

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1949

**715. Counties—District Attorney—Private Practice Not Illegal—Must Observe Statutes and Rules Relative to Duties of District Attorney.**

CARSON CITY, January 4, 1949.

HONORABLE ROBERT E. JONES, *District Attorney, Las Vegas, Nevada.*

DEAR MR. JONES: This will acknowledge receipt of your letter dated December 23, 1948, received in this office December 27, 1948, in which you request an opinion as to whether or not is illegal in this State for a District Attorney to be a member of a partnership firm for the practice of law.

There are no Nevada statutes specifically prohibiting a District Attorney from being a member of a law partnership, but there are statutes and rules of professional conduct of the State Bar of Nevada which set forth certain limits to such partnership practice.

Section 2086, N.C.L. 1929, provides:

No district attorney, or partner thereof, shall appear within his county as attorney in, or directly or indirectly aid, counsel or assist in the defense in any criminal action began or prosecuted during his term; nor in any civil action began or prosecuted during his term, in behalf of any person suing or sued by the state or county thereof.

The next section fixes a penalty for violation of the Act and the following section provides that the Act shall apply with equal effect to any and all partners of the District Attorney.

Rule XIX provides:

Attorneys may not represent conflicting interests nor appear, represent or advise on opposite sides, even in formal or uncontested matters when the relationship between the attorneys is of (a) Law Partners; (b) Associates; (c) Employer and Employee; (d) Office holder and deputy; or (e) Consanguinity within the third degree.

Adopted by the Supreme Court, April 19, 1940.

There are few decisions directly in point which deal with the question of prosecuting attorneys having interests which are adverse to the interests of the public, although the general principles which prevent attorneys from representing adverse interests are discussed in a number of cases.

In the case of *Hosford v. Eno*, 168 N.W. 764, the question to be determined was whether the City

Attorney might legally accept employment from one who had violated a city ordinance to represent him in the Circuit Court, or out of court, on a criminal charge arising out of the same

transaction. The Court said that the City Attorney by entering into such contract placed himself in the position of attempting to serve two masters at once, whose interests were legally hostile to each other. The Court held the contract void, saying: "The rule is rigid, and designed not alone to prevent the dishonest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent."

See, also, 43 A.L.R. 109; 55 A.L.R. 1375; 9 A.L.R. 196. These cases may assist you in determining a specific circumstance or a general principle concerning partners under our statute.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**716. White Pine Soil Conservation District—Does Not Come Within the Provisions of the State Bonding Act.**

CARSON CITY, January 4, 1949.

HONORABLE JOHN KOONTZ, *Secretary of State, Carson City, Nevada*.

DEAR MR. KOONTZ: This will acknowledge receipt of the letter dated December 21, 1948, from the White Pine Soil Conservation District, which you forwarded to this office on December 29, 1948.

You inquire if the White Pine Soil Conservation District is entitled to come within the provisions of the Act relating to surety bonds for public officials.

We are of the opinion that the provisions of the Bond Trust Fund Act apply only to State, county and township, incorporated cities and irrigation districts, and do not apply to employees and officers of a soil conservation district.

Section 4915.23, Nevada Compiled Laws, 1931-1941 Supplement, as amended by chapter 128, Statutes of Nevada 1943, provides that every State, county and township official, and his or her deputy, and officials of incorporated cities and irrigation districts and their deputies in the State required by law in his or their official capacity to furnish surety bonds shall apply to the State Board of Examiners for surety.

Section 4915.24, Nevada Compiled Laws, 1931-1941 Supplement, provides in the case of the county and township officials each county shall pay from the County General Fund the premiums. In the case of cities provision is made to pay the premiums from the City General Fund. The premium of State officials is paid from the State General Fund and in the case of irrigation districts the premium is paid from the District General Fund.

Section 6870.05, Nevada Compiled Laws, 1931-1941 Supplement, as amended by chapter 119, Statutes of 1947, subsection F, which provides for the organization of a district, contains this language:

When the application and statement have been made, filed and recorded, as herein provided, the district shall constitute a governmental subdivision of the state and a public body corporate and politic.

Section 6870.07, Nevada Compiled Laws, 1931-1941 Supplement, as amended by chapter 119, Statutes of 1947, provides in the latter part of the section that the supervisors shall provide for the execution of surety bonds for all employees and officers who shall be entrusted with funds or property.

A soil conservation district constitutes a governmental subdivision of the State, but its employees and officers are not State officers.

Section 4902, Nevada Compiled Laws, 1931-1941 Supplement, provides that the premium for any surety bond shall be paid for by the State, if the bond is required for a State officer, or by the district, county or city, as the bond may be required.

The 1937 Bond Trust Fund Act, in section 4915.24 referred to above, designated the fund in each subdivision mentioned from which the premium should be paid and specified irrigation districts making the payment out of its General Fund. Certain cases were enumerated in the section, and the rule of construction is that all cases not mentioned are excluded.

If it is desired to bring the soil conservation district within the provisions of the State Bonding Act, it should be done by legislative enactment.

We are enclosing an extra copy of the opinion for your use in answering Mr. Hoover.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**717. Taxation—Veterans’ Exemption—Closing Date of War.**

CARSON CITY, January 5, 1949.

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

Attention: A.W. Ham, Jr., Deputy District Attorney.

DEAR SIR: This will acknowledge receipt of your letter dated December 30, 1948, received in this office December 31, 1948.

You request an opinion as to the effect of section 6418, 1929 N.C.L., 1941 Supp., (Seventh) wherein veterans who have served in time of war are allowed a tax exemption. The question arises as to what date is considered the closing date of the war in order to entitle soldiers to this exemption.

We are of the opinion that the closing date of the war as contemplated by the statute was December 31, 1946, under proclamation by the President.

Section 6418, 1929 N.C.L., 1941 Supp., as amended by chapter 200, Statutes of Nevada 1947, paragraph Seventh, which provides the exemption for veterans, contains the following language:

“\* \* \* of any person who has served, or is serving, in the army, navy, marine corps, revenue marine, or in any other branch of the armed forces of the United States in time of war \* \* \*.”

The proclamation of the President, No. 2714, found under Title 50, War Appendix, Pocket Part on page 107, reads as follows:

With God’s help this nation and our allies through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our

enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. 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 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 December 31, 1946.

It was held in *Fleming v. Mohawk Wrecking & Lumber Co.*, 67 S.Ct. 1129, that the cessation of hostilities does not necessarily end the President's war powers under sections 601-605, War Appendix, Title 50. It was also held in *Porter v. Wilson*, 69 F. Supp. 447, that the District court would not uphold the fiction that a war was being conducted when, in fact, there was no war. This case was cited in a note under the Fleming case.

It appears, therefore, that for the purpose of the exemption provided in sections 6418, 1929 N.C.L., 1941 Supp., as amended, the term "in time of war" extended only to December 31, 1946.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**718. Water Law—Carville Decree Little Humboldt River Governs Allocation and Use of Early Waters.**

CARSON CITY, January 13, 1949.

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

DEAR MR. SMITH: Reference is hereby made to your letter of December 28, 1948, received in this office December 28, requesting the opinion of this office relative to the authority of the State Engineer to regulate and distribute the waters of a stream system during the nonirrigation season that has been adjudicated pursuant to the water law of Nevada.

Your letter of inquiry relates to the distribution of the waters of the Little Humboldt River Stream System, the rights to the use of the waters thereof were adjudicated and determined in the decree of the Sixth Judicial District Court of the State of Nevada, known as the Carville Decree, which was filed in said Court May 9, 1935.

We are advised that you desire an interpretation of that part of the Carville Decree relating to the diversion and distribution of the so-called early runoff or early water of the stream system as referred to on page 74 of said decree, wherein it is stated as follows:

That the rate of use of water under all of said classifications shall be based upon a continuous flow of .01 of a cubic foot per second for each acre irrigated that will yield the acre-foot element per acre during the irrigating season; that the

irrigating season for said classified lands shall begin April 1 of each year, and the calculated rate of flow of water shall be based upon an irrigating season of 180 days for Class A lands, 90 days for Class B lands, and 30 days for Class C lands, and actual and beneficial use shall be the measure and limit of all rights; provided, that the State Engineer shall have the right, power and authority to direct that said irrigating season shall begin earlier or later, because of the changes in climatic conditions and because of fluctuation in and to the waters of the stream system, giving due regard to the early runoff, allowing the same to go down stream and reach the lower users to serve their irrigation according to their priorities. And this condition shall prevail throughout the irrigation season, unless and until the amount of water of the stream system shall become so depleted that if allowed to continue those on the lower part of the stream would receive no beneficial use of the waters thereof, even though such users possess a prior right to the use to such waters. In this event, a beneficial use of said water shall be made along said stream system as is reasonable and practical in connection with such priorities as can then be recognized and served, having regard for the economic welfare of the State and the beneficial use of said waters.

#### OPINION

That the Carville Decree is a final decree wherein the relative rights to the use of the waters of the Little Humboldt River Stream System were adjudicated, settled and determined cannot be doubted. Such decree shows on its face that all of the statutory and jurisdictional steps were taken from the inception of the adjudication proceeding to and including the entry of the decree. Section 36a of the water law, i.e., section 7924, N.C.L. 1929, provides:

The decree entered by the court, as provided by section 36 of this act, shall be final and *shall be conclusive upon all persons and rights* lawfully embraced within the adjudication \* \* \*. (Italics ours.)

It is to be noted that as early as the year 1907 and 1908 the then State Engineer began investigations for the determination of the relative rights of the Little Humboldt River Stream System and that thereafter down to and after the enactment of the 1913 Water Law such investigations were continued together with the assembling of proofs incident to the water rights. It further appears that on March 14, 1928, the then State Engineer received and filed in his office a petition signed by a majority of the claimants of the waters of said stream system requesting the State Engineer to complete the adjudication of the water rights as expeditiously as the water law would permit and pledging themselves to contribute certain moneys for that purpose. Finding of Fact I, Decree. Thus, a majority of the water users of the stream system brought such system within the water law for the purpose of adjudicating the relative rights of all the claimants to the use of the waters thereof, to have adjudicated and finally determined by a court just what their each and several rights were and to write those rights into the final decree of the Court in accordance with section 36a above quoted. The act of the petitioners was binding upon all of the water users of the stream system brought such system within the water law for the purpose of adjudicating the relative rights of all the claimants to the use of the waters thereof, to have adjudicated and finally determined by a court just what their each and several rights were and to

write those rights into the final decree of the Court in accordance with section 36a above quoted. The act of the petitioners was binding upon all of the water users of the stream system in question and brought within the adjudication proceedings all the claimed water rights thereon. The final decree was and is binding upon all of the claimants so made parties to the proceedings. Not only was such decree binding as to them, but binding as to any and all their successors in interest. That the decree as entered by Judge Carville was satisfactory to all of the then claimants to the waters in question is well evidenced by the fact that no appeal from such decree was taken to the Supreme Court of this state within the time such an appeal could have been taken or at any other time was any appeal attempted. We have then a decree binding in all respects on the present water users of the stream system in question.

The water law, pursuant to which the adjudication proceeding were had, provides in section 54, i.e., section 7939, N.C.L. 1929:

It shall be the duty of the state engineer to divide the waters of the natural streams or other sources of supply in the state among the several ditches and reservoirs taking water therefrom, according to the rights of each, respectively, in whole or in part, and to shut or fasten, or cause to be shut or fastened, the head gates or ditches, and to regulate, or cause to be regulated, the controlling works or reservoirs, as may be necessary to insure a proper distribution of the waters thereof. \* \* \*

It is clear that when a stream system has been adjudicated and a final decree entered the State Engineer must look to such decree for the water rights he is required to serve and the waters he is required to divide according to the rights of each in order to comply with the quoted statute. The Carville Decree itself provides:

That the state engineer and his assistants shall be the administrators of the waters of the Little Humboldt River and its tributaries, and he shall make such rules and regulations as may be necessary for the proper distribution of said waters so long as said rules conform to the findings of this Court and this Decree. Page 75, Decree.

Thus, the Court in the decree in question constituted, as required by the law, the State Engineer and his assistant officers of the Court in the administration of such decree. Section 36½ water law, section 7926, N.C.L. 1929.

The question then is, having in mind the hereinabove-quoted provisions of the Carville Decree relative to the early runoff of water, what is the duty of the State Engineer in allowing the early runoff of waters to go down stream to reach the lower users to serve their irrigation needs according to their priorities, and when does this duty devolve upon the State Engineer?

The answer to this question requires the interpretation of the Carville Decree with respect to the water rights therein adjudicated and determined.

The rights so adjudicated were vested rights acquired prior to the enactment of the statutory water law pursuant to which they were adjudicated. The use to which such rights were theretofore and then and there put was a beneficial use, and as clearly shown by the decree such beneficial use was primarily the irrigation of the soil so as to produce crops of hay, grain and

other crops, including pasturage, so essential to the welfare of the producers and also the State at large. Aside from the beneficial use of water for domestic and stockwatering purposes, no other use of the water was provided for in the decree. We must assume that when the Court so decreed the beneficial uses above stated that the Court so found from all the evidence submitted to it that such was the fact.

The Court found and determined the respective relative rights as to priorities, acreage subject to beneficial irrigation, the duty of water required for such irrigation, fixed the length of the irrigation season where in the beneficial use was to be had, i.e., 180 days for Class A lands, 90 days for Class B lands, and 30 days for Class C lands, and then said "and actual and beneficial use shall be the measure and limit of all rights." Page 74, Decree.

That the Court fixed seasonal uses of the waters in question cannot well be doubted. The primary beneficial use by irrigation was and is to be had in the irrigation season of 180 days duration beginning the first day of April each year, unless the opening date thereof is changed by the State Engineer. Findings of Fact IX and XI, and page 74, Decree. The other seasonal use is the use for stockwatering and domestic purposes. The Court found and determined that all claimants having water for irrigation are entitled to use water for stockwatering and domestic purposes at any time during the year with the right to divert the same according to their priorities for irrigation, such use to be limited to the quantity of water reasonably necessary for such purposes, provided that the amount of water diverted and used for stockwatering purposes is not to exceed one-tenth of a cubic foot per second for each one thousand head of stock, and also provided that during the irrigation season the amount of water diverted for irrigation shall not be increased by any amount used for stockwatering and domestic purposes. Finding of Fact XIII, Conclusions of Law, page 25, and page 74, Decree.

The Court in its restraining order incorporated in its decree, page age 75, said, inter alia:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that each of the parties hereinbefore named is the owner of the flow and use of the several amounts of water appropriated to him and as set forth herein, and in said Order of Determination where no change has been made; that each and every party to this action, and their and each of their servants, agents and attorneys, and all persons claiming by, through or under them, and their successors and assigns, in and to the water rights and lands herein described be and each of them is forever enjoined and restrained from claiming any rights in order to the waters of the Little Humboldt River Stream System, except the rights set up and specified in this Decree \* \* \*.

We think the inescapable conclusion is that in the adjudication and determination of the relative vested rights of the claimants in and to the waters of the stream system in question, the Court found and determined that such rights relating to the irrigation of lands were and are to be exercised and the water thereto appertaining used in and during the irrigation season only, and that the only departure therefrom is the allocation, distribution and diversion of water for stockwatering and domestic purposes beyond and outside of the irrigation season.

An examination of the each and several decreed rights to the use of the waters in question for irrigation fails to disclose that any claimant thereto was or is awarded any prior rights to such waters for such purpose beyond the limits of the irrigation season as established in the Decree, or

as therein authorized to be established by the State Engineer in changing the beginning of the irrigation season.

In brief the Decree stands thus, that each and every water user on the stream system has been and is decreed a certain amount of the waters for beneficial irrigation purposes during a specific period of time in each year, and that beyond such specific time and during the rest of the year, he has and is decreed a reasonable amount for domestic purposes and a specific amount for stockwatering purposes. This latter water was and is not decreed as water for irrigation purposes.

We think that pursuant to the decree in question the duty of the State Engineer, and his Assistants and Water Commissioners, insofar as the dividing and distribution of the waters in question are concerned pursuant to the decree, is to distribute such waters during the irrigation season according to the several rights and priorities thereto, and that in the nonirrigating season to distribute the stockwater and domestic water in accordance with the rights and priorities decreed thereto and no more.

We apprehend that it will be said, what is the effect of that portion of the decree quoted at pages 1 and 2 of this opinion reading:

\* \* \* provided, that the State Engineer shall have the right, power and authority to direct that said irrigating season shall begin earlier or later, because of the changes in climatic conditions and because of fluctuation in and to the waters of the stream system, giving due regard to the early runoff, allowing the same to go down stream and reach the lower users to serve their irrigation according to their priorities. And this condition shall prevail throughout the irrigation season, unless and until the amount of water of the stream system shall become so depleted that if allowed to continue those on the lower part of the stream would receive no beneficial use of the waters thereof, even though such users possess a prior right to the use of such waters.

It is to be noted that in the foregoing portion of the paragraph of which the foregoing quotation is a part that the Court fixed the beginning of the irrigation season as of April first of each year and that such was to be the beginning of the irrigation season, unless, as provided in the proviso immediately following such language, the State Engineer should by reason of the conditions therein mentioned change the beginning of such season earlier or later as the case might be.

It is, we think, most clear that the decree provides for beneficial irrigation use in the irrigation season only and that no right attaches to the use of water for irrigation except in the irrigation season, whether such season begins April first as provided in the Decree or at an earlier or later date fixed by the State Engineer pursuant to the conditions provided in the Decree and found by the State Engineer to exist in any particular year. In brief, when, under the Decree, rights to the use of water for irrigation attaches by reason of the beginning of the irrigation season, it when becomes the duty of the State Engineer to distribute the water according to the respective rights of each claimant, and this whether the irrigation season is that fixed in the Decree or as established by the State Engineer.

