941 Super DeLuxe Coupe) was received by J.H. Wittwer, County Extension Agent, June 20, 1944. A claim in favor of Porter & Baskin (veterinary expense) for \$1,342.12 was audited and allowed May 31, 1944, by the State Board of Examiners (List No. 6104). The revised supplement budget of Clark County Farm Bureau, Inc., for the year 1944, lists as receipts \$3,900 as an emergency loan negotiated by the County Commissioners and covered into the State Treasury to the credit of Clark County Farm Bureau. The budget lists among disbursements \$1,342.12 out of the Emergency Loan Fund for the purchase of the automobile in question.

According to the letter from J.H. Wittwer, County Extension Agent, dated October 7, 1948, this car was used from the time of purchase until about December 1, 1947, by Dr. Maddy (D.V.M.), when the veterinarian left, and while not in use in 1948 remained in the custody of the Farm Bureau subject to what disposition of it might be provided by Chapter 94, Statutes of 1947, effective July 1, 1947. When the car, after approximately four years of use and ownership, was sold May 15, 1948, the car and proceeds could be traced directly back to the emergency loan of \$3,900 in the 1944 budget and the tax levy to retire that loan under the Act of April 1, 1919, as amended, to the same effect as if the proceeds of the emergency loan placed in the State Treasury to the credit of the County Farm bureau had remained in the custody of the Farm Bureau subject to what disposition of it might be provided by Chapter 94, Statutes of 1947, effective July 1, 1947. When the car, after approximately four years of use and ownership, was sold May 15,

1948, the car and proceeds could be traced directly back to the emergency loan of \$3,900 in the 1944 budget and the tax levy to retire that loan under the Act of April 1, 1919, as amended, to the same effect as if the proceeds of the emergency loan placed in the State Treasury to the credit of the County Farm Bureau had remained there from that day to this.

Until July 1, 1947, Agricultural Extension work and Farm Bureaus were governed by the Act of April 1, 1919 (1929 N.C.L., secs. 347-356), amended by adding sections 6a, 6b and 6c in 1935 (1929 N.C.L., 1941 Supp., secs. 353, 353.01, and 353.02). The amendments cited are not pertinent here. Section 3 of the original Act, as amended in 1921, provided for the county budgets and county Farm Bureau tax levies, the proceeds of which were to be covered into the State Treasury. A matching State tax was also provided.

The Act of 194 (chapter 94, page 304) provides for a county budget and a county tax, the proceeds of which are to be covered into the "agricultural extension fund in the county treasury" and shall be paid out claims drawn by the agricultural extension agent of said county.

Sections 7 and 8 of the Act of 1947 provide as follows:

Sec. 7. All supplies, materials, equipment, property, or land acquired for the use of county agricultural extension offices under the provisions of that act of the legislature known as "An act to provide for cooperative agricultural and home economics extension work in the several counties in accordance with the Smith-Lever act of Congress, approved May 8, 1914; providing for the organization of county farm bureaus, for county and state cooperation in support of such work; making an annual appropriation therefor, levying a tax and for other purposes," approved April 1, 1919, as amended, shall remain the property of the county extension offices set up under the provisions of this act; and provided particularly that any and all contracts for the purchase of equipment or property, or land of any type or description made thereunder shall remain in full force and effect until the completion of such contract.

Sec. 8. On and after the effective date of this act, the director of agricultural extension service of the University of Nevada is hereby directed to carry out until December 31, 1947, the requirements of agricultural extension work as contemplated in the county farm bureau budgets, approved by the agricultural extension service and various boards of county commissioners for the calendar year of 1947; provided, that the agricultural extension director, with approval of the board of regents of the University of Nevada, shall be authorized to use such moneys as remain in the various county farm bureau funds in the state treasury, together with the remittances received by the state treasurer from the August 1947 tax collections, to carry out the requirements of the county farm bureaus funds, shall be transferred by warrant drawn by the state controller upon the state treasurer, to the county agricultural extension fund of each such county; provided, however, that the balances remaining on December 31, 1947, in the state once-cent-farm bureau-tax fund, heretofore levied, as shown by the books of the agricultural extension service of the University of Nevada, shall be transferred, by warrant drawn by the state controller upon the state treasurer, to the agricultural extension fund of the public service division of the University of Nevada, to be used as heretofore directed.

It will be noted that, by section 7, all "property" acquired for the use of county agricultural extension offices under the previous Acts "shall remain the property of the county extension offices set up under the provisions of this act."