Good husbandry and more economical and better beneficial use no doubt will be had by the distribution of the early water downstream to the lower users, and this may be far better accomplished by the opening of the irrigation season at a much earlier date than April first. In



any event, even to the lower users the so-called early water to be divided and distributed according to their respective priorities as fixed in the Decree and as water for irrigation purposes.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**719. Public Officers—State Employees May Draw Compensation From Another State Department During Course of Paid Vacation.**

CARSON CITY, January 25, 1949.

HONORABLE JERRY DONOVAN, *State Controller, Carson City, Nevada.*

DEAR MR. DONOVAN: Reference is hereby made to your letter of January 17, 1949, received in this office on January 18, 1949, wherein you inquire as follows:

Is a State employee, on paid vacation, allowed to draw compensation from another State Department during the course of said vacation?

We are advised that the facts of the transaction which prompted your inquiry were as follows: A clerk-stenographer employed by the Public Service commission of this State pursuant to section 22 of the Motor Carrier's Licensing Act, being section 4437.21, 1929, N.C.L., 1941 Supp., and whose duties required her to stenographically report hearings held by such Commission, was on her services as a reporter of hearings were required by the State Engineer in the stenographic reporting of a water conference hearing in his office and in his capacity as State Engineer. Such reporter, at the time being absent from Carson City, made a special trip to Carson City for the purpose of reporting the hearing.

OPINION

An examination of the statutory law of this State fails to disclose an express prohibition of payment of compensation to a State employee who, while on an annual vacation under pay, performs valuable services for some department of the State government other than the department where regularly employed and from which such employee is on leave for paid vacation purposes.

Under the facts as stated hereinabove, we are of the opinion that the employee in question is entitled to compensation for the services rendered the State Engineer even though at the time such employee was on a paid vacation from her duties with the Public Service Commission.

We think the opinion of the former Attorney General Thatcher on an analogous situation is apropos. We quote the opinion:

CARSON CITY, July 14, 1913.

STATE BOARD OF EXAMINERS, *Carson City, Nevada.*

GENTLEMEN: In accordance with your request I have made an examination of the law concerning the claims of R.A. McKay for the transcript testimony furnished the State Engineer in the matter of the protests of the Union Canal Ditch Company, et al., v. Carpenter, et al., amounting to \$122.40 and \$44.10, respectively, and desire to report that in my opinion the same is a just and valid claim against the State, and should be paid.

It appears that these claims are for services performed by Mr. McKay, which were not incumbent upon him to perform by reason of his position as Chief Clerk in the office of State Engineer; that he makes no charge for reporting the testimony, and that the transcript was written out by him after office hours at night and on Sundays.

Respectfully submitted,  
GEO. B. THATCHER,  
Attorney General.

Very truly yours,  
ALAN BIBLE, *Attorney General*.  
By W.T. MATHEWS, *Special Assistant Attorney General*.

**720. Cigarettes—Licenses and Excises Not Collected From Post Exchanges, Officers' Messes, Reservation Stores—Privilege Not To Be Abused by Selling to Civilians.**

CARSON CITY, January 26, 1949.

HON. H.S. COLEMAN, *Supervisor, Liquor and Cigarette Tax Division, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. COLEMAN: Your letter of January 14 and memo enclosing letter of January 13, from Mr. Ebert, reached here January 15, 1949.

Confirming later talks with you, I am preparing a legislative bill for you to clarify the situation.

In the meantime the following principles should be observed and made known to retailers.

The Federal Government and its instrumentalities are usually accorded immunity from revenue laws including licenses, excises, imposts, and other taxation.

This extends to Federal "enclaves" (which are lands considered as part of the Federal territory though geographically located inside State boundaries) reservations, post exchanges, officers' messes and the like. State officers, however, are privileged to visit such places for the purpose of inspection and in investigating violations of State laws occurring outside. They may also enforce license and excise laws enacted under the police power for collecting reasonable revenues to cover cost of inspection.

We have taken the position for the sake of comity that licenses and excises will not be collected from post exchanges, officers' messes, reservation stores and the like. But that privilege is not to be abused by selling commodities to civilians or other persons for whose convenience the exchanges, messes or stores were not setup. "Civilians" would embrace persons not in the armed

services and others whose duties as Federal employees do not require their constant residence at the post or area served by the establishment.

A dealer entitled to receive from a wholesaler, cigarettes without stamps affixed (or equivalent stamping) for sale at such place should not, as a general rule, sell to civilians at all. Sometimes this rule is broken in cases of doubt and these mistakes may well be overlooked.

However, when a considerable fraction of sales is subject to question, the dealer ought to collect the tax by adding it to the sale price and the tax money should be forwarded to the Tax Commission with an explanation every month. Charging the price plus tax in doubtful cases while charging the price without tax to those exempt ought to discourage civilians from trading at such places.

For a long-term cure of the matter we contemplate requiring a dealer who sells to both classes of customers to buy from the department a supply of distributive "Tax Due" stickers at 2-cents each and to affix one to each pack of cigarettes sold, renewing his supply when exhausted. A failure to affix a stamp in a proper case could be prosecuted. The alternative of requiring the dealer to obtain a certain percentage of his purchases bearing a stamp might leave the dealer with a rising supply of stale unsold cigarettes.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**721. Public Schools—Balance Remaining in Appropriation Made by Legislature to State High School Fund Reverts After July 1, 1949.**

CARSON CITY, January 27, 1949.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated January 22, received in this office January 24, 1949.

You request an opinion as to the status of the balance remaining in the appropriation made by the Legislature under chapter 80, Statutes of Nevada 1947, to the State High School Fund for the biennium ending June 30, 1949, and wish to know if the present balance will remain in this fund after July 1, 1949 or will revert to the State General Fund.

We are of the opinion that any balance remaining in this fund from the amount of the appropriation made in chapter 80, Statutes of 1947, will revert to the General Fund of the State on July 1, 1949.

Chapter 80, referred to above, appropriated out of the General Fund of the State the sum of seven hundred thousand dollars for the biennium ending June 30, 1949.

Section 7348, 1929 N.C.L., 1941 Supp., provides that the State Controller shall prepare a complete statement showing, separately, the whole amount of each appropriation of money made by law, the amount paid under the same, and the unexpended balance to be laid before the Legislature at each regular session.

Section 7351, 1929 N.C.L., 1941 Supp., provides for the drawing of warrants out of the particular fund with a yearly total of all payments and the balance remaining, and the amount, if

any, reverting.

State v. Hallock, 20 Nevada 73, held: “The fiscal officers of the state government have uniformly construed these laws, by usage, as intending an appropriation for the limited time only; that is to say, the appropriation is to meet, within the named fiscal years, the liabilities incurred during these years. Unexpended balances against which no warrants have been drawn are considered as having lapsed, and are carried to the general fund of the treasury.”

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**722. Hospitals—Clark County—Hospital Trustees Have No Authority to Appoint Physician for the Care of the Indigents—County Commissioners Vested With Power and Duty to Take Care of Indigents.**

CARSON CITY, February 8, 1949.

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

DEAR MR. JONES: Reference is hereby made to your letter of February 2, 1949, received in this office February 3, 1949, wherein you request the opinion of this office as to whether the Board of Hospital Trustees of Clark County General Hospital has the authority to employ a physician to care for the indigent sick of the county. You advise that in checking the statutes that there is no definite law on this subject and the statutes appear to be somewhat in confusion. You also advise that it appears from the statutes that the Board of County Commissioners are given general supervision over the support of the poor.

OPINION

An examination of the law discloses that there is no provisions therein for hospital trustees to appoint a physician for the care of the indigents, except section 2235, N.C.L. 1929, provides that the trustees shall prescribe that a staff of physicians shall be organized for service in such county hospitals and that rotation of service of the members of the staff be required for indigents admitted to the hospital without payment of fees to such physicians.

Apparently there is no express statutory authority for the Boards of County Commissioners to appoint county Physicians, although section 5240, N.C.L. 1929, providing for County Health Officers, states that such County Health Office may be a County Physician. The Boards of County Commissioners of the respective counties of the State are vested with the power and duty to take care of the indigents of their counties.

We are of the opinion that boards of county Commissioners may appoint County Physicians to attend to the indigent sick outside of the county hospitals and that such Commissioners may do so under their implied powers to care for the indigents of the county. Certainly if the Commissioners must care for the indigent sick of their county, then it naturally follows from an economical standpoint that the appointment of a County Physician pursuant to the implied powers is warranted.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**723. Utilities—Pacific Telephone and Telegraph Company—No Further Legislative Authority Necessary to Enable Company to Lay Submarine Cable Across Colorado River.**

CARSON CITY, February 17, 1949.

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

DEAR MR. McLEOD: Reference is hereby made to your letter of February 9, 1949, received in this office February 10, 1949, relative to the matter of the Pacific Telephone and Telegraph Company laying a submarine cable for its telephone line across the Colorado River approximately two and five-tenths miles north of Davis Dam. You inquire whether it is necessary to get legislative authority for the laying of such cable. Division Plant Engineer J.B. Taylor's letter relative thereto, as to whether such legislative authority is necessary, has been noted.

This office has examined the law of this State with respect to the power of telephone companies to construct telephone lines within this State and also to maintain such lines after construction. We are of the opinion that no further legislative authority is necessary to enable the telephone company to lay a submarine cable across the Colorado River at the point designated.

Section 7668, N.C.L. 1929, relative to telegraph companies, is the statutory authority for telegraph companies to construct their lines over public or private land and along or across any streets, alleys, roads, highways or streams within this State. Such section apparently grants rights-of way for such purpose, save and except, that rights-of-way over privately owned lands must be acquired from the owner of such lands and compensating, if necessary, paid therefor.

Section 7671, N.C.L. 1929, further provides that such companies shall have the right-of-way for the telegraph lines. This Act was enacted in 1866 and has remained the law to the present time without amendment.

Later, in 1897, the Legislature of this State in section 7680, N.C.L. 1929, extended the same rights and privileges to telephone companies.

We are of the opinion that nothing further is necessary to be done by the telephone company or this State with respect to the laying of the submarine telephone cable across the Colorado River north of the Davis Dam.

We are returning herewith the letter of Division Plant Engineer J.B. Taylor, together with the sketch furnished with this letter.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**724. Health—Officers of State Department Not Required to Make Reports of Investigations Available to Public Before Submitting to Proper Authorities.**

CARSON CITY, February 15, 1949.

CHARLES F. BLANKENSHIP, M.D., *Acting State Health Officer, Nevada State Department of Health, Carson City, Nevada.*

DEAR DR. BLANKENSHIP: This will acknowledge receipt of your letter dated January 24, received in this office January 26, 1949, enclosing a letter from Mr. W.W. White, Director of the Division of Public Health Engineering. A summary of the question submitted is the responsibility of the director to make available for publication in newspapers and to the public generally his reports of investigations of State institutions.

We are of the opinion that an officer of any division of the State Health Department is not required to make his reports of investigations available to the public before submitting such reports to the proper authorities. Such reports, when submitted to the Department of Health, become a record of the department and as such records are open to inspection by any person, unless made confidential by statute.

Section 5620, N.C.L. 1929 provides: "All books and records of the state and county officers of this state shall be open at all times during office hours to inspection by any person, and the same may be fully copied or an abstract or memoranda prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of said records or in any other way in which the same may be used to said records or in any other way in which the same may be used to the advantage of the owner thereof or of the general public."

When a report of an investigation is filed with any State or county officer, such report becomes a record of that office and is open to inspection during office hours.

Chapter 30, Statutes of 1945, modified this Act by making confidential the records of the State Welfare Department concerning applicants and recipients of Old-Age Assistance.

Section 5268.14, 1929, N.C.L., 1941 Supp., makes it unlawful to disclose data contained in vital statistics, except as authorized by the Public Health Act, or by the State Board of Health.

Section 5267, 1929 N.C.L., 1941 Supp., gives the State Board of Health broad authority to make and enforce the rules and regulations, but such rules and regulations must be consistent with the law. While the statutes confer the right to examine books and records of public officers, this right cannot be extended to impede the work of a department in the making of its records.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**725. Hospitals—Mineral County—Establishment—Has Not Acquired Legal Status as County Hospital.**

CARSON CITY, February 19, 1949.

HON. L.E. BLAISDELL, *District Attorney, Hawthorne, Nevada.*

DEAR SIR: Reference is hereby made to your letter of February 16, 1949, received in this office the 17th inst., wherein you request the opinion of this office concerning the legal status of the Mineral County Hospital. You further state as follows:

Prior to 1916 this hospital was an Old Man's Home, operated by the County Commissioners. In 1917 the hospital was rebuilt, after calling for bids through the County Commissioners, and paid for from the General Fund. In 1935 the County Commissioners, who had been managing the hospital until that time, appointed trustees of the hospital, pursuant, apparently, to chapter 172, 1923 laws, or sections 2225 et seq. of the 1929 N.C.L. Since 1935 the Trustees have been elected, in the manner provided by statute for the election of Hospital Trustees, and they have managed the hospital.

There has never been a petition presented for a hospital, nor legislative Act enacted for its creation, or a tax voted for its support.

In favoring us with your opinion, I will request an expression from you as to whether chapter 172 of the 1923 laws is altogether repealed by section 2241, N.C.L. 1929, or whether section 2241, N.C.L. 1929, repeals said chapter 172 only with respect to counties having a population of 15,000 or over.

#### OPINION

We understand from the foregoing statement that it is only since 1935 that the Mineral County Hospital has been administered by the Board of Hospital Trustees provided by law for the administration of County Public Hospitals, that no petition to the Board of County Commissioners for the establishment of such hospital was ever presented and no tax voted therefor as required by the statute. We assume from your statement that no election by the people was had prior to 1935 or thereafter for the purpose of establishing a County Public Hospital.

Chapter 172 of the 1923 Statutes provided for the establishment of County Public Hospitals. The Act provided for a petition signed by twenty-five percent of the taxpayers of the county asking that an annual tax be levied for the establishment of such hospital, etc. Thereafter the proposition was required to be submitted to the voters at the next general election and if the majority of the votes cast thereon was in favor of such establishment, the County Commissioners were directed to levy the tax therefor and appoint a Board of Hospital Trustees. In brief the 1923 Act was quite similar to the Act of 1929 which Act is now sections 2225-2242, N.C.L. 1929, as amended. However, the 1923 Act contained two sections that were not incorporated in the 1929 Act, i.e., sections 16 and 18, which said sections when construed together provided that any hospital theretofore established by the County Commissioners under any Act of the Legislature should ipso facto come under the provisions of the 1923 Act in like manner and with the same force and effect as if the election therefor had been held in accordance with section 1 of the 1923 Act. The 1923 Act, however, was expressly repealed in toto irrespective of population of the county by the 1929 Act. See section 17 thereof, being section 2241 N.C.L. 1929.

In 1931 the Legislature enacted an Act which expressly provided for the taking over and administering of County Hospitals, County Isolation Hospitals, County Homes for the Indigent Sick, County Work Houses for Indigents and County Poor Farms by the Boards of Hospital Trustees provided for in the 1929 County Public Hospital Act. However, the condition precedent for such taking over was and is provided in section 1 of such Act as follows:

In all counties where a tax for the *establishment and maintenance* of a *public hospital* has been *authorized*, or as *hereinafter authorized*, by a majority of the

*voters voting for a bond issue in accordance with the statutes of the State of Nevada, the supervision, management, government and control of, the above-mentioned hospitals, etc., shall vest in and be exercised by the board of trustees of the county public hospital \* \* \*. (Italics ours.)* Section 1, chapter 67 Statutes of 1931, being section 2243, 1929 N.C.L., 1941 Supp.

As we have shown, however, the 1923 Act was expressly repealed by the 1929 Act. The 1929 Act not having incorporated therein sections comparable to sections 16 and 18 of the 1923 Act, then the condition precedent to the establishment of County Public Hospitals administered by Boards of Hospital Trustees was governed by the provisions of section 1 of the 1929 Act, i.e., section 2225, N.C.L. 1929, which said section required the submission of a petition to the Board of county Commissioners signed by at least thirty percentum of the taxpayers of the county, asking that an annual tax be levied for and including a bond issue as provided in section 2230, N.C.L. 1929, for the establishing and maintenance of a County Public Hospital. The proposition was thereupon placed on the ballot at the next general election and if approved by a majority of the voters at such election, the tax would thereupon be sanctioned, and the Board of County Commissioners were empowered and directed to appoint the Hospital Trustees. The foregoing provisions has been substantially carried forward in the various amendments to the 1929 Act and constituted in 1931, 1935 and today the condition precedent for the establishment of County Public Hospitals and the appointment and subsequent election of Boards of Hospital Trustees. See section 2225, 1929 N.C.L., 1941 Supp., as amended at 1943 Statutes, page 213, and section 2226, 1929 N.C.L., 1941 Supp.

If the Board of County Commissioners had proceeded pursuant to section 18 of the 1923 Act prior to its repeal in 1929, no doubt the Mineral County Hospital would have acquired a legal status as a County Public Hospital within the purview of that Act and later Acts. However, we understand no steps were taken by the Board of County Commissioners nor Mineral County to establish such hospital as a County Public Hospital within the purview of the law until 1935, and that the procedure then was to simply appoint a Board of Hospital Trustees without holding the necessary election for the establishing of such hospital as required by the statute.

We are of the opinion that the conditions precedent to the establishing of such hospitals as hereinbefore pointed out are mandatory and that boards of County Commissioners had and have no implied powers sufficient to override the plain requirements of the statutory provisions relative to the method of establishing county public hospitals. We are therefore constrained to hold that, from the facts before us, the Mineral County Hospital has not acquired a legal status as a County Public Hospital within the provisions of the law providing therefor.

In view of the importance of the matter and the Legislature now being in session, it is suggested that a bill be introduced in the Legislature as a curative measure ratifying the attempted establishment of the hospital as a County Public Hospital.

Respectfully submitted,  
ALAN BIBLE, *Attorney General.*  
By W.T. MATHEWS, *Special Assistant Attorney General.*

**726. Contractors—Individual Contractors and Effect of Law on Their Operations.**



CARSON CITY, February 23, 1949.

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

Attention: A.W. Ham, Jr.

DEAR MR. JONES: Reference is hereby made to your letter of February 16, 1949, received in this office the 18th instant, wherein you request the opinion of this office with respect to the interpretation of section 8 of Article III of the State Contractor's Board Act, the same being section 1474.20, 1929 N.C.L., 1941 Supp. Your letter contains the following statement:

A conflict of interpretation has arisen as to the interpretation of section 1474.20 of Nevada Compiled Laws, 1931-1941 Supplement.

The particular question includes the following facts: A person has come into the City of Las Vegas and has contacted jobs which involve spraying of a paint of a flame-proof nature. The compensation for his work has been at the rate of fifty dollars (\$50.00) per day, the materials being furnished by the owner of the premises. When will this man be required to be licensed under the State Contractor's Act?

Further, I would like to know if the three hundred dollars (\$300.00) mentioned in section 8 of Article 3 of this Act means three hundred dollars (\$300.00) for any job individually or is this sum to be accumulated over a period of time.

#### OPINION

Your inquiry poses the question of whether the person contracting jobs of spraying paint of a flame-proof nature is an independent contractor or an employee of the owner of the premises upon which the paint is sprayed. If such person is simply the employee of the owner of the premises and working for wages only, the, of course, the State Contractors' Board Act has no application, it is so provided in the act itself. Section 1474.10, 1929 N.C.L., 1941 Supp. A different situation arises, however, if such person is an independent contractor and the Act will apply to him, unless he comes within the exemption provided in section 1474.20, *supra*.

Your letter of inquiry does not state in full all of the necessary facts, but, for the purposes of this opinion, we assume that the person spraying the paint contracts, with the owner of the premises as follows: That for and in consideration of the owner furnishing the paint necessary for the completed work and the sum of fifty dollars per day, the painter will spray the house or structure with the fire-proofing paint in a good and workmanlike manner. That the owner neither retains nor exercises control over the painted with respect to the hours of work, time of beginning and ending the work day, the manner or detail in which the work of spraying the paint is had. IN brief, the owner furnishes the paint and pays the sum of money per day for which the painter is to furnish the result of such a contract, i.e., the completed painting of the house or structure for which the painter is qualified by his trade and training to furnish, without interference or direction upon the part of the owner.

If such is the contract, then, in our opinion, the painter is an independent contractor and subject to the provisions of the Act in question unless he comes within the exemption provided in the Act.

The books are replete with definitions of an independent contractor and subject to the provisions of the Act in question unless he comes within the exemption provided in the Act.

The Books are replete with definitions of an independent contractor. In the main these definitions are so similar as to make them identical as to meaning and different only in phraseology. In *Allen v. Bear Creek Coal Co.*, 115 Pac. 673, the Court said:

The relation of the parties under a contract of employment is determined by the answer to the question: Does the employee in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant and not an independent contractor. If, on the other hand, the employee has contracted to do a piece of work, furnishing his own means of executing it according to his own ideas, in pursuance of plan previously given him by the employer, without being subject to the orders of the latter as to details, he is an independent contractor.

In *Richmond v. Sitterding*, 43 S.E. 562, it is said:

Where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and employs his own labor, which is subject alone to his own control and direction, the work being executed either according to his own ideas, or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master, but an independent contractor.

The foregoing cited definitions of an independent contractor are found in substantially the same language in nearly every case dealing with the status of independent contractors. In 27 Am. Jur. 486, section 6, it is said:

The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is in fact independent depends upon the extent to which he is in fact independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant, if not under such control, he is an independent contractor. Where a contractor lets a portion of work to another contractor, the latter's independence is also determined by the same criterion. It is not, however, the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. \* \* \*

The foregoing text is supported by an exhaustive array of authorities in the notes thereto. See, also—

Nicholas v. Hubbell, 103 A. 835, 19 A.L.R. 221 and extensive annotation at pages 226-276;  
Litts v. Risley Lumber Co., 120 N.E. 730, 19 A.L.R. 1147 (painting case);  
Gall v. Detroit Journal Co., 158 N.W. 36, 19 A.L.R. 1164, and extensive annotation at pages  
1168-1361;  
Holbrook v. Olympia Hotel Co., 166 N.W. 876 (painting case);  
Nettleship v. Shipman 296 Pac. 1056;  
Laird v. Utilities Ins. Co., 99 S.W.2d 627;  
Brigman v. Holt & Bowers, 32 S.W.2d 220.

Does the fact that the painter in question is paid for the work at the rate of fifty dollars per day control as to his status as an employee in view of the language contained in section 1474.10, 1929 N.C.L., 1941 Supp.? Such section provides:

The term contractor for the purpose of this act is synonymous with the term “builder” and, within the meaning of this act, a contractor is any person, except a licensed architect or a registered civil engineer, acting solely in his professional capacity, who in any capacity *other than as the employee of another with wages as the sole compensation*, undertakes to \* \* \*. (Italics ours.)

We think this section of the statute, insofar as it relates to an employee, is susceptible to the construction that the term employee is to be used in its commonly known meaning, i.e., that of servant as used in the law of master and servant. That as used in the above-quoted section it means an employee who performs the work for which he is employed under the sole control and direction of his employer with respect to the details of how and when the work is to be performed and subject to the interference at any and all times by the employer.

It is well said in 27 Am. Jur. 494, section 13:

The measure of compensation for work to be done is an important element to be considered in determining whether one is an independent contractor, but it is not controlling. Thus the fact that the compensation of a contractor is by the day, in a lump sum, or on a commission basis is not a material factor. The modern cases look to the broader question whether the person is in fact independent or is subject to the control of him for whom the work is done. \* \* \*

See, also, annotation 20 A.L.R. 755.

In Marion Shoe Co. v. Eppley, 104 N.E. 65, the Court quoted with approval from Emerson v. Fay, 26 S.E. 386, as follows:

As a general rule, where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work, and he employs his own labor, which is subject alone to his control and direction, the work being executed either according to his own ideas or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master, but is an independent contractor, and the fact that his compensation is to be measured by a per diem to himself and those employed by

him does not affect the independent character of his employment, nor does the circumstance that his employer is to furnish the materials to be used in doing the work alter his status as an independent character of his employment, nor does the circumstance that his employer is to furnish the materials to be used in doing the work alter his status as an independent contractor, and create the relation of master and servant.

To same effect: *Holbrook v. Olympia Hotel Co.*, 166 N.E. 876.

In *Gall v. Detroit Journal Co.*, N.W. 36, 19 A.L.R. 1164, it was held that the publisher of a newspaper who employs another to deliver the papers to such addresses as the publisher may from time to time designate *at a stated sum per week*, with the right to employ any means deemed necessary, over which the employee shall have absolute control, is not liable for injuries caused by his negligence in the performance of the work, since he is an independent contractor.

The most that can be said of the method of payment in the instant matter is, that it is a circumstance only to be considered in arriving at the status of the painter. It can be said in all fairness that the payment at the rate of fifty dollars per day is an extremely high rate of pay per day, in all probability far above the daily wages of a painter employed as a servant under the control of his employer as a master, or employed by an independent contractor.

The most that can be said of the method of payment in the instant matter is, that it is a circumstance only to be considered in arriving at the status of the painter. It can be said in all fairness that the payment at the rate of fifty dollars per day is an extremely high rate of pay per day, in all probability far above the daily wages of a painter employed as a servant under the control of his employer as a master, or employed by an independent contractor as a workman to assist in the performance of a specific contract entered into by such independent contractor.

We conclude, assuming that the facts surrounding the contract of spraying the fire-proofing paint as assumed in connection with those stated in the letter of inquiry are correct, that the painter in question is an independent contractor subject to the provisions of the State Contractors' Board Act, unless such painter, even as an independent contractor, brings himself within the provisions of section 1474.20, 1929 N.C.L., 1941 Supp., which reads as follows:

This act does not apply to any work or operation on one undertaking or project by one or more contracts, the aggregate contract price for which for labor, materials, and all other items is less than three hundred dollars, such work or operations being considered as of casual, minor or inconsequential nature.

The exemption set forth in this section does not apply in any case wherein the work of construction is only a part of a larger or major operation, whether undertaken by the same or a different contractor, or in which a division of the operation is made in contracts of amounts less than three hundred dollars for the purpose of evasion of this act or otherwise.

Such section, upon a casual reading, would seem to create quite a broad and far-reaching exemption if it is construed to relate to more than one undertaking or project for the reason that it would permit of the contractor entering into numerous contracts where the contract price would be less than three hundred dollars for each undertaking or project. We do not believe the Legislature intended any such broad exemption. To so construe such section would be, in effect,

to nullify the Act itself with respect to all but the larger undertakings.

The canons of statutory construction, where ambiguity or uncertainty may appear in a statute, provide that the presumption is that the framers intended to give force and effect, not only to the main legislative intent of the Act but also to its several parts, words, clauses, and chose appropriate language to express their intention. This presumption is removed only when it appears from a construction of a statute, as a whole, effect cannot be given to the paramount purpose unless particular words or clauses be rejected, or without limiting their literal import.

State v. Reno Brewing Co., [42 Nev. 397](#).

If there be any ambiguity or indefinite expressions found in a statute, it is incumbent on the courts to adopt that construction which best accords with its true intent.

In re Lavendol's Estate, [46 Nev. 181](#); Ex parte Smith, [33 Nev. 466](#); [State v. Hamilton, 33 Nev. 418](#).

Courts in interpreting statutes will so construe them as to carry out the manifest purpose of the Legislature, even though it may be necessary to disregard the literal meaning of certain of the language used.

State v. Eggers, [36 Nev. 373](#).

In Escalle v. Mark, 43 Nev. at page 175, the Court said:

It is a cardinal rule of statutory construction that the legislative intent controls (Worthington v.

District Court, [37 Nev. 212](#) .....) and in seeking the intention of the legislature in enacting a certain law, we must ascertain the evils sought to be remedied. This Court, speaking through Hawley, J., in Ex parte Siebenhauer, [14 Nev. 365](#), said: "The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and policy of the law may also be invoked to aid in its interpretation, and it should always be construed so as to avoid absurd results."

An examination of the entire Act in question, we think, discloses that the Legislature intended to provide a policing measure governing the activities of all persons who act as independent contractors and hold themselves out as persons qualified and capable of entering into and performing all or some of the activities set forth in section 1474.10, 1929 N.C.L., 1941 Supp. It is clearly manifest that the Act was designed for the protection of the public in dealing with the contractors and that it provided the power and duty of the licensing board to revoke licenses and to refuse license when the holder thereof, or an applicant therefor, has been guilty of acts or conduct, harmful to either the safety or protection of the public, or guilty of dishonest, either the safety or protection of the public, or guilty of dishonesty, fraud and deceit whereby an injury as been sustained by another, or who has failed to comply with and complete a contract, improper diversion of funds, willful delay in completion of construction, etc. The Act also requires that all applicants for contractors' licenses shall show such a degree of experience and such general knowledge of the building safety and health laws of the State and of the rudimentary principles of the contracting business as the Board shall deem necessary for the safety and protection of the public. Sections 1474.24 and 1474.25, supra.

We think the proper construction of the Act requires a limitation to be placed upon the application of section 1474.20 hereinabove quoted. It is one thing to permit an independent contractor to contract for one undertaking or project where the entire contract price is less than

three hundred dollars without first having obtained the contractor's license, as such a contract if limited to only one undertaking or project and no more, without the contractor obtaining the necessary license, squares with the language of the section as it would be, as stated therein, "considered as of casual, minor or inconsequential nature." However, if such independent contractor, such as the painter in question, holds himself out as a person proficient in his work as to all contracting with him and enters into two or more numerous contracts, the contract price of each being less than three hundred dollars, without having secured the proper license, the protection to the public provided in the statute is most materially lessened if not in fact nullified and such numerous contracts could not well be said to be 'casual, minor or inconsequential in nature,' but to the contrary, we think, would be deemed a manifest evasion of the Act as permitting such a contractor to enter a community and enter into many and divers contracts without the protection to his contractees with respect to his status accorded by the statute.

It is, therefore, our considered opinion that the entire Act, including section 1474.20, is to be construed in the light of the canons of statutory construction hereinbefore cited and that the exemption therein is limited to one undertaking or project without the independent contractor first securing the contractor's license in said Act provided.

Further, it is apropos to state that in applying the exemption provisions of a licensing Act that the same rule applies as in the law of taxation, i.e., the person claiming the exemption from the licensing provisions of the law must point to a statute clearly and expressly providing such an exemption. Section 1474.20 does not so provide as to *one* undertaking or project the contract price of which is less than three hundred dollars. "Those who seek shelter under an exemption law must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public." 33 Am. Jur. 363, sec. 38.

Pursuant to your request we are enclosing an extra copy of this opinion for your use.

Respectfully submitted,

ALAN BIBLE, *Attorney General*.

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

**727. Public Schools—Lyon County High Schools—Status.**

CARSON CITY, March 1, 1949.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated February 3, 1949, received in this office February 4, 1949.

You request an opinion as to the status of the four high schools operating in Lyon County, which schools were organized by special Act of the Legislature under chapter 164, Statutes of Nevada, 1917, and if these high schools are to be classed as district high schools or county high schools.

Inquiry as to the operation of these high schools disclosed the fact that they have been maintained within districts with defined boundaries for a period of more than thirty years.

We are of the opinion that the high schools in Lyon county are district high schools and are subject to the general law governing district high schools in counties not having a county high

school.

Chapter 164, Statutes of Nevada 1917, authorized and directed the County Commissioners of Lyon County to issue bonds of said county for the purpose of establishing, constructing and maintaining high schools in the county. Section 7 of the Act created four county high school districts in the county. In the case of one district it provided that it should not be considered organized until it shall appear, under the laws of this State, that they have sufficient qualified students to organize a high school, and until such time that district was declared a part of district number one.

The next section made it the duty of the County Commissioners to divide the county into districts as provided in the preceding section, define the boundaries of each, and file a certificate thereof with the county Clerk.

Section 12 provides as follows: “The respective high schools herein provided for shall be under the same supervision and shall be subject to the same laws, rules and regulations as govern other high schools in this state, and all provisions of law concerning such high schools except as they may conflict herewith are hereby adopted.”

Chapter 181, Statutes of Nevada 1939, was an Act to establish district high schools in counties having a duly established high school.

Chapter 183, Statutes of Nevada 1939, was an Act to establish district high schools in counties not having a duly established county high school.

These Acts were included in the School Code, chapter 63, Statutes of Nevada 1947.

The later general statutes do not present an irreconcilable conflict with the former special Act and can be harmonized to bring the high schools in the various districts in Lyon County under the same laws, rules and regulations as govern other district high schools in the State.

As stated in *Seaborn v. Wingfield*, 56 Nevada 260, “Where a doubt exists as to the proper construction on a constitutional or statutory provision, courts will give weight to the construction placed thereon by other coordinate branches of government and by officers whose duty it is to execute its provision.” Also, *State v. Brodigan*, 35 Nevada 35; *State v. Grey*, 21 Nevada 378.

The County Commissioners and trustees of the districts in Lyon County have operated the high schools as district high schools prior to and subsequent to the acts of 1939 and are now operating under the provisions of the 1947 School code, and are, therefore, in all respects district high schools.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**728. Fire Protection—Qualification of Voters for Creation of District.**

CARSON CITY, March 1, 1949.

MR. E.W. McLEOD, *State Forester-Firewarden, Office of Surveyor General, Carson City, Nevada.*

DEAR MR. McLEOD: This will acknowledge receipt of your letter dated February 21, 1949, received in this office February 23, 1949, requesting information relative to the qualifications of voters at an election under the Act providing for the organization of fire protection districts

within the State.

We are of the opinion that the qualification of a person to sign a petition to form a fire protection district and to vote at the election to organize such district is that the name of such person must appear on the last county assessment prior to such petition or election.

Section 1929.02, 1929 N.C.L., 1941 Supp., which defines the preliminary procedure to organize a fire protection district contains the following language: "When twenty-five percent or more of the holders of title or evidence to title to lands lying in one body and whose names appear as such upon the last county assessment roll shall present a petition to the board of county commissioners \* \* \*." This section limits the right to file a petition to owners of real property whose names appear as such on the assessment roll.

Section 1929.04, 1929 N.C.L., 1941 Supp., provided for the division of the territory, to be included into the district, into five divisions which should constitute election districts. It also provided: "\* \* \* and one director, who shall be a resident of the precinct for which he is elected shall be elected \* \* \*." This section was amended by chapter 134, Statutes of Nevada 1947. The language, "who shall be a resident of the precinct" was changed to read "who shall be a property owner of the precinct."

Section 1929.05, 1929 N.C.L., 1941 Supp., provides for the holding of an election to establish the district. It contains the following language: "Holders of title or evidence of title to lands within the district, and no others, shall be qualified and entitled to vote either in person or by proxy at an election held by such district."

The intent of the Act is to limit the right to vote at such election to owners of real property. In order to determine the meaning of the term "holders of title or evidence of title," it will be necessary to refer to the first part of the Act when this term is defined. It is clear from the language in section 2 that a person must not only be the holder of title or evidence of title, but such person's name must appear on the assessment roll of the county. This being so, it will be presumed that the terms, "holders of title or evidence of title" in section 5, and "property owner" as used in the 1947 amendment to section 4 of the Act, mean "whose names appear as such on the last county assessment roll," as specifically provided in section 2 of the Act.

As stated in *State v. Hamilton*, 33 Nevada, on page 422, "Another well-settled rule of construction is that, where one section of a statute treats specifically of a matter, it will prevail over other sections in which incidental reference is made to the matter."

The appearance of the name on the assessment roll as holders or owners of real property is the qualification required to sign the petition and to vote at the election.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**729. Insurance—Illegal Inducements—Right of Insurance Company to Borrow Money in Acquiring New Business.**

CARSON CITY, March 3, 1949.

MR. JERRY DONOVAN, *Insurance Commissioner, Carson City, Nevada*.

Attention: Mr. G.C. Osburn, Deputy.



DEAR MR. DONOVAN: This will acknowledge receipt of your letter dated January 21, 1949, received in this office January 25, 1949.

As a result of the conference in our office with officers of the Western American Life Insurance and Mr. John P. Thatcher of the firm of Thatcher, Woodburn and Forman, attorneys for the company, we informed Mr. Thatcher that we would welcome a written statement from him setting forth the result of his research on this subject. This statement was received February 26, 1949 and we believe his conclusions on the subject matter are legally sound.

The first question involves the interpretation of section 3656.82, 1929 N.C.L., 1941 Supp., defining illegal inducements to insurance.

The second question is the right of an insurance company to borrow money to be spent in acquiring new business and agreeing to repay the money only out of its surplus earnings.

We are of the opinion that the policy form of the Western American Life Insurance with coupons attached which gives the policy holder five options as to the use of the coupons does not violate section 3656.82, 1929 N.C.L., 1941 Supp., which forbids the delivery as an inducement to insurance any shares or other capital shares, benefit certificates, or other contracts of any kind promising returns and profits.

In answer to your second question, we are of the opinion that working capital of the insurance company may be secured by accumulating surplus funds for the purpose, and there is nothing in the insurance law to prohibit the company from borrowing money, if the borrower is not obliged to pay the loan except from the profit made in the use of it, and the capital of the company is not impaired thereby.

Section 3656.82, 1929 N.C.L., 1941 Supp., defining illegal inducements. Quoting that part deemed relevant, it reads as follows:

No life company authorized to do business in this state shall issue or deliver in this state or permit its agents, officers or employees to issue or deliver in this state as an inducement to insurance or in connection therewith any agency company shares or other capital shares, benefit certificates or share sin any common law corporation, securities of any special or advisory board, or other contracts of any kind promising returns and profits as an inducement to insurance;

Section 3656.45, 1929 N.C.L., 1941 Supp., prohibits the payment or acceptance of rebates and other considerations for insurance which is not specified in the policy. The same section provides that nothing contained in the section shall prevent a company from paying a bonus to policy holders.

The policy of the Western American Life Insurance company in question gives the policy holder five options as to the coupon: (1) it may be used to purchase capital stock of Western American Corporation, a domestic corporation; (2) may be redeemed in cash; (3) may be applied toward the payment of premiums; (4) may be applied to purchase additional paid-up insurance; or (5) it may be allowed to accumulate with the company at 3 percent compound interest. There is no issuance or delivery of stock by the company as an inducement for the purchase of insurance. The five options are named in the policy and may be exercised as determined by the policy holder.

The contract insurance provides that in the event the insured shall not make a selection of any

of the five options, the guaranteed coupons will be accumulated in accordance with option 5, that is, at 3 percent compound interest. It does not provide that they shall be used to purchase stock in the Western American Corporation.

Relative to the right of an insurance company to borrow money, there is no provision in the Insurance Act which directly authorizes or prohibits the borrowing of money to secure working capital. Section 3656.11, 1929 N.C.L., 1941 Supp., subsection (1) provides: "The company shall incorporate under the general corporate laws of this state and file its articles in the office of the secretary of state as required by law." The section defines the qualifications that a company after incorporation must meet before receiving authority to transact business. The authority to borrow money is specifically granted corporations under the general corporation law.

Section 3656.12, 1929 N.C.L., 1941 Supp., requires that a stock company under the insurance Act shall have and at all times maintain a paid-up capital of the amount set forth in its articles of incorporation and sets up a minimum surplus requirement.

Working capital of an insurance company may be secured by accumulating or acquiring surplus funds for this purpose. In the case of the insurance company in question the proposal is to borrow money from the Western American Corporation, a domestic corporation, certain sums of money on a contract which provides that the same will be payable only out of surplus in excess of \$75,000.

This question is answered in the case of *Kingston v. Home Life Ins. Co. of America*, 101 Atlantic 898, cited by Mr. Thatcher, which is directly in point. IN this case the Home Life Ins. Co. of American and the Home Protective Company were each a Delaware corporation in which a majority of the directors of the insurance company were also directors of the Protective Company. The Court on page 902 said: "Where the company is a new one the cost of getting new business for a time exceeds the premiums received from holders of the policies. The capital stock of a company cannot under the laws of this state be used for such working capital, for it must be maintained intact. \* \* \*" In substance, then, the Insurance Company obtained from the Protective Company money with which to acquire new business under an agreement to pay the money only from its surplus in excess of ten thousand dollars," \* \* \* "Was this lawful or unfair?" \* \* \* "If properly spent the money brings in a crop of good business and until the new business comes in the value of the company is increased by the expenditure which will bring in the profitable new business. It certainly is not wrong to borrow money for such purpose, if the borrower is not obliged to repay it except from the profit he makes in the use of it. Such borrower cannot be made insolvent because of borrowing of the money, for he cannot be made to repay it unless he makes a profit from the use of it."

The case of *Jacobs v. Wisconsin National Life Insurance*, 156 N.W. 159, also cited by Mr. Thatcher, supports the right of an insurance company to make such contract where the statute neither expressly or by implication forbids the making of such a contract.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**730. Soil Conservation—Districts Not Empowered to Borrow Money and Pledge Assets.**

CARSON CITY, March 7, 1949.

MR. P.P. HOOVER, *Chairman, Board of Supervisors, White Pine Soil Conservation District, Ely, Nevada.*

DEAR MR. HOOVER: Reference is hereby made to your letter of March 1, 1949, received in this office the 3rd inst., wherein you request our opinion upon the question of whether the Soil conservation District is empowered to borrow money pledging as security therefor the assets of the District. You advise that the attorney for your local bank gave an opinion that the District could not, under the law, borrow money on its assets.

#### OPINION

Soil conservation districts are created pursuant to the soil conservation districts law, the same being sections 6870.01-6870.18, 1929 N.C.L., 1941 Supp., as amended at 1947 Statutes 431, etc.

The law provides that when a district is created it “shall be governmental subdivision of this state and a public body corporate and politic.” Section 6870.05, supra, as amended at 1947 Statutes 434. Thus the law creates a public governmental subdivision of the State subject to the statutory powers expressly set forth in the Act. It is a cardinal rule that public bodies have only such powers as are expressly granted in the law or such implied powers that can be clearly said to flow from the express powers.

An examination of the Soil Conservation Act fails to disclose anywhere therein the power of such districts and/or their officers to borrow money or pledge the assets thereof as security for the loan. No right to levy taxes upon the property within the district for the payment of the loan is contained in the Act. It is true the power is granted districts to own, control, sell or lease its real or personal property, but it cannot well be implied from such power that a district may encumber its property with a loan thereon.

Further, the general law of this State governing the fiscal affairs of counties, municipalities, school districts, and irrigation districts, and which permits them to make emergency loans providing the power to levy taxes for the repayment thereof, does not extend to soil conservation districts. See section 3020, 1929 N.C.L., 1941 Supp.

In brief, we think, soil conservation districts occupy the same status as counties prior to the enactment of the fiscal managements statutes, in that counties could not borrow money, save where expressly empowered to issue bonds for certain purposes. In *Waitz vs. Ormsby County*, [1 Nev. 370](#), the Supreme Court laid down the rule that Boards of County Commissioners could not borrow money for use of the county because such power was not expressly granted them by law. We are of the opinion that such is the case here, i.e., soil conservation districts are not empowered to borrow money in the manner stated in your letter.

Respectfully submitted,

ALAN BIBLE, *Attorney General.*

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

**731. Public Schools—Union School District—Board Has No Authority to Call Bond Election for Entire District—High School Districts and Elementary School Districts May Unite to Establish Consolidated District.**

CARSON CITY, March 8, 1949.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated March 3, 1949, received in this office March 4, 1949, submitting the following questions:

1. Under the provisions of Section 78, Chapter 63, 1947 Statutes of Nevada, has the board of education of a union school district, composed of a high school district, or several elementary school districts with the same or different boundaries, authority to hold a bond election to provide funds for construction of a school building to be used for the joint use of the elementary and high school, or elementary school districts, as the case may be?

2. In the event that your answer is in the affirmative, and if the qualified electors of the union district vote favorably upon the question of the issuance of such bonds, would the bonds thereafter issued be a legal charge against all districts, elementary and high school, embraced within the union district?

Under the provisions of Chapter 9 (sections 54-61, inclusive) of Chapter 63, 1947 Statutes of Nevada, may a high school district and an elementary district consolidate?

We are of the opinion that the Board of Education of a Union School District has no authority under the statutes to call a bond election for the entire district to provide a school building for the joint use of such Union District. The power to issue bonds in a Union District is specifically confined to the district on behalf of which the bonds are sought to be issued, and at an election called and conducted in such district.

It is our opinion, in answer to your second question, that High School Districts and Elementary School districts may unite for the purpose of establishing a Consolidated School District.

Chapter 12 of chapter 63, Statutes of Nevada 1947, embodies the organization and administration of Union School Districts. Section 74 provides the method for organization and specifically provides that any school district of any kind, high school, elementary, or both, may combine to form a Union District, even though such Elementary District or districts are wholly situate within the boundaries of a High School District at the time of the formation of such Union District.

Section 75 provides that the control of all high and elementary schools in the Union District shall be vested in the Board of Education for such Union District.

Section 76 provides for the election or appointment of the Board of Education, and upon such election or appointment the office of the trustee of each of the several districts shall no longer exist.

Section 77 contemplates a general election in the Union District for the election of the Board of Education. It specifies the terms of the members and provides that two members shall be from the High School district at large and three members shall be from the Elementary District.

Section 78 defines the powers of the Board of Education. It gives the Board power to employ all superintendents, principals, teachers, janitors and other employees. It may employ one or more persons to teach jointly any of the special subjects offered in the schools.

Section 79 provides that the salaries of the superintendent and teachers employed to teach

jointly in the several schools shall be borne jointly by the several districts forming the Union District, and paid out of the several school funds concerned in proportion to the services rendered to the several schools.

The power to issue bonds is distinguished and set apart in sections 78 and 80. Section 78 which defines the powers of the Board of Education contains the following language: “\* \* \* it shall have the power to issue bonds, for the purposes allowed by law, on behalf of any school district included in the union, which bonds have been authorized at a general or at a special school bond election called and conducted in the district on behalf of which the bonds are sought to be issued in the manner provided by the general school law; \* \* \*.”

This cannot be construed to be a general power to issue bonds for the entire Union District, as it specifically provides that such issue be on behalf of any school district included in the union, and authorized by an election called and conducted in the district seeking the bond issue. This construction is strengthened by the following language in the same section: “\* \* \* provided, however, that the taxes for the payment of principal and interest of such bonds, when and as the same respectively become due, shall be levied only on and against the taxable property, including the net proceeds of mines, within the boundaries of the school district on behalf of which such bonds are issued.” The section further provides for the board of education to bonds and interest, and the county commissioners shall levy such tax within such district on behalf of which the bonds are issued. Upon the issuance of such bonds the section provides, “the same may be designated as the bonds of such union district issued on behalf of the particular school district for which the same shall have been authorized, as herein provided.”

Section 80, relating to the apportioning of money, provides: “Funds shall be raised and apportioned to the high school districts which form a part of said union district in the manner prescribed by law, and for the purpose of apportioning state and county moneys, the school districts which were united to form said union district shall be and are hereby retained as separate school districts, and the superintendent of public instruction shall apportion state and county moneys to said districts as required by law. The separate identity of each of the particular school districts, which were united to form said union school district, shall be and the same is hereby retained for the purposes of the conduct of school bond elections therein, the issuance of bonds on behalf of such particular school district, and the certification, levy and collection of taxes therein for the payment of the principal and interest of such bonds, all as hereinabove provided in this chapter.”

While the Union District is governed by one board which shall have control of the fiscal policy of the high and elementary schools forming the union, and the power to employ all necessary personnel, some of whom may serve jointly and whose expenses shall be borne jointly by the districts served, the Board has no power to call an election to issue bonds which would be binding on the district jointly. The power to issue bonds remains within the respective districts.

#### CONSOLIDATION OF A HIGH SCHOOL DISTRICT AND AN ELEMENTARY DISTRICT

Section 31, subsection 4, defines a Consolidated District as a combination of two or more school districts wherein the component school districts completely lose their separate identity except for apportionment purposes and merge into one enlarged district with a single board of trustees.

Section 54 provides: “any two (2) or more adjacent school districts may unite for the purpose of establishing a single consolidated school district.”

Section 56 defines the procedure for the election of trustees, and contains this language: “\* \* \* provided, however, that if the school board of the larger district is composed of five members, such district being a district of the first class or a union school district, at the meeting hereinabove in this section provided, the members of the two or more boards concerned shall elect their ballot five of their number to be trustees of the consolidated district, and such trustees so elected shall hold office until the next regular election and certification of school trustees as provided for by law.”

Section 57 provides the manner of apportioning State and county school moneys and apportioning money to the High School districts found in section 80 relating to Union Districts, but section 61, concerning Consolidated Districts, reads: “In all matters relating to consolidated school districts, not provided for in the preceding sections of this chapter, the law relating to other school districts shall be in full force where said laws are applicable.”

Taking into consideration the definition of a Consolidated District which permits a district to retain its identity for apportionment purposes, and the reference made to a Union District in section 56, it appears that High School Districts and Elementary School Districts may form a Consolidated School District.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**732. Public Service Commission—No Jurisdiction to Approve Contracts, Pass on Proposed Rates, or Grant Certificates of Convenience to Power Districts.**

CARSON CITY, March 11, 1949.

PUBLIC SERVICE COMMISSION, *Carson City, Nevada.*

Attention: J.G. Allard, Chairman.

GENTLEMEN: Reference is hereby made to your recent request for the opinion of this office concerning the jurisdiction of the Public Service Commission to entertain and/or approve the taking over by the Lincoln County Power District No. 1 of the Town of Pioche Water System and operate the same by furnishing of water to the Town of Pioche as a public utility and grant a certificate of public convenience thereon. You submit with your request a file of papers wherein it appears that the power district has leased for a period of ninety-nine years all right and title of the Amalgamated Pioche Mines and Smelters Corporation in and to said water system. It also appears that the Board of County Commissioners of Lincoln County, acting as a governing board for the Town of Pioche, has sold and conveyed to the power district all of the town's title and interest in and to the water system. In brief the power district is to all intents and purposes, for ninety-nine years at least, the owner of and in control of the water system.

We understand the Commission has been requested to pass upon the entire transaction, approve the same and examine and approve proposed rates for the use of water as furnished by the power district.

Your inquiry is, has the Commission the jurisdiction and is it its duty to, if the transaction is

approved, grant the power district a certificate of public convenience.

#### OPINION

It is well settled in the law that Public service Commissions derive their powers only from the statute providing for and granting their powers, and have no authority except as is expressly conferred upon them.

Chicago R.R. Co. v. Commerce Commission, 67 A.L.R. 938.

A public service commission has, however, no inherent power; all its power and jurisdiction, and the nature and extent of the same, must be found within the statutory or constitutional provision creating it. 43 Am. Jur. 701, sec. 193 and cases cited in Note 17.

Lincoln County Power District No. 1 is a municipal corporation, made so by statute. Chapter 72, Statutes of 1935, being sections 5180.01-5180.18, 1929 N.C.L., 1941 Supp. The Supreme court of this State in State v. Lincoln County Power District No. 1, [60 Nev. 401](#), held that such district was a municipal corporation and a political subdivision of the State created to make available an abundant supply of electricity at the lowest possible cost.

In the Power District Act to the Public Service Commission was and is granted certain powers dealing with the creation of and consolidation of power districts and dissolution thereof. Sections 4, 5, 6, and 7 of the Act. However, nowhere in the Act is the Commission empowered to examine or approve contracts entered into by the power district or to grant certificates of convenience to it concerning any activity of the district in its corporate capacity or otherwise. So far as the Power District Act is concerned the Commission's powers and duties end with the creation, consolidation or dissolution of such districts.

Does the Public Service Commission Act of this State vest jurisdiction over municipal corporations in the Commission?

A close and careful examination of the Act, i.e., section 6100-6146, N.C.L. 1929, as amended, fails to disclose that the Legislature has vested such jurisdiction in the Commission. The definition of a public utility contained in section 6106, N.C.L. 1929, while broad and comprehensive, does not, in our opinion, include municipal corporations, as there is no express language clearly pointing to municipal corporations therein. To the contrary there is in section 6137, N.C.L. 1929, and as such section was amended at 1947 Statutes 808, the following language, "provided, however, that a municipality constructing, leasing, operating or maintaining any public utility shall not be required to obtain a certificate of convenience."

We think it apropos to here point out that section 14 of the Power District provides, "That this act is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this act shall not apply to a district incorporated under this act."

Thus the Legislature has expressly taken power districts out of the jurisdiction of the Commission, save as provided in sections 4, 5, 6, and 7 of the Power District Act.

Applying the rule of construction of statutes relating to the powers of Public Service Commissions hereinabove quoted, that the power and jurisdiction of the Commission and the nature and extent of the same must be found within the statute, we are inclined to the view, and so hold that, the Commission has no jurisdiction in the Instant matter to examine or approve the contracts of the power district, to pass upon the proposed rates for the use of water, or to grant a

certificate of convenience.

It may be that a power district as a municipal corporation may enter into contracts and activities that are ultra vires and not sanctioned by the law. However, that would be a question for the Courts and not the Commission. If the situation disclosed by the transaction submitted with your inquiry needs correction, then we suggest that the Legislature is the body to correct the same by appropriate legislation.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**733. Food and Drugs—Ice Cream—Manufacturers, Wholesalers, Jobbers Not Complying With Standards Defined in Statute Liable to Prosecution—Dealer Must Present Written Guarantee From Manufacturer—No Penalty for Importing Inferior Produce from Another State.**

CARSON CITY, April 1, 1949.

DEPARTMENT OF FOOD & DRUGS, *State of Nevada Public Service Division, Post Office box 719, Reno, Nevada.*

Attention: Mr. Wayne B. Adams, Commissioner.

GENTLEMEN: This will acknowledge receipt of your letter dated March 28, 1949, received in this office March 29, 1949, in which you request an opinion in answer to the following questions:

1. Where a dealer has violated the provisions of the Act, but possesses a guarantee from the manufacturer, does the manufacturer, wholesaler, or jobber then become liable to prosecution?
2. Where such manufacturer, wholesaler, or jobber is located outside the boundaries of this State and imports his products into this State for resale, can he be prosecuted in the manner prescribed in the Act?

We are of the opinion, in answer to your first question, that the manufacturer, wholesaler or jobber who makes or dispenses ice cream that does not comply with the standard defined in the statute would be liable to prosecution. Also, the dealer, in order to claim exemption from prosecution, must present a written guarantee from the manufacturer, wholesaler or jobber that the ice cream purchased complies with the standard fixed by statute. The sale in this State of an inferior product could be controlled by the Commissioner under the provisions of the Food and Drug Act after appropriate notice and opportunity for hearing.

The answer to your second question is that the statute does not fix a penalty for the importing of ice cream into the State that does not comply with the Nevada standard, and the Courts of this State would not have jurisdiction over an offense committed wholly within another State.

Section 5 of the Act regulating the manufacture and sale of ice cream, being section 2293.04, 1929 N.C.L., 1941 Supp., as amended by chapter 65, Statutes of Nevada 1947, defines the



composition of ice cream within the meaning of the Act, and how it shall be manufactured, distributed and dispensed.

Section 7 of the Act, being section 2293.06, 1929 N.C.L., 1941 Supp., reads as follows:

Any person who shall violate any provision of this act shall be deemed guilty of a misdemeanor, and fined not more than fifty dollars (\$50) for the first offense, and for any subsequent offense shall be fined not more than two hundred dollars (\$200) and imprisoned for not more than thirty days. But no dealer shall be prosecuted under the provisions of this act if he shall present a statement in writing from the manufacturer, wholesaler or jobber from which such ice cream was purchased, containing a guarantee as to the quality of such ice cream.

The dealer in this State is presumed to know the law defining ice cream, and the guarantee presented, in order to exempt such dealer from prosecution, must show that the ice cream purchased contains the essential ingredients, percentage and weight required by section 5 of the Act. The exemption cannot be interpreted as a means to evade the provisions of the Act when the product is purchased outside the State. It is a protection to the dealer who in good faith purchases from a manufacturer, wholesaler or jobber within the State who must comply with the provisions of the act.

Although the statutes do not affix a penalty for the importing of ice cream into the State which does not comply with the standard fixed by statute, the commissioner, under the provisions of the Food and Drug Act has additional powers to control the sale within the state of inferior products.

Section 6206.05, 1929 N.C.L., 1941 Supp., declares when food shall be deemed adulterated.

Subsection (b) of this section provides:

- (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or
- (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so “as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.”

See, also, Attorney General’s Opinion No. 277, Biennial Report 1944-1946, rendered before the amendment in chapter 65, Statutes of 1947, relative to the authority of the Commissioner of Food and Drugs to establish a minimum weight per gallon for ice cream.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**734. University of Nevada—Professor Returning From Military Service Entitled to Receive Full Benefit of Promotions Granted During Absence.**

CARSON CITY, April 4, 1949.

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

DEAR MR. TABER: This will acknowledge receipt of your letter dated March 29, 1949, received in this office March 30, 1949, enclosing a statement of facts from a professor at the University of Nevada, referred to you under the provisions of section 6877.02, 1929 N.C.L., 1941 Supp., which requires District Attorneys, under the provisions of the Act of the State of Nevada providing for the reemployment of persons called from their employment by reason of the Federal Selective Training and Service Act of 1940, to investigate the application of persons claiming to be entitled to the provisions of the Nevada statute.

A summary of the facts submitted are as follows: A professor at the University of Nevada received a permanent position of assistant professor. He entered the military service in 1942 on leave of absence from the University. In 1947 he was honorably discharged and returned to the University as assistant professor. Another member of the staff entered military service in 1942 and returned to the University in 1946. During the time he was in the service the University granted the position two promotions, and to the advanced positions he was reinstated. Two other assistant professors during the years 1943 and 1944 were advanced to associate professors.

You request an opinion as to the right of the assistant professor in question to be restored to the full benefit of whatever right he might have acquired if he had remained in his employment, and if he is entitled to be compensated for any loss of salary occasioned by a refusal to so reinstate him.

We are of the opinion that the assistant professor is entitled to be promoted to a position equal in rank and salary to which the other professors were promoted, if his qualifications meet the requirement of such position. In our opinion, he is also entitled to be compensated for his loss of salary caused by the deal in complying with his application.

Section 308(b) Federal Selective Service Act of 1940, as amended, title 50, appendix 1947, contains the employment and reemployment provisions concerning service personnel who leaves positions, other than a temporary position, to enter military service, and upon discharge from such service make application for reemployment within ninety days, and is still qualified to perform the duties of such former position, shall be restored to such position or to a like position of status and pay.

Congress declared the Act to be mandatory if such position was in the employ of any state or political subdivision thereof, it is hereby declared to be the sense of Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

The Legislature of Nevada, conscious of the policy of Congress, passed an Act providing for the reemployment of persons called from their employment by reason of the provisions of the Federal "Selective Training and Service Act of 1940" and provided for the method enforcing the provisions thereof, which was approved March 12, 1941. This Act followed substantially the provisions of the Federal Act. This Act was amended by chapter 58, Statutes of 1943. Paragraph 2 of section 1 reads as follows: "If such position was an appointee officer or as an employee in any department, commission or agency of the State of Nevada, or in the employ of any county or political subdivision of the State of Nevada, or in the employ of any city, town, or irrigation district within the State of Nevada, such employer shall restore such person to such position or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

Section 2 of the Act as amended provides that a person who is restored to a position in accordance with the provisions of paragraphs 1 or 2 of section 1 shall be considered as having been on furlough or leave of absence during his period of training and service, and shall be

restored without loss of seniority; shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees or leave of absence in effect at the time such person was inducted or enlisted in the service.

The facts presented show that the professor was restored to his position, but lost his seniority and the benefits offered by the University pursuant to the established rules and practices.

*Droste v. Nash-Kelvinator Corporation*, 64 Fed. Supp. 716. On page 720 the Court said: "The act does more than restore the World War II veteran to the status quo ante. It gives him the full benefit of whatever rights he might have acquired if he had remained in his position instead of being inducted into the service. If the seniority accumulated during the time he was in the service entitled him a better job classification than he had at the time he entered the service, it is the duty of the employer to give him this better classification."

*Kay v. General Cable Corporation*, 144 Fed.(2) 653. In this case the Court held: "The status which the statute protects is 'a position \* \* \* in the employ of' an employer—an expression evidently chosen with care. The word 'employee' was not used. While it may be assumed that the expression which was adopted is roughly synonymous with 'employee,' it unmistakably includes employees in superior positions and those whose services involve special skills, as well as ordinary laborers and mechanics."

Application for reemployment in the position to which the person was entitled should be made within the time provided by the statute.

Section 6877, 1929 N.C.L., 1941 Supp., requires that application for such reemployment be made within forty days after the person is relieved from service. This followed the Federal Act of 1940. The Federal Act was amended by the Act of December 8, 1944, which substituted ninety days for forty days after being relieved from service. The State Act was not amended.

In the case of *Donaldson v. Tennessee Coal, Iron & R. Co.*, 68 Fed. Supp. 681, the Court held that the petitioner made application within ninety days after the date of his discharge from the Navy. Respondent refused to reinstate petitioner to the position to which he was entitled within five days and the Court held he was to be compensated for his loss of wages caused by such delay.

*Rosario v. Department of Labor of Puerto Rico*, 68 Fed. Supp. 1. The petitioner in this case within thirty days after his honorable discharge from service applied for reinstatement. The application was filed in July 1945 and the case was decided in October 1946. The Court held that the defense of laches interposed was not sustained. That the position of the department has not changed in any essential respect so as to relive it of its obligation. The Court said: "It is unfortunate that a soldier who has served his country faithfully in time of war and has offered, if necessary, to make the supreme sacrifice in defense of his country, should be compelled to institute proceedings in Court in order to compel an officer of his government to perform in his behalf a duty which is clearly directed by a law of Congress." The Court held from an examination of the record that the department could easily grant the petition without in any way affecting the orderly administration, and ordered his reinstatement and that he be compensated for his loss of salary since his application was made.

See, also, Attorney General's Opinion No. 266, Biennial Report 1944-1946, in which this office held that a returning veteran must be restored to the position which he left to enter the service or to a position of like seniority, status and pay, including any increase of pay such position commands at the time of reemployment.

Very truly yours,

ALAN BIBLE, *Attorney General*.  
By GEORGE P. ANNAND, *Deputy Attorney General*.

**735. Public Employees Retirement—Death Before Retirement—Amount Credited Paid Directly to Designated Beneficiaries or Next of Kin.**

CARSON CITY, April 4, 1949.

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

DEAR KERWIN: Your letter of March 17, 1949, was received in this office March 18, 1949.

You state that Frank Garaventa died November 27, 1948, and at that time had paid into the Public Employees' Retirement Fund \$61.77 and his contribution as a member. On December 11, 1947, Mr. Garaventa names his sister as his beneficiary under the provisions of the act which became effective July 1, 1947.

The question is whether to pay the sum to the sister or into Court for the heirs.

Section 21 of the Act which you quote requires payment to the named beneficiaries having an insurable interest. This section reads as follows:

In the event that a person who is a member of the system dies before retiring, the amount credited at the time of his death to his account in the fund shall be paid to the beneficiaries which he designates. For this purpose he may designate as a beneficiary any person having an insurable interest in his life. Should he designate no such beneficiary, it shall be paid directly without probate to the surviving next of kin, etc. \* \* \*

We have no statute or Court decision defining an "insurable interest," although the term has a clear general meaning. Blood and marriage ties within the second degree are usually recognized without other circumstances.

In view of the fact that the sister is a blood relative within the second degree, and has been named as beneficiary, we believe you would be authorized to pay the sum directly to her.

We are sending a copy of this opinion to Mr. John Davidson so that he may be advised of our views and take such action as he deems appropriate.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**736. Constitutional Law—Member 1949 Legislature Ineligible to Appointment as Member State Board Livestock Commission.**

CARSON CITY, April 12, 1949.

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

DEAR GOVERNOR PITTMAN: Reference is hereby made to your letter of April 5, 1949, received in this office April 6, 1949, wherein you request an opinion as to whether the

appointment of members of the Legislature to the State Board of Livestock Commissioners will be legal under the present law.

#### OPINION

We assume that your question is directed to the application of the amendment to section 2 of the State Board of Stock Commissioners Act, which amendment was enacted by the recent Legislature and is now chapter 313, Statutes of Nevada 1949.

An examination of such chapter discloses that the Legislature materially amended such section in that it abrogated entirely the existing board of three members and substituted therefor a State Board of Stock Commissioners consisting of five members, which Board, under the amendment, is to be appointed within thirty days after the passage and approval of the Amendatory Act.

It is to be noted that the Amendatory Act provides certain qualifications for the appointed members. It also provides specific terms of office for such Commissioners and in addition thereto requires that they take the constitutional oath of office and each shall file a bond as provided by law in the sum of \$5,000 conditioned on the faithful performance of their duties. It is also provided that the members of the commission shall receive no salary, but shall be allowed a per diem of \$10 per day and their necessary traveling and subsistence expenses as allowable by law when in attendance at meetings of the Board or engaged in other official business.

The State Board of Stock Commissioners Act, the same being sections 3826-3848, N.C.L., 1929, and as amended, show beyond any question of a doubt that the members of the Board are empowered to perform governmental duties with respect to livestock and to assist in the inspection, quarantine, and condemnation thereof when affected with any infectious or contagious disease and are given broad powers in this respect, no doubt for the welfare of the people of this State.

Such being the status of the members of the Board, we are of the opinion that the appointment of Commissioners to the Board constitutes the appointment to a public civil office of profit. Each member is appointed for a definite term, is required to take the official oath, to give a bond and receive compensation for services. Such constitutes a civil office of profit as found by our Supreme Court in the case of State v. Cole, [38 Nev. 215](#). Such being the status of the Commissioners in question here, we think that section 8, Article IV, of the Constitution of this State, reading as follows:

No senator or member of assembly shall, during the term for which he shall have been elected, nor for one year thereafter, be appointed to any civil office of profit under this state which shall have been created, or the emoluments of which shall have been increased, during such term except such office as may be filled by elections by the people.

constitutes a prohibition against the appointment of members of the Legislature of the 1949 session to the office of Livestock Commissioner.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**737. Counties—Agricultural Extension Division—County Commissioners Not Empowered to Impose Conditions on Expenditure of Funds Budgeted for Extension Purposes.**

CARSON CITY, April 13, 1949.

HONORABLE C.H. GORMAN, *Comptroller, University of Nevada, Reno, Nevada.*

DEAR CHARLES: About April 1, 1949, you left with us a letter to you from Mr. Cecil W. Creel, Director of Agricultural Extension, requesting you to obtain the opinion of this office on a problem therein presented.

We enclose an extra copy of this opinion for your convenience.

It appears that Mr. Creel submitted to the Board of Commissioners of Clark County, through J.H. Wittwer, County Extension Agent, the Clark County Extension Budget for 1949. That budget includes as income the sum of \$12,396.00 designated "County Extension Funds" and as an expense the sum of \$1,800 (among other sums) from "County Funds" (more properly "County Extension Funds") for the purchase of an automobile.

The County Commissioners have notified Mr. Wittwer that they will not authorize the payment of this sum by the County Treasurer unless the title of the automobile purchased shall vest in the county of Clark. The notice was dated March 2, 1949 and the matter was referred to Mr. Creel by Mr. Wittwer March 4, 1949.

The question is whether the County Commissioners may withhold directions to the Treasurer in the premises unless the condition referred to is complied with.

The answer is in the negative.

Chapter 94, Statutes of Nevada 1947, is controlling. Section 2 of that Act is as follows:

SEC. 2. The director of agricultural extension shall prepare and submit to the board of county commissioners, for each county participating, an annual financial budget covering the county, state, and federal funds cooperating in the cost of cooperative extension work in agriculture and home economics. Such budget shall be adopted by the board of county commissioners and certified as a part of the annual county budget, and the county tax levy provided for agricultural extension work in the annual county budget, shall include a levy of not less than one cent on each one hundred dollars of taxable property; provided, that if the proceeds of said county tax levy of one cent are insufficient to meet the county's share of such cooperative agricultural extension work, as provided in said combined annual financial budget, the county commissioners may, by unanimous vote, levy an additional tax so that the total in no instance shall exceed five cents on each one hundred dollars of the county tax rate. The proceeds of such tax shall be placed in the agricultural extension fund in each county treasury and *shall be paid out on claims drawn by the agricultural extension agent of said county as designated by the director of agricultural extension, when approved by said director of agricultural extension and countersigned by the comptroller of the University of Nevada.* A record of all such claims approved and paid, segregated by counties, shall be kept by the comptroller of the University of Nevada. The cost of maintaining such record shall be paid from state funds hereinafter provided by this act. The state's cooperative share of the cost of such agricultural extension

work, as entered in said budget described in this section, shall not be more than a sum equal to the proceeds of one cent of such county tax rate; provided, that when the proceeds of a one-cent tax rate are insufficient to carry out the provisions of the budget previously adopted, the agricultural extension director is authorized to supplement said state cooperative share from such funds as may be made available in the public service division fund of the University of Nevada.

Section 3 of the Act provides for filing the county extension budget with the Comptroller of the University of Nevada.

The Acts of 1914 and 1919 (amended 1935) concerning County Extension offices and Farm Bureau management, respectively (see as to latter 1929 N.C.L., 1941 Supp., secs. 353, 353.01, 353.02 and the amendment of 1921), provide background for the Act of 1947. Section 7 of the act of 1947 provides 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 end 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.

While this may strictly apply only to property the acquisition of which was completed before the Act of 1947 was designed to take effect, the words "all supplies, materials, equipment, property or land *acquired* \* \* \* shall remain the property of the county extension offices set up under the provisions of this act"; may well be understood to mean "which shall be acquired," and thus exclude the idea of county ownership as such of an automobile purchased for County Extension purposes. If in fact the county shall take title which includes possession and control of such property and use it as it uses other property to which it holds title, the door will be open to starve and pervert all the practical functions of County Extension work. No theory to support this construction can be found in the earlier Acts and the earlier Acts when they can exist alongside of the new Act may not well be considered repealed in their entirety.

So far as authorizing the County Treasurer to pay out County Extension funds is concerned, the Commissioners act as mere functionaries exercising a vigilant watch over the Treasurer and the funds (trust and otherwise) passing through his hands. Once the budget is adopted, filed and if necessary revised, it controls the program free from the interference of the County Commissioners. They may impose no conditions such as are sought to be applied here. A letter on an allied subject was written December 28, 1948 bearing on the transition period when the new law was taking over.

We are returning herewith the correspondence and a copy of the Clark County Extension Budget for the year 1949 which you left in this office.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**738. Taxation—Net Proceeds of Mines—Commission May Base Assessment on Average Price per Ton of Ore Sold.**

CARSON CITY, April 14, 1949.

MR. R.E. CAHILL, *Secretary, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. CAHILL: Your letter dated April 12, 1949 was delivered to us the same day.

You present the following situation for our consideration.

Great Lakes Carbon Corporation, Dicalite Division, reported its proceeds covering the period January 1, 1947 to June 30, 1948. This showed the entire product (consisting of diatomaceous earth subject to taxation as proceeds of mines) was currently sold to Dicalite Company of New York, a wholly owned corporate subsidiary of the producer. Over the first half-year the "selling price" is recorded as \$21 per ton and for the succeeding year it was \$23 per ton.

As a result of audit you estimated the value of the proceeds on the average sale price for which the subsidiary resold the product on the open market. This figure was \$30.26 per ton.

Great Lakes Carbon Corporation has protested these revised figures, claiming the resale price ran from \$26 to \$36 per ton. The corporation claims the tax should be based on the sums received by it on the first sale of the product. It also claims allowance should be made for selling cost under section 6579, Nevada Compiled Laws 1929.

It is on the first point that the company relies most strongly. The second point (as to selling deductions) while controversial on the facts is not necessary to consider here, except that selling costs incurred in this State would ordinarily be allowed against the gross value of the product after determining the rule for ascertaining the gross value.

The gross value in our opinion is the sum received by Dicalite Company of New York and it is the base from which the tax on net proceeds should be computed.

The corporation complains that you are disregarding the fact that the Great Lakes Carbon Corporation (Dicalite Division) and the Dicalite Company of New York are two separate corporate entities (although the latter is a wholly owned subsidiary of the former.)

The case of *Hans Rees & Sons, Inc. v. State of North Carolina*, 283 U.S. 123 is cited by the company. We do not find it germane to the problem here. It was cited in 329 U.S. 416 at 423, and in 330 U.S. 422 at 427, in a way to disclose that the point is not similar to that here.

The law is well-settled that when a wholly owned subsidiary is used to evade a contract liability, or duty to avoid State control or supervision the Courts will look through the veil or corporate structure. See 145 A.L.R. 475; 13 Am. Jur. "Corporations" sec. 1381; *Cities Service Company v. Kreneke* (Kan.) 20 P(2) 460-471; 87 A.L.R. 16; *C.M. & St. Paul R. v. Minneapolis, etc., Asso.*, 247 U.S. 490 (referring to the device as sheer sophistry); *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510 at 524 (affirming CCA 9th). See also Powell on Parent and Subsidiary Corporations; Wormser on Corporations.

Even if the corporation and subsidiary were considered to be two separate entities the company would be in no better case for confessedly it sold the product for less than its value. It is the function of the Commission to determine the value of the gross yield and in no event can you be charged with acting capriciously.

Very truly yours,

ALAN BIBLE, *Attorney General.*



By HOMER MOONEY, *Deputy Attorney General*.

**739. County Commissioners—Salaries of Deputies in County Offices May Not Be Increased and Made Retroactive.**

CARSON CITY, April 16, 1949.

HON. C.J. McFADDEN, *District Attorney, White Pine County, Ely, Nevada*.

DEAR JUDGE McFADDEN: Your letter of April 12, 1949, following our telephone conversation, reached this office April 14, 1949.

You inquire whether the County Commissioners, in fixing the salaries of deputies in the county offices may legally make an increase in compensation retroactive to January 1, 1949.

The answer is in the negative.

The Legislature of 1947 passed a similar Act (Stats. 1947, page 15). That Act went into effect upon its passage and approval February 26, 1947.

The present Act of 1949 (A.B. 252) went into effect April 1, 1949, upon its passage and approval.

Both Acts are similar in authorizing the various officers to name deputies, upon consent of the Commissioners. Neither Act fixes the rate of salary of deputies so that the matter of salary is one properly to be passed on by the Commissioners.

It is to be assumed that present deputies are acting on consent of the Commissioners under the prior law, involving an agreement as to the rate of pay. Such a relation is one of contract and until the change of rate is actually made the service is to be compensated under the existing rate. An attempt to make an increase retroactive to January 1, 1949, or at all, would have the effect of paying a deputy for service already paid for. All engagements must be for the future, not the past.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**740. Water Law—Application of and Authority of State Engineer Within Hawthorne Naval Ammunition Depot.**

CARSON CITY, April 19, 1949.

J.D. BURKY, *Commander (CEC) USN, Twelfth Naval District, San Francisco 2, California*.

DEAR SIR: Reference is hereby made to your letter of April 4, 1949, wherein you request the opinion of this office concerning the application of the Nevada Water Law and the authority of the State Engineer thereunder within the Hawthorne Naval Ammunition Depot in Mineral County. You refer to chapter 144, Statutes of Nevada 1935, wherein Nevada ceded jurisdiction over the land within the depot, and then state as follows:

The Navy Department is presently planning the development and use of available surface water within the boundaries of the Hawthorne Naval

Ammunition Depot, and it is desired at this time to determine whether or not the jurisdiction ceded by the above-cited Legislative Act extends to provisions of the State of Nevada Water Law, as amended, and the authority of the State Engineer over waters within the boundaries of the Naval Ammunition Depot, Hawthorne, Nevada.

#### STATEMENT

It will be helpful, we think, to an understanding of this opinion, to briefly sketch the origin and establishment of the U.S. Naval Ammunition Depot. The land within the exterior boundaries of the Depot, as well as all of the land comprising the State of Nevada, was ceded to the United States by Mexico in the treaty of Guadalupe-Hidalgo in 1848. From that year until 1864 we understand that the United States held, controlled and governed the land now comprising the Naval Depot as a proprietor and as United States territory, permitting, of course, the acquiring of ownership by private individuals of lots and parcels of land therein and no doubt permitting mining operations, etc. In 1864 Nevada was admitted into the Union as one of the sovereign States. The United States, at that time, neither by an Act of Congress or by stipulation reserved governmental jurisdiction over the land in question. All of such land, except such portions thereof as had passed into probate ownership, remained the property of the United States but subject to the jurisdiction of Nevada. In brief, such land was public domain held by the United States as a proprietor and subject, of course, to the acts of Congress pertaining to the sale and disposal thereof, the Federal Mining Laws and Federal Statutes relating to the protection of the State at the time of its admission into the Union, the State was thereupon vested with legislative jurisdiction thereover and the State could and did exercise the same authority and jurisdiction over the land as was exercised over similar property held by private parties.

Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525.

We are advised that beginning with the year 1926 and ending with the year 1935, by means of four Presidential Executive Orders, many sections of the public land now within the area comprising the Naval Depot were withdrawn from settlement, location, sale and entry and held for the exclusive use and benefit of the United States Navy. We are further advised that the title to State-owned land within the area was extinguished by means of an exchange of such land for United States' land outside of the area in the year 1929.

It also appears that the Federal Government from time to time purchased or condemned privately owned property within the boundaries of the Naval Depot. But we are not advised that the Federal Government sought or obtained the consent of the State to the purchase of such property.

The exterior boundaries of the proposed Naval Depot were established sometime prior to 1935, in which year the United States sought and obtained the cession of Nevada's jurisdiction over the land comprising the "U.S.N. Ammunition Depot." The cession of jurisdiction is contained in chapter 144, Statutes of Nevada 1935. Section 1 thereof reads as follows:

The State of Nevada, except as hereinafter reserved and provided, hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area situated near Hawthorne, Nevada, in Mineral County, commonly known as the "U.S.N. Ammunition Depot," comprising all of that certain area now occupied by the federal government in connection with said plant, or to be hereafter acquired or annexed thereto, or to be used in connection therewith, including all the buildings and improvements thereon.

Section 2 reserves the right in the State to tax privately owned property within the area. Section 3 reserves the rights in the State to serve any of its criminal or civil process within the area for any cause comes properly under the jurisdiction of the State laws.

#### OPINION

The precise question is—did the State cede to the United States its jurisdiction over the public waters within the Naval Ammunition Depot and thereby render inapplicable the law of the State pertaining to the appropriation and use of such waters?

The statute ceding the jurisdiction does not, in our opinion, cede exclusive jurisdiction to the United States, particularly as to the public waters in and upon the land over which jurisdiction was ceded. The language of the statute is—“The State of Nevada, except as hereinafter reserved and provided, hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area situated near Hawthorne, Nevada \* \* \*.”

The law is well settled that the statute in question is subject to strict construction. Statutory grants by the Legislature, where sovereign power is delegated or where it is sought to derogate from sovereign authority, are to be construed strictly against the grantee.

Black, Interpretation of Law, 2d ed. 499.

Statutes relinquishing jurisdiction are strictly construed.

A controlling reason for such construction is that it is a matter of the very greatest importance to both the national and the state governments affected.

Six Companies v. Devinney, 2 Fed. Supp. 693, citing Larson v. South Dakota, 278 U.S. 429.

That a State may divest itself of jurisdiction over land in favor of the United States may be conceded. That it may attach reservations to its cession of jurisdiction is well settled in the law.

That the statute ceding jurisdiction is to be strictly construed in favor of the State is, we think, beyond question. It has been the law for many years, particularly in the arid States of the West, that the water above and beneath the surface of the ground belongs to the public and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with plenary control thereof. It has been the statutory law of Nevada for many years that “The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground belongs to the public.”

Sec. 7890 N.C.L. 1929.

Of this statute it was said in Bergman v. Kearney, 241 Fed. at page 892:

For years the national government has consistently recognized and respected rights acquired by appropriation to the use of water. It has conformed to the state statutes regulating the acquisition of unappropriated waters; and when its proprietary interest in the use of running water has come in conflict with that of the individual, it has, like the individual, resorted to the courts for settlement and adjustment.

In 1877 Congress in the Desert Land Act of 1877 (19 Stats. at L. 377, Chap. 107) severed the water from the land and the effect of such statute was thereafter that the land should be patented separate and apart from the water and that then all the nonnavigable waters thereon should be reserved for the use of the public under the laws of the state and territories named in the act, one of the states named being Nevada. This statute was construed by the Supreme Court of the United States in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, the

Court, inter alia, held:

1. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain.

2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.

3. That the effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.

In course of the opinion the Court said, at page 162:

The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable “shall remain and be held free for the appropriation and use of the public” are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be envinced.

And at page 163:

Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since “Congress cannot enforce either rule upon any state.” *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.

It is interesting to note what the Court said in a marginal note on page 164:

In this connection it is not without significance that congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of the state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

We think it is clear that the Supreme Court of the United Sates has definitely determined that the nonnavigable waters within a State, even though on public lands of the United States, is the property of the public, i.e., the public of that State, and that the right to the use of such water must be acquired in the manner prescribed by the laws of such State, and that unless such State has expressly parted with its jurisdiction over such water in a statute ceding jurisdiction over land

to the United States, then it has not done so.

The land comprising the Naval Depot was not purchased by the United States with the consent of the State, thus the rule that exclusive jurisdiction vested in the United States does not obtain.

Article I, section 8, clause 17 of the Constitution of the United States provides:

*The Congress shall have power—*

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

This constitutional provision received an exhaustive examination and construction by the Supreme Court of the United States in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, and in *Chicago, Rock Island and Pacific Ry. Co. v. McGlinn*, 114 U.S. 542. These cases concerned the Fort Leavenworth Military Reservation in the State of Kansas. The United States owned the land within the reservation, having acquired the same by cession from France many years before Kansas became a State. We think the following quotations from the cases are apropos here. Quoting from the *Lowe* case, at pages 538-539:

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments the case is different. Story, in his *Commentaries on the Constitution*, says: "If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect"; and in support of this statement he refers to *People v. Godfrey*, 17 John. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or offenses against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain pursuant to the treaties of 1783 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseisin of the State; much less can it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection."

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the

land subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the places comes from the cession of the State since her admission into the Union. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American Insurance Co. v. Canter*, 1 Pet. 542; Halleck, *International Law*, ch. 34, sec. 14.

The counsel for the railroad company does not controvert this general rule in cases of cession of political jurisdiction by one nation to another, but contends that it has no application to a mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; and argues upon the assumption that there was no organized government within the limits of Fort Leavenworth. In this assumption he is mistaken. The government of the State of Kansas extended over the Reservation, and its legislation was

operative therein, except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects, the law of the State prevailed.

And to the same effect see:

Crook Horner & Co., v. Old Point Comfort Hotel Co., 54 Fed. 604.

Gill v. State, 210 S.W. 637;

Steele v. Halligan, 229 Fed. 1011.

We think the instant matter stands thus:

1. That the United States did not in the first instance, i.e., 1848, acquire the land in question for any purposes other than that as territory of the United States and held it as a proprietor thereafter, save as to property therein acquired by private interest, and as to certain lands that the State acquired title thereto but surrendered its title thereafter to the United States in exchange for other lands.

2. That as to certain privately owned property within the area composing the Naval Depot, the United States acquired title thereto by purchase or condemnation, but without the consent of the Legislature of Nevada.

3. That the Congress of the United States in the Desert Land Act of 1877, as construed by the Supreme Court of the United States in *California Oregon Power Co. v. Beaver Portland Cement Co.*, supra, had and has placed the ownership of nonnavigable waters on the public domain in the public and that the right to acquire the use thereof was and is determine to be within the plenary power and jurisdiction of the State to grant according to its laws, and that such law was in effect long prior to the creation and establishment of the Naval Depot and that it is still in full force and effect.

4. That no law of the State of Nevada sanctions or authorizes the Legislature to sell or otherwise dispose of the corpus of water above or beneath the surface of the ground to any entity. The Water Law of this State, enacted in 1913, which is an amendment of an earlier Act, authorizes only and provides for the acquiring only of the right to use such water beneficially. Sections 7890-7978, N.C.L. 1929, as amended. That such law was and is a municipal law relative to valuable property rights and continued in effect upon and after the cession of jurisdiction over the land in question by chapter 144, Statutes of Nevada 1935.

5. That the Congress of the United States, even if it possessed the power to so do, has not legislated upon the question of the ownership of the public-owned waters so as to deprive the States of the plenary power to provide the method for the appropriation of waters on the public domain owned by the United States.

Entertaining the views hereinabove set forth, it is the considered opinion of this office that the cession of jurisdiction over the land comprising the U.S. Naval Ammunition Depot at Hawthorne, Nevada, as contained in chapter 144, Statutes of Nevada 1935, did not cede the jurisdiction of the State and/or its Water Law over and concerning the waters upon and in the lands comprising the Naval Depot.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

cc: Hon. Alfred Merritt Smith, State Engineer, Carson City, Nevada.

**741. Public Schools Kindergartens—Tax Levy and Establishment.**

CARSON CITY, April 25, 1949.

HON. L.E. BLAISDELL, *District Attorney, Hawthorne, Nevada.*

DEAR MR. BLAISDELL: This will acknowledge receipt of your letter dated April 15, 1949, received in this office April 16, 1949. You request an opinion if under section 89, chapter 63, Statutes of Nevada 1947, it is mandatory for the County Commissioners to levy the 25 cent kindergarten tax, upon proper application by the Board of School Trustees. You state the Mineral County budget has been prepared, and in its present form, is within 2 cents of the constitutional limit.

We are of the opinion that a kindergarten department may only be established if the levy of the special tax will not deprive the other school departments in the district of sufficient money, or will not violate the constitutional tax limit.

Section 89 of chapter 63, the 1947 School Code, quoting that part deemed pertinent, provides:

“The board of school trustees of every school district in this state may establish, equip and maintain a kindergarten or kindergartens in such school district upon petition of the parents or guardians of twenty-five (25) or more resident children who will be eligible to attend such kindergarten under the provisions of this section; and no child shall be eligible to attend such kindergarten who has not reached the age of five years on or before October 1 of that school year, or who has reached the age of six years before that date. The board of school trustees of every such school district in which a kindergarten is established under the provisions of this school code shall, at least fifteen (15) days before the first day of the month in which the boards of county commissioners in this state are required by law to levy the taxes required for county purposes, submit to the board of county commissioners of the particular county in which said school district is situated, an estimate of the money necessary for the establishment, equipment and maintenance of such a kindergarten or kindergartens in the district; and, if sufficient money for the same is not available in the school funds of such school district, then said board of county commissioners shall have power to direct that a special tax not to exceed twenty-five (25¢) cents on the one hundred (\$100) dollars of assessed valuation of the taxable property within such school district shall be levied; and upon notification by the clerk of the board of school trustees of such school district that such action has been taken, such board of county commissioners shall levy and cause to be collected such tax upon all the taxable property in such school district.”

The Legislature, in this section, has given the trustees of the district the control over the establishment of a kindergarten subject to the contingency which arises when parents of twenty-five children, between the ages designated in the section, present the petition. The evident purpose of the Legislature was to provide a kindergarten when the conditions warranted, and when so established the section further provided: “If the average daily attendance in any kindergarten in any school district shall be ten (10) or less for the preceding school year, the board and school trustees of such school district, shall, at the close of that school year, discontinue such kindergarten.”

Chapter 31 of the School Code, title “School Trustees,” refers to kindergartens under section 275, subsection 4, which divides the public schools within the districts into kindergarten, primary, grammar, and high school departments. This subsection contains the following language: “and provided further, that there shall be money for all such departments, and if not,



then the division shall be in the order in which they are herein named, excepting the kindergarten department, which shall not be considered as taking precedence over any other department; and provided also, that the kindergarten department shall not be established in any school district having a school population of less than one hundred (100) resident children of school age.” This section gives the trustees the power to maintain within their districts the four departments named, provided there shall be money for all such departments, and if not, then the kindergarten department may not be maintained. The establishment of a kindergarten is limited to certain essential conditions.

Reading sections 89 and 275 together, it appears that the intent of the Legislature was to provide for the establishment of a kindergarten, except that it should not take precedent over any other school department in the district. If the special tax levy provided in section 89 would deprive any other school department of sufficient money, then the word “shall” in the provision for the special tax levy by the County Commissioners should be considered directory and not mandatory.

The rule of construction maintained in *State ex rel. Baker v. Wichman et al*, is that whether a word is construed as mandatory or directory depends on intention to be gathered from the statute, if such intention can be ascertained.

In determining the mandatory or directory character of a statutory provision, the problem, as with other questions of statutory construction is primarily one of ascertaining the intent of the Legislature. *Sutherland Statutory Construction*, Vol. 3, section 5804. “It can be stated as a general proposition that, as regards the question of mandatory and directory operation, the courts will apply that construction which best carries into effect the purpose of the statute under consideration. To this end, the courts may inquire into the purpose behind the enactment of the legislation requiring construction as one of the first steps in treating the problem. The ordinary meaning of language may be overruled to effectuate the purpose of the statute.”

The purpose of the statute is to provide for the establishment of a kindergarten when it is possible to do so without impairing the efficient operation of the other school departments in the district.

The final adjustment as respects rates of taxes brings the revenue system of counties, cities and school districts under review of the Nevada Tax Commission, as held in *Las Vegas ex rel. v. Clark County*, 58 Nevada 469.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**742. Counties—Assessor Must Have Tax Lists Printed, Advertising for Bids Not Obligatory.**

CARSON CITY, April 25, 1949.

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

DEAR MR. JONES: Reference is hereby made to your request of April 22, 1949 for the opinion of this office upon the following query:

Whether the County Assessor is required to advertise for and obtain bids from publishers for the printing of the taxpayers' list required by the provisions of section 6429, N.C.L. 1929, in

view of the amendment of section 1963, N.C.L. 1929, as found in chapter 241, Statutes of 1947?

You advise that there is a conflict of opinion between the Assessor and the Board of County Commissioners and Auditor of Clark County, in that the Assessor takes the position that the above statute makes it obligatory on him to have the list printed and published, and the Auditor and Commissioners take the position that he has no right to do so without first obtaining bids from a newspaper or publishing company before having the list of taxpayers printed.

#### OPINION

Pursuant to an examination of the statutory law on the question, we are of the opinion that the Assessor is correct, and that neither section 1963, N.C.L. 1929, nor the amendment thereof of 1947 makes it obligatory upon the Assessor to advertise for bids for the publication of the taxpayers' list.

The Act relating to the powers and duties of the Board of County Commissioners, the same being sections 1935-1962, N.C.L., 1929, was enacted in 1865. Nowhere in such Act, even as amended down to date, empowers the County Commissioners to deal with the question of the publication of the taxpayers' list. Such statute deals with the powers and duties of the Boards of County Commissioners as its title expressly provides. The Act requiring the advertising for bids by the Boards of County Commissioners was first enacted in 1867, which Act is found at 1867 Statutes, page 59, and is in the same language as the present section 1963, N.C.L. 1929, with exception that in 1911 the proviso now found in such section was added. The Act of the 1947 Legislature, chapter 241, page 764, increased the amount of the contract from \$500 to \$1,000. It must be borne in mind at all times that this Act relates to the powers and duties of the Boards of County Commissioners and relates to contracts which such Boards of County Commissioners are authorized to enter into, which, in the absence perhaps of section 6429, N.C.L. 1929, might have authorized the County Commissioners to deal with the subject matter of the inquiry.

However, section 6429 is section 16 of the Act to provide revenue for the support of the government of the State of Nevada, and repeals certain Acts relating thereto. This particular section apparently came into the law in 1891 and was amended in 1913 and also again in 1915. This section empowers the County Assessor to prepare a printed list of all the taxpayers in the county of the total valuation of the property on which they severally pay tax. A copy of said list shall be by the Assessor delivered in person or mailed to each and every taxpayer in the county, provided that the cost of printing aforesaid list shall not exceed 20 cents for each name for as many copies as there are names on the list. In addition, the Boards of County Commissioners are therein authorized and empowered to allow the bill contracted by the Assessor under this section and the several County Auditors are authorized to draw their warrants in payment of same. Thus the Legislature in an Act providing for revenue for the government of the State of Nevada has expressly authorized the Assessor to prepare printed lists of the taxpayers and to pay therefor a price not to exceed 20 cents for each name going to make up the list. The Boards of County Commissioners are not in such statute authorized to enter into contracts for the printing of such lists, but if any contract is entered into it is by the County Assessor alone.

The section of the law providing for the advertising of bids for contracts by the Boards of County Commissioners is found in Act entitled "An act supplementary to an act entitled 'An act to create a board of county commissioners of the several counties of this state and defining their duties and powers.'" Such Act relates to the powers and duties of the Boards of County Commissioners and

not those of the Assessors, and the amendment found in chapter 241, 1947 Statutes, is entitled in the same manner.

We have then a situation where two separate and distinct Acts are sought by the County Commissioners and Auditor to be construed in *pari materia*, which we think is not the proper construction.

In the final analysis it is our opinion that the County Assessor may, without advertising for bids, cause to be printed the list of all the taxpayers in his county provided that the cost of printing such list shall not exceed 20 cents for each name thereon.

If upon application to the publisher, the publisher declines to publish the list as submitted for 20 cents per name or any lesser amount, then it would seem that the County Assessor would not be empowered to have the list published unless he could find a publisher in his county who would publish the same for not to exceed 20 cents per name. He would have full power to cause publication thereof at less than 20 cents per name if such publisher could be found.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**743. Intoxicating Liquor—Licenses—No Provision in Statute for Refunds.**

CARSON CITY, April 26, 1949.

H.S. COLEMAN, *Supervisor, Liquor & Cigarette Tax Divisions, Carson City, Nevada*.

DEAR MR. COLEMAN: Your inquiry dated April 25, 1949, was delivered to this office the same date. You inquire:

(1) If a licensee ceases to operate under his license and another is licensed for the rest of the calendar year, is he entitled to a refund for the unused term of his license?

(2) If there is no one licensed for the remainder of the year, should a refund be made?

The answer is in the negative in both cases.

The rule is equitable in the second case and in the first case, even though the State receives double payment for the remainder of the year, the statute makes no provision for refunds. See sections 8 and 15 of the law (Sections 3690.08, 3690.15, as amended 1945, page 346.)

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**744. Fertilizers—Term “Brand” Defined—Registration.**

CARSON CITY, April 26, 1949.

MR. LEE M. BURGE, *Supervising Inspector, Division of Plant Industry Department of Agriculture, 118 W. Second Street, Reno, Nevada*.

DEAR MR. BURGE: This will acknowledge receipt of your letter dated April 20, 1949, delivered to this office the same day, in which you request an opinion as to the interpretation of

Senate Bill 43, chapter 303, Statutes of 1949, being an Act regulating sale and distribution of commercial fertilizers within this State.

You state that a question arises as to the term "brand" and give as an example that a company may register a brand "Simplot" and under that brand it may be selling two or more formulations.

You inquire if there should be a registration of each formulation under the general brand, and also inquired, at the time you submitted the letter, if the statute required an annual license fee of \$25 for each formula.

You submit a second question as to the procedure for collecting the additional fee required under section 6, and should this be collected through a stamp arrangement or through affidavit from the manufacturer.

We are of the opinion that the term "brand" refers to the formula of each variety of commercial fertilizer sold or offered for sale in this State, and that each kind should be separately registered.

The fee of \$25 is an annual license fee to be paid by the manufacturer or importer, and is not required to be paid for each separately registered brand.

The payment and collection of the additional fee of 20 cents on each ton of commercial fertilizer sold in package lots, and 2 cents per ton if sold in carload lots, is governed by rules and regulations of the State Department of Agriculture, but the language of the statute would not permit a stamp tax arrangement.

Section 3 of the Act provides that every lot or parcel of mixed commercial fertilizer sold, or offered for sale, shall have on each bag or container a printed statement clearly and truly certifying the net weight of the contents, "the name, brand or trademark," the principle address of the manufacturer or person responsible for placing the commodity on the market. Then follows under subparagraphs (d), (e), and (f), the formulas.

Section 5 reads as follows: "Before any commercial fertilizer is sold or offered for sale within the State of Nevada, the manufacturer or importer shall separately register with the state department of agriculture of the State of Nevada each and every brand of commercial fertilizer offered for sale, and shall pay annually to said state department of agriculture, on or before the thirty-first day of December, a license fee of twenty-five dollars; and shall also deposit with said state department of agriculture an air-tight container the size to be determined by the state department of agriculture containing not less than two (2) pounds of such fertilizer, with an affidavit that it is a fair sample of the fertilizer sold, or offered for sale."

The words "name, brand or trademark" are used in the alternate in section 3. Section 5 requires the manufacturer or importer to separately register each and every "brand" offered for sale. The manufacturer may use a general name, or a trademark which might be a symbol and would not be a particular description of the lot or parcel. The word "brand" as used in section 5 must be interpreted to mean that each formulation shall be separately registered and a sample of each furnished the department. The intention of the Legislature as to the payment of the annual license fee for each formula or brand is not clearly defined by the language in section 5.

You informed us that the statute was taken from the Idaho law on this subject. Section 22-605 of the Idaho Code Annotated, 1932 edition, contained the identical language as section 5 of the Nevada Act down to the words "twenty-five dollars" and immediately continued with the following words, "for each and every brand of commercial fertilizer so registered and offered for sale in this state \* \* \*." This section was amended by chapter 58, Statutes of Idaho 1947, and the above-quoted language was omitted. This part of the section as amended reads the same as the Nevada statute.

Section 4208.5, Revised Code of Montana 1935, contained the provision for each and every brand so registered, and the amendment in chapter 72, Statutes of Montana 1947, retained this language.

It appears, therefore, that the Nevada Legislature followed the Idaho statute as amended at intentionally omitted the language providing an annual license fee on each and every brand registered. In conformity with the language in the section it appears that an annual license of \$25 is required of each manufacture or importer and not as a registration fee for each brand or formula which must be registered as to the contents of each parcel, container or stock pile. To hold otherwise would require the addition of words which the Legislature did not intend to be included.

It must be conceded that a court has no legislative powers and cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself.

The section requires that each and every brand of fertilizer be registered before sold, or offered for sale. It does not require an annual registration if the brand remains the same.

The case of Logan v. Tennessee Chemical Co., 144 S.E. 269, is a case in which a statute similar to that of Nevada was interpreted by the Court. The Court held: "The object of the provisions of section 1777 is not to require a re-registration where the fertilizer materials remain as they were

when registered under section 1771, but to prevent persons who have filed their brands of fertilizer and fertilizer materials, as provided in section 1771, from changing the brand without the approval of the commissioner of agriculture \* \* \*. Repetitions of registration of the same brand of fertilizer or fertilizer materials would be of no value to the public and an unnecessary inconvenience to the persons offering them for sale, and intent to require such a vain and useless thing does not appear expressly or by necessary implication from the language of the statute."

The payment and collection of the additional fee as provided in section 6 of the Nevada Act is governed by rules and regulations promulgated by the State Department of Agriculture. The section, however, provides as follows: "\* \* \* the state department of agriculture shall prepare suitable forms for reporting sales of such fertilizer, and on request shall furnish the same without cost to all persons dealing in registered brands of commercial fertilizers \* \* \*." This provision would not permit a stamp tax arrangement.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**745. Agriculture—Committee for Predator and Rodent Control—Title to Motor Vehicle Purchased From State Department Funds Remains in Said Department—No Statutory Authority for Assumption of Title by Any Other Board or Committee.**

CARSON CITY, April 27, 1949.

MALCOLM N.C.L. ALLISON, *District Agent, Predator and Rodent Control, U.S.*

*Fish and Wildlife Service, P.O. Box 1510, Reno, Nevada.*

DEAR MR. ALLISON: This will acknowledge receipt of your letter dated April 18, 1949, received in this office April 19, 1949.

You write that it is desired to purchase a pickup truck from State funds out of the appropriation to the State Department of Agriculture (A.B. 238) for the biennium ending June

30, 1949, and inquire if the ownership of this truck will carry over to the committee which was established by the Legislature at its last session under A.B. 361, and if the ownership of the truck will continue to the new committee and be available for use by the Fish and Wildlife Service after July 1, 1949.

We are of the opinion that the ownership of the truck will remain in the name of the State Board of Stock Commissioners, conducting activities under the name of the State Department of Agriculture, and the use of the truck will be under the control of such department and will not carry over to the committee created by chapter 256, Statutes of 1949. The Board has no authority to enter into agreements with the Fish and Wildlife Service and the operation of the truck could be under such agreement.

Chapter 273, Statutes of Nevada 1947 (A.B. 238, 43d Session) appropriated \$50,000 to be expended through the State Board of Stock Commissioners in cooperation with the Fish and Wildlife Service, United States Department of the Interior, during the biennium ending June 30, 1949, for the control of rodents, predatory animals, or other animal pests injurious to livestock, agriculture crops, or the public health within the State.

Section 3848.21, 1929 N.C.L., 1941 Supp., authorized the State Board of Stock Commissioners to conduct its various activities under the name of the State Department of Agriculture. Property purchased with money appropriated by chapter 372, Statutes of 1947, would be property under the control of the State Department of Agriculture for which the department would be accountable.

Chapter 256, Statutes of 1949, created a "committee" for the purpose of cooperating with the Fish and Wildlife Service of the "U.S." Department of Interior for the control of predatory animals and rodents within the State. The bill carried no appropriation. There is no provision authorizing or directing the transfer of any funds or property of the Stock Commission or State Department of Agriculture to the committee.

Chapter 313, Statutes of 1949 increased the membership of the Board of Stock Commissioners to five. The bill increased the amount of the official bond, but no change was made in the duties and activities of the Commission.

The same Legislature under chapter 259 created the wool-growers predatory animal committee and authorized it, in behalf of the sheep-raising industry, to enter into cooperative agreements with the Federal Fish and Wildlife Service in its program of predatory animal control.

While the statutes authorize other departments to cooperate with the Federal Act for the protection and conservation of wildlife, they do not remove this authority from the State Board of Stock Commissioners. The ownership of the property purchased from the funds appropriated for its activities remains the property of, and under the control of the Commission.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**746. Public Employees Retirement—Integration Public School Teachers—Amount and Effect of Refund from Members Annuity Savings Account.**

CARSON CITY, April 29, 1949.

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

DEAR MISS BRAY: Your memorandum of inquiry dated April 18, was received the same day.

We append your questions respecting the interpretation of section 9(2), paragraph 2(a), chapter 124, Statutes 1949, with our answers, as follows:

(1) Will the refunds paid to new members and original members under Plan No. 2 from the Members Annuity Savings Account include the interest that has been credited to the accounts of the individual members?

Answer: No. Section 9(2), paragraph 2(a), of the 1949 Statutes, sets out the terms of the contract of integration, and in part provides that: "All moneys paid in by the members of the previously existing system shall be restored to them \* \* \*." Thus the refund of the terms of the contract is limited to moneys paid in by the members, and interest cannot be included.

(2) Will the refunds to original members from the Permanent Fund include all contributions or will the first \$60 contributed to the Permanent Fund be withheld?

Answer: Will include all contributions including the first \$60.

(3) Will the same rules govern the refunds to active members?

Answer: Will include dormant members, but under rules requiring such members to make application within a reasonable time.

(4) Will amounts smaller than or equal to \$60 contributed to the Permanent Fund be refundable? In other words, will all amounts contributed after July 1, 1927 be refundable regardless of the time elapsed since the last teaching of the member? If such amounts are refundable, will it be the duty of the Teachers' Retirement office to locate and notify all former members or must such members request refunds before payment is made?

Answer: All amounts regardless of size are refundable, but former members should be governed by rules requiring application to be made in reasonable time.

(5) Will the \$60 retained by the Retirement System when paying refunds from the Permanent Fund be refundable in cases where the amount contributed in excess of \$60 has been refunded?

Answer: No. The members having elected to withdraw under the provision of the old Act, are bound by such withdrawal and have no additional rights under the new Act.

(6) Will the members who elected to become new members in 1937, thereby forfeiting prior contributions to the Permanent Fund, be entitled to refunds of contributions to the Permanent Fund?

Answer: No. The election was quid pro quo and on adequate consideration so that a second demand for the \$60 would be an inequitable repetition.

Very truly yours,

ALAN BIBLE, *Attorney General.*

By HOMER MOONEY, *Deputy Attorney General.*

**747. Agriculture—Spraying Fields by Airplane—Insurance—License.**

CARSON CITY, May 5, 1949.

MR. HARRY E. GALLAWAY, *Field Inspector, Division of Plant Industry,* Department of  
*Agriculture, P.O. Box 1027, Reno, Nevada.*

DEAR MR. GALLAWAY: This will acknowledge receipt of your letter dated April 30, 1949, received in this office May 1, 1949, requesting an opinion on chapter 156, Statutes of Nevada 1949. You inquire if it will be necessary to register and collect the \$25 fee for each and every airplane, even though one or more planes may be operated by one company. You also inquire if the term "public liability and property insurance" as used in the statute should be interpreted to mean "public liability and property damage."

We are of the opinion that the purpose of the statute is to require a license and an annual renewal fee of \$25 from a person or company engaged in the business of spraying fields by airplane, and is not required for each airplane operated.

The term "public liability and property insurance" should be interpreted to mean a public liability and property damage insurance policy.

Chapter 156, Statutes of Nevada 1949, is an Act to regulate spraying fields by airplane. Section 1 of the Act provides:

Every person, individual, firm, association, or corporation, or any member, officer, agent or employee thereof, engaged in the business of spraying fields, ranches, ranges, crops, or any similar property, with any material, poison, spray or solution, for the purpose of destroying noxious weeds, plants, insects or animals thereon by airplane, shall first apply to the state department of agriculture for a license to engage in said business. The original application for a license shall be accompanied by a fee of twenty-five dollars (\$25). Said license shall be renewed annually upon payment of a twenty-five dollar (\$25) registration fee and the state department of agriculture is hereby empowered to set up rules and regulations for the purpose of carrying out the provisions of this act.

The purpose of the Act is to regulate the business of the spraying of fields under rules and regulations by the State Department of Agriculture. The applicant before engaging such business must secure a license from the Department. The original license and annual registration fee is not a revenue measure for the licensing of airplanes, but a means to provide money for the administration of the Act. It applies to the individual or collection of individuals engaged in such business. To interpret the language, "or any member, officer, agent or employee thereof," to mean that every airplane used in the business should obtain a license, would require a license for each member, officer, driver, or one who handled tanks, equipment or materials used in such business. Such a construction would result in absurd consequences.

In *Garson v. Steamboat Canal Co.* 43, Nevada 298, it was held: "A common rule of statutory construction requires the court to avoid interpretation that will result in absurd consequences." To the same effect this rule is applied in *State ex rel. Abel v. Eggers*, 36 Nevada 372, and *Nye County v. Schmidt*, 39 Nevada 456.

This interpretation is aided by the provision in section 2 of the act which provides for the granting of a license to anyone engaged in the business as set forth in section 1, "*provided*, such person, individual, corporation, firm, association, shall present to the department evidence showing coverage by public liability and property insurance in an amount not less than ten thousand dollars (\$10,000)." This implies that the operator of the business supply the public liability insurance. The insurance is required to protect the public and property against any legal



liability of the insured, and should be interpreted to have the usual meaning of a public liability and property damage insurance.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**748. Trade-Marks—Designation “Hiway Host.”**

CARSON CITY, May 6, 1949.

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

DEAR MR. KOONTZ: Reference is hereby made to your letter of April 27, 1949, received in this office April 28, 1949, with respect to whether the designation of a magazine “Hiway Host” constitutes a trade-mark or form of advertisement, or, should the applicant for recording of such as a trade-mark be advised to copyright it under the Federal copyright law.

OPINION

First, we beg to advise that it is not our province to advise any person to obtain a copyright under the Federal copyright law. We think this is a matter to be determined by the person in question.

An examination of the facsimile of the proposed or rather used, designation “Hiway Host,” as annexed to the application for recording thereof, places it over the line of demarcation between trade-mark and a form of advertisement. It is our opinion that the designation “Hiway Host,” as exhibited by the facsimile thereof, does in fact constitute a trade-mark.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**749. Welfare—Foster Home Defined—Day Nursery or Semi-Institutional Agency Does Not Come Within Provisions of Statute.**

CARSON CITY, May 7, 1949.

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 2, 1949, received in this office May 3, 1949, requesting an interpretation of the definition of foster home, as defined in section 1061, 1929 N.C.L., 1941 Supp. You inquire if such care-agencies as day nurseries and large semi-institutional child-caring agencies come within the terms of the statute.

We are of the opinion that the term foster home as used in the title of the Act and in section 1 means a home where the family assumes the position of foster parent or parents by caring for the child of another as their own child. A day nursery or semi-institutional, child-caring agency, in our opinion, does not come within the provisions of the statute.

Section 1061, 1929 N.C.L., 1941 Supp., reads: “*Any family home in which one or more children under 16 years of age not related by blood, adoption or marriage to the person or persons maintaining the home are received, cared for, and maintained for compensation or otherwise, shall be deemed to be a foster home for children. No person shall conduct a foster home so defined without receiving an annual license to do so from the state welfare department.*” (Italics ours.)

The title of the Act relates to foster homes for children, and the section above quoted uses the term family home. This would imply that the Legislature intended that the term “family home” would be construed in its usual sense. The terms “foster daughter,” “foster son,” “foster mother,” “foster father” have an appropriate meaning in law and are understood according to their usual import. Words and Phrases, Permanent Edition, vol. 17, Pocket Part 1949.

There is nothing in the statute to indicate that a different meaning was intended by the use of the term “family home.”

The definition adopted in *In re Norman’s Estate*, 295 N.W. 63, was that “foster” means affording, receiving or sharing nourishment, nurture or sustenance, though not related by blood or by ties of nature, or the like. Hence, foster mother or father means a woman or man who has performed the duties of a parent to the child of another by rearing the child as an own child.

Foster child is one who has been cared for by a foster parent.

Therefore, a day nursery or any semi-institutional child-caring agency would not come within the terms of the statute which has in a view a family home where the relation of parent and child exists to the extent of intending to rear the child of another as one’s own child.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

### **750. Daylight Savings Time—Governor May Proclaim—Counties and Municipal Corporations Have No Power to Invoke.**

CARSON CITY, May 9, 1949.

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

DEAR GOVERNOR PITTMAN: Reference is hereby made to your letter of May 5, 1949, received in this office the same day, wherein you propound the following queries:

1. Do the counties in Nevada have legal right to invoke daylight-saving time?
2. If the answer is no, then will you state under what authority a number of the counties went on daylight-saving time in 1948, during the power shortage?
3. As far back as 1936, one or more of the counties have had daylight-saving time. Did such county or counties act without legal authority?
4. Can municipalities or incorporated towns establish daylight-saving time? If so, by what procedure and authority?

### OPINION

At the threshold of this opinion I desire to direct your attention to the opinion of this office, No. 579, dated March 3, 1948, directed to you in response to your inquiry as to you authority, as

Governor of the State, to proclaim daylight-saving time within the State, due to the necessity of curbing the use of electric power by reason of the shortage thereof due to drought conditions. In such opinion it is pointed out that any change in the method of computing and marking time and changing the daily time to what is known as daylight-saving time required the action of the lawmaking body of the State, i.e., the Legislature, and that the Legislature not having provided for daylight-saving time by statute that the then emergency did not serve to provide for a proclamation for daylight-saving time.

There has been no change in the law since the issuance of the foregoing opinion, save and except, the 1949 Legislature by a duly enacted statute, chapter 251, Statutes of Nevada 1949, has empowered you, as Governor, to proclaim daylight-saving time. No other officer, board or entity is authorized by the by the statute to proclaim any changes in the standard time. Our former opinion is, we think, applicable to the instant matter insofar as counties and municipalities are concerned.

Answering query No. 1—It is our opinion that the counties of Nevada do not have the legal right to invoke daylight-saving time. The Supreme Court of this State has held that a county is only a quasi corporation, and possesses such powers and is subject to such liabilities only as are specially provided for by law, and that the Legislature has complete control of the entire subject of counties, except when prohibited by constitutional provisions. *Schweiss v. First Judicial District Court*, [23 Nev. 226](#); *Quilici v. Strosnider*, [34 Nev. 9](#). The governing boards of the counties are the boards of County Commissioners, such Boards are held to be inferior tribunals of special and limited jurisdiction, which jurisdiction is limited by the legislative authority conferred upon them by the Legislature, and they can only exercise such powers as are specially granted and the mode of exercising their powers prescribed by law is exclusive. *Sadler v. Eureka County*, [15 Nev. 39](#); *State v. Boerlin*, [30 Nev. 473](#); *State v. McBride*, [31 Nev. 57](#).

A search of the law of this State fails to disclose that the Legislature has ever delegated to the Boards of County Commissioners the power to, by ordinance or otherwise, provide daylight-saving time or any other time different from the standard time applicable to this State as fixed by Congress in the respective time zone. Such power never having been granted such Boards it follows that they do not have the legal right to invoke daylight-saving time. However, even if it could be said that such Boards did impliedly possess such power, still the Legislature by enacting the 1949 statute entitled “an Act authorizing the governor of the State of Nevada to establish daylight saving time; *making such time the official time for the State of Nevada*; defining daylight saving time, and other matters properly relating thereto” (italics ours) withdrew from such Boards any such power.

Answering Query No. 2—From the answer to query No. 1 it is clear that the Legislature has never delegated the power to the Boards of County Commissioners to establish any time different from standard time, not even in cases of emergency. No doubt in 1948 such Boards acted in good faith in an endeavor to curtail the use of electric power so far as possible and no question was ever raised as to their power to so act. However, as a legal proposition we are of the opinion such Boards then possessed no legal power to proclaim a difference or change in the daily time.

Answering Query No. 3—It is our considered opinion that the boards of County Commissioners of such counties acted without legal authority.

Answering Query No. 4—Municipal corporations, including cities and incorporated towns, are mere instrumentalities of the State for the convenient administration of government, and their powers are fixed and granted by the Legislature. *City of Reno v. Stoddard*, [40 Nev. 537](#). In

Ronnow v. City of Las Vegas, [57 Nev. 332](#), the Court said:

In Tucker v. Virginia City, [4 Nev. 20](#), at page 26, the court says: “That municipal corporations have no powers but those which are delegated to them by the charter or law creating them; that the powers expressly given and the necessary means of employing those powers constitute the limits of their authority. It is conceded that beyond this they can have no active existence, and can do no act which the law can recognize as valid and obligatory upon them.” And in State ex rel. Rosenstock v. Swift, [11 Nev. 128](#), at page 140, the court says that “a municipal corporation, in this state, is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication.”

It is our opinion that the power to provide a daily time different from the standard time in and by municipalities, cities and incorporated towns must be expressly granted by the Legislature in the charters or statutes creating them, or amendments thereto. If such power is not so granted, then municipalities, cities and incorporated towns in this State have no power to officially establish daylight-saving time or any other time different from the established standard.

Very truly yours,

ALAN BIBLE, *Attorney General*.

**751. Criminal Law—Prosecution for Misdemeanor Under City Ordinance Does Not Prevent Second Prosecution Under State Law.**

CARSON CITY, May 9, 1949.

HONORABLE C.J. McFADDEN, *District Attorney, White Pine County, Ely, Nevada.*

DEAR JUDGE: Your letter of May 4 was received May 7, 1949.

You state that as a result of a shooting in the city of Ely one Mrs. Carter was fined and sentenced to jail for a violation of a city ordinance.

You later charged he with assault with a deadly weapon, a violation of State law, and you desire to know if a prosecution would be barred by the objection of double jeopardy or prior conviction.

It is our opinion that no such objection exists in the case presented.

You have been cited to 22 C.J.S., “Criminal Law,” sec. 240, p. 372. However, the precise point is settled in the same volume at sec. 297, p. 449, citing among other cases Ex p. Sloan, [47 Nev. 109](#), 217 P. 233.

At 15 Am. Jur., “Criminal Law,” sec. 380, p. 54 the same distinction appears citing the following authorities in point:

State v. Holm, [55 Nev. 468](#), 37 P.2d 821.

Gaviers v. U.S., 220 U.S. 338.

State v. Barton, 105 P.2d 63 at 65.

State v. Humphrey, 210 S.W.(2) 1004.

State v. Tucker, 246, P. 758.

In Ex p. Sloan, [47 Nev. 109](#), there is an extensive discussion at pp. 115, 116, and 117.

The case of State v. Holm, [55 Nev. 468](#) involved two prosecutions in the State Court but it was held although the facts were the same in two different offenses were involved (see sec. 10911, N.C.L. 1929). See extended discussion at page 472 and concurring opinion page 473.

We do not consider the proceeding in the City Court void however. The case presents two distinct offenses against separate sovereignties (the City and the State) and one does not affect the other.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**752. Old-Age Assistance—Conflict in 1949 Amendments to Section 15 of the Initiative Act—Chapter 252, Statutes of 1949, Will Govern.**

CARSON CITY, May 9, 1949.

MRS. HERMINE G. FRANKE, *Director, Division of Public Assistance, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.*

DEAR MRS. FRANKE: This will acknowledge receipt of your letter dated May 6, 1949, received in this office May 7, 1949, in which you request an opinion respecting the evident variance or conflict contained in the two amendments to section 15 of the Initiative act providing compulsory Old-Age Assistance, which were passed at the last session of the Legislature under A.B. 141 and A.B. 251, and which amendment will prevail.

We are of the opinion that A.B. 251, chapter 252, Statutes of Nevada 1949, approved March 29, 1949, is the latest expression of the legislative will and this amendment will govern.

Chapter 51, Statutes of Nevada 1949 (A.B. 141), amends section 15 of the Initiative Act relating to compulsory Old-Age Assistance. The substance of the amendment was the striking out of the language raised by the levy and collection of an ad valorem tax and inserting a provision that the fund be provided by direct legislative appropriation from the General Fund. The language, "to pay the state's one-fourth ( ) of the total amount of such old-age assistance," remained the same as in the original Act.

Chapter 252, Statutes of Nevada 1949 (A.B. 251), amended sections 2, 14, and 15 of the Act. Sections 14 and 15 provide the method of raising funds to meet the requirements of the act by the counties and State respectively. Before amendment of section 14 it provided for a tax levy in the counties to pay one-fourth of the total amount of Old-Age Assistance to paid in that county. This was changed to read "one-half of the total amount of old-age assistance, after deducting federal matching." Section 15 was amended by striking out the provision that required a levy of a tax to meet the State's proportion, and also changed the language "one-fourth" to "one-half of the total amount, after deducting federal matching," and also added language to provide that the State's proportion be supplied by direct legislative appropriation from the General Fund. This amendment was approved March 29, 1949.

In *Ex parte Smith*, [33 Nev. 466](#), on page 475, the Court held: "When two provisions are irreconcilable the last one controls as being the latest expression of the legislative will." In *Sutherland Statutory Construction*, Third Edition, Vol. I, page 484, the rule is stated as follows: "However, when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms."

Chapter 252 is the latest enactment and expression of the legislative intent and will govern.

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

**753. Public Service Commission—Jurisdiction Does Not Extend to Control and Regulation of Privately Owned Oil Pipe Line Not Used as Common Carrier.**

CARSON CITY, May 9, 1949.

PUBLIC SERVICE COMMISSION, *Carson City, Nevada*.

Attention: Lee S. Scott.

GENTLEMEN: Reference is hereby made to your letter of April 21, 1949, requesting the opinion of this office as to whether the Commission would have jurisdiction over an oil pipe line laid in the city of Reno as set forth in your letter reading as follows:

Recently a Reno general contractor called at this office and stated he intended to install pipe lines in the alleys and streets of the city of Reno for the purpose of transporting fuel oil for various customers.

His plan is to sell fuel oil, under pressure, to various customers and measured by meter and sold under meter rates.

He asked in so doing would he be classified as a public utility and subject to the jurisdiction of this Commission. He has also asked if, on the other hand, he would be subject to secs. 4945 to 4956, inc., N.C.L. 1929.

It would appear to me that if fuel oil could be considered as heat, then the operation would be classified as a public utility under sec. 7 of the Public Service Commission of Nevada Act. It also appears that secs. 4945 to 4956, inc., transporting petroleum products by means of a pipe line, where the product being transported is carried on it by the carrier and not for sale by the carrier.

The query is—does such pipe line and the use to which it is put constitute a public utility subject to the jurisdiction of the Commission?

OPINION

We understand that in connection with the pipe line a large storage tank will be installed wherein the fuel oil is stored and which oil is the property of the contractor or person owning the tank and the pipe line.

The question presents a matter that is not easy of determination, but after a close examination of sections 4945-4956, N.C.L. 1929, and section 6106, N.C.L. 1929, defining public utilities, we are inclined to the view that the language of section 6106 is not sufficiently broad to include the proposed pipe line in the city of Reno and the sale of fuel oil delivered by means of such pipe line.

It will be noted that the Public Service Commission Act, and particularly section 6106, deals with public utilities generally. On the other hand, sections 4945-4956 deal with a particular utility or business and relates to pipe lines used in common carrier business, although there is some language included therein which might be construed as the use of such pipe line in connection with the business of buying and selling crude oil or petroleum. However, we feel that

a fair and reasonable construction of such Act requires its consideration as relating to a pipe line, the use of which is had by other parties by means of the payment of rates for the transportation of oil, and not as owners of such pipe line used exclusively in the purchase and sale of crude oil or petroleum. We are inclined to this view particularly by reason of the following language contained in section 4945. This is the section defining the oil pipe lines as common carriers. However, the very last sentence of that section reads as follows:

But the provisions of this act shall not apply to those pipelines which are limited in their use to the wells, *stations, plants* and refineries of their *owner* and which are *not* a part of the *pipe-line transportation* system of any common carrier as above defined; nor shall such provisions apply to any property of such a common carrier which is not a part or necessarily incident to its pipe-line transportation system. (Italics ours.)

This language indicates the intention of the Legislature that particularly stations and plants, which necessarily would include the plant of the proposed oil distributing line in Reno, were owned by a system of any common carrier as defined in the section.

Sections 4945-4956, N.C.L. 1929, constitute a special Act relating to and defining common carrier pipe lines, and, as pointed out above, contain an exemption from the provisions of such act which, in our opinion, relates to the very proposition and project outlined in your letter. The Public Service Commission Act relates generally to public utilities and is clearly a general Act. It contains no express repeal of the Act containing sections 4945-4956, N.C.L. 1929. It has long been the settled law of this State as construed by our Supreme Court that repeals by implication are not favored, and one of the canons of statutory construction is well-stated in *State v. Beard*, 21 Nev. at page 220, as follows:

One of these rules is that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. In considering this rule in *Sedg. on State. Const. 98*, the author says: "The reason and philosophy of this rule is, that when the mind of the legislator has been turned to the details of a subject and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Mr. Bishop states it thus: "Ordinarily, if there are a general statute and one local or special on the same subject in conflicting terms, neither abrogates the other, but both stand together, the former furnishing the rule for the particular locality or case, the latter for the unexpected place and instances. And it is immaterial which is the later in date."

And in *State v. Hamilton*, 33 Nev. at page 422, the Court quoted with approval the following: It is said, at sections 157, 158, in *Sutherland on Statutory Construction*: "When the legislator frames a statute in general terms or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the general act shows a plain intention to do so. Where there is in one act, or several contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same acts."

In *State v. Ducker*, 35 Nev. at page 222, the Court said:

A general statute without negative words will not repeal the particular

provisions of a former one unless the two acts are irreconcilably inconsistent.

In *State v. Boerlin*, 38 Nev. at page 45, the Court again said:

In the absence of a clear showing, the repeal or modification of statutes is not presumed, and, when there is a general and special statutory provision relating to the same subject, the special provision will control.

It is therefore, our considered opinion that, under the present condition of the statutory law on the subject, the special Act, i.e., sections 4945-4956, N.C.L. 1929, particularly the last sentence of section 4945 hereinabove quoted, precludes the jurisdiction of the Public Service Commission in the matter.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**754. Agriculture—State Agricultural Society—Cash Awards for Annual Fair May Be Limited.**

CARSON CITY