By section 8 the agricultural extension director “shall be authorized to use such moneys as remain in the various county farm bureau funds in the state treasury * * * to carry out the requirements of the county farm bureau budgets.” This points directly to the law that existed before the new Act went into effect on July 1, 1947. Any balances remaining December 31, 1947 (while the automobile in question was in the hands of the County Farm Bureau) “in the state treasury to the credit of the various respective county farm bureau funds * * * shall be transferred to the county agricultural extension fund of each such county.”

It will be observed that if the automobile had been liquidated December 31, 1947 (instead of May 15, 1948), the proceeds would remain in the County Extension Fund.

It is obvious that whether the proceeds of the automobile acquired in 1944 and sold in 1948 are considered (by a species of trust from the emergency loan) as in the State Treasury to be delivered to the County Extension Fund, or are to be considered as possessed and acquired by the County Extension Service, the practical effect is the same. The money belongs to the County Agricultural Extension Fund of Clark County. Once the original title is established by the claim allowed by the Board of Examiners May 31, 1944, the fund may be treated like a trust fund through all its alterations, permutations and proceeds to the present residue.

We understand the County authorities have in some manner come into manual possession of the outstanding check in question although it is made out to the Agricultural Extension Division, Clark County Farm Bureau. It is our official opinion that this check should be surrendered to the payee named. Under no view can the automobile be considered the property of the county or subject to the law relating to the sale of county property.

We enclose an extra copy of this opinion.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General.*

713. Taxation—Fleet Lines, Inc.—Tangible.

CARSON CITY, December 28, 1948.

HON. ROBERT E. JONES, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. JONES: Receipt is hereby acknowledged of your letter of November 23, 1948, wherein you request the opinion of this office as to the legality of the personal property tax assessment placed upon certain trucks and motor vehicles owned by the Fleet Lines, Inc., a Nevada corporation, by the Assessor of Clark County, as hereinafter set forth. The following opinion has been delayed due to the press of official business in this office and the necessity of further research of the law.

STATEMENT

We are advised that Fleet Lines, Inc., a Nevada corporation, in 1948, was and is engaged in the business of a common carrier by motor trucks between points in Clark County, Nevada, and points in the State of California. It also operates as such carrier between points in California and the State of Arizona. The company maintains its headquarters in Las Vegas, Clark County, Nevada, and as a Nevada corporation it is domiciled in Nevada. It appears that its paramount business is that of a common carrier in interstate commerce. During the year 1948 the Nevada

Tax Commission, according to law, placed a valuation for assessment purposes upon the property of the company, including a number of trucks and tractors, used in its business as a common carrier, of \$30,000. Thereafter the Assessor of Clark County levied a personal property assessment upon some 29 trucks and tractors owned by the company but not include in the Tax Commission's assessment. This latter assessment being made upon a valuation of some \$29,000. Prior to the assessments above mentioned the company had registered and caused to be registered in Nevada under the motor vehicle registration law of all of its automotive equipment thereafter assessed for personal property taxes or franchise taxes by the county Assessor and the Tax Commission. The company protested both of the assessments to the County Board of Equalization and the State Board of Equalization. We understand the State Board of Equalization made no change in the assessment as made by the Tax Commission on the property used in its business by the company. We are not here concerned with that assessment.

As to the assessment made by the County Assessor, it appears the company claimed and claims now that none of the trucks and automotive equipment so assessed was ever used by it in the State of Nevada and was never in the State, but to the contrary such equipment was used by it in its business in California and Arizona. We find no evidence to refute such claim in the file of papers and documents submitted with the request for the opinion of this office. It does not appear that the County Board of Equalization, upon considering the protest lodged with it on behalf of the company, notified the company that if it had paid personal property taxes on the same automotive equipment in some other State, it would give due consideration thereto and reduce or cancel the tax levied on such equipment in this State. It does not appear that evidence of such tax payment in some other State was submitted to the County Board or the County Assessor and/or that he tax had in fact been paid in such other State.

A close examination of the problem as presented by the inquiry discloses that the paramount question is: "was the automotive equipment assessed by the County Assessor subject to the taxing power of this State, notwithstanding such equipment had been registered in this State pursuant to the motor vehicle registration law thereof?"

OPINION

At the threshold of this opinion we desire to point out that the question of the valuation of the automotive property as fixed by the Tax Commission and/or the Assessor is not involved. We are not concerned with the valuation. That is a question for the assessing board and officers to settle, with the right of the owner of the property to have such valuation tested in the courts if aggrieved thereat.

Section 6(a) of the Motor Vehicle Registration Act provides: "Every owner of a motor vehicle, trailer, or semitrailer intended to be operated upon any highway in this state, shall, before the same can be operated, apply to the department for and obtain the registration thereof." Section 4435.05, N.C.L., Supp. 1931-1941.

Section 11 of such Act provides: "The department is registering a vehicle, and upon payment of the annual license fee as provided for in this act together with the payment of the personal property tax thereon (*if such vehicle be subject to taxation in the State of Nevada*) * * * shall issue to the applicant a temporary certificate of registration * * *." (Italics ours.) Sec. 4435.10, N.C.L., Supp. 1931-1941, as amended at 1945 Stats. 151.

The company in question here, as we understand it, registered all of its automotive equipment for the year 1948, whether used or being within the State or not, pursuant to the above sections of

the law and paid the registration fees therefor. The registration of the automotive equipment that was not within or used in the State was, we think, a voluntary registration on the part of the company. There was and is no law prohibiting the County Assessor from so registering the equipment and receiving the fees therefor. The State was then beneficiary to the extent of such fees.

Were the trucks, tractors and trailers, the personal property of the company, so assessed by the County Assessor under the circumstances shown here, subject to taxation in this State in view of the fact that they were not in or being used in the State upon and after the registration thereof?

Section 1, Article X of the Nevada Constitution, provides:

The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory * * *.

Section 2, Article VIII of the Constitution, provides:

All real property and possessory rights to the same, as well as personal property in this State, belonging to corporations now existing or hereafter created, shall be subject to taxation the same as property of individuals * * *.

Section 6418, N.C.L. 1929, as originally enacted and/or as subsequently amended, provides:

All property of every kind and nature whatsoever, within this state, shall be subject to taxation, except:

Then follows certain exemptions not material here.

It is, we think, clear that the above constitutional and statutory provisions only sanction the taxation of property, particularly personal property, that is situate in or so used in the State as to create an actual situs therein. The only exception to such proposition is in cases where personal property has not acquired an actual situs therein. The only exception to such proposition is in cases where personal property has not acquired an actual situs in some other State or country under the old maxim "mobilia sequuntur personam" (movable property follows the person). This proposition was exhaustively examined and passed upon by our Supreme Court in state ex rel. United States Lines Co. v. Second Judicial District Court of Nevada, [56 Nev. 38](#), wherein the right of the State to tax the steamships of a Nevada corporation was sustained upon the ground that such ships had not acquired a situs in any other State so as to be subjected to the taxing power of that State, in brief, the maxim "mobilia sequuntur personam" was held applicable. However, the Court did not hold that "tangible personalty which has actual situs should be taxed where it is located, where it receives protection of law, and where expense of such protection must be incurred, but where such property has no actual situs anywhere, it should be taxed in domicile of its owner."

The foregoing rule is well stated in 51 Am. Jur. 470, sec. 457:

While the maximum "mobilia sequuntur personam" is subject to many exceptions as applied to tangible personal property, it applies, at least as a prima facie rule, to tangible personal property, even though such property is physically outside the state of the owner's domicil. The domicil of the owner is the taxable situs assigned to tangibles where an actual situs has not been acquired elsewhere. That state is the situs for purposes of taxation of tangible personal property temporarily in another state, but not permanently located there. But when tangible personal property is permanently located in a state other than the state of the owner's domicil in such circumstances as to acquire a situs there for purposes of taxation, it is taxable there; in this situation the state of the domicil of the "owner, which affords no substantial protection to the

property, has no jurisdiction to tax such property. An attempt to do so is a violation of the due process clause of the Federal Constitution.”

Again it is to be noted that the maxim “*mobilia sequuntur personam*” has undergone a major change in its application to tangible personal property and its effectiveness has been destroyed to a marked degree under the more modern rule against double or multiple taxation of tangible personal property, brought about by many court decisions. In 51 Am. Jur. 472, sec. 459, it is stated:

Thus, beginning was established of the prohibition against double or multiple taxation of tangible property, not because of any constitutional objections to such taxation in the state where it is found and at the same time have a like situs as the owner’s domicil. This principle, once applied as a rule of statutory construction, has, by the decisions of the United States Supreme Court, been elevated to the rank of a constitutional principle, binding alike upon legislatures and courts. That court denies to the state of the domicil of the owner the power to tax tangible personal property physically located in another state. Under this rule, tangible personal property which as acquired a fixed situs in a state other than that of the domicil of its owner is immune from taxation when considered as a form of riches upon which to base a tax in personam upon its owner.

The basis of the foregoing rule is found in *Union Refrigeration Transit Co. v. Kentucky*, 199 U.S. 194, 50 L.ed. 150, wherein the United States Supreme Court laid down the rule that an attempt by the State of the domicil of the owner to levy a personal property tax upon tangible personal property located wholly within another State is in effect an attempt to extort rather than to tax, and is beyond the power of the Legislature as taking property without due process of law. This case arose over the taxing, by the State of Kentucky, of refrigeration cars owned by the company, a Kentucky corporation. The statute of Kentucky provided that all personal estates of persons residing in Kentucky and of all corporations organized under its laws, whether the property was in or out of the State, should be subject to taxation. The refrigerator cars were not used in Kentucky but were permanently located out of the State. The Court in its opinion said, *inter alia*:

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be compensation.

The Court also said:

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws.

Such is the rule delineated in the *United States Lines v. District Court* case, [56 Nev. 38](#), cited hereinabove.

The foregoing United States Supreme Court case and the doctrine established by it has been followed in a great many cases. We think it has established the majority rule in this country with respect to the taxation of tangible personal property that has acquired an actual situs in a jurisdiction other than the domicil of the owner. Such is the weight of authority. 51 Am. Jur.

466-474, secs. 451-462 and many cases cited in the notes thereto; Brock & Co. v. Los Angeles County, 65 P.2d 791, 110 A.L.R. 700, Annotations, 110 A.L.R. 709-732. See, also, Curry v. McCannless, 307 U.S. 35, 83 L.ed. 1339, 123 A.L.R. 162 and extensive note 123 A.L.R. 180-184.

We think the Legislature of this State by reason of its incorporation in section 11 of the Motor Vehicle Registration Act, as originally enacted and/or as amended at 1945 Statutes 151, the language thereof, hereinbefore quoted relative to the payment of the personal property tax upon registration of a motor vehicle, i.e., "if such vehicle be subject to taxation in the State of Nevada," had in mind and intended that notwithstanding the owner of a motor vehicle registered or caused to be registered such vehicle under the registration laws of this State, nevertheless the personal property tax was not to be levied and collected unless such property had acquired an actual situs in this State by being within the State and commingled with other personal property of such owner in the State, or had acquired a taxable situs in the State by reason of its use by the owner in, into and out of the State in the carrying on of such owner's business in the regular course thereof, particularly where as here the owner is a Nevada corporation and domiciled in the State.

The fact that the automotive equipment assessed by the County Assessor was not used in and had not acquired an actual situs in the State as tangible property subject to taxation in Nevada, we conclude:

1. That the County Assessor is not prohibited from registering the automotive equipment of the company in question even though such equipment was or is not subject to personal property taxation in this State.

2. That the law governing the taxation of tangible personal property is that such property is taxable in and by the State of the actual situs of such property even though the owner thereof may be domiciled in some other State, where such property has not been brought within such latter State or permanently used into and out of such State in the business of the owner.

3. That it is the opinion of this office as to the automotive equipment of the Fleet Lines, Inc., assessed by the County Assessor, not being in and/or used by such company in the State of Nevada in the year 1948, that the same is not subject to the personal property tax assessed therein.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By W.T. MATHEWS, *Special Assistant Attorney General*.

714. Constitutional Law—Special Bill Combining Office of Constable and Deputy Sheriff of County Unconstitutional.

CARSON CITY, December 31, 1948.

HON. JOHN G. TOMLINSON, *Assemblyman from Humboldt County, Winnemucca, Nevada*.

DEAR ASSEMBLYMAN TOMLINSON: This will acknowledge receipt of your letter of December 23, received in this office Monday, December 27, 1948, concerning the constitutionality of a special bill combining the offices of the Constable of Union Township and the Deputy Sheriff of Humboldt County.

We agree with your analysis that such a special Act would be unconstitutional under the

provisions of section 20, Article IV of the State Constitution.

The case of Moore v. Humboldt County, on the petition for rehearing, found at [46 Nev. 225](#), sustains your views.

Very truly yours,

ALAN BIBLE, *Attorney General*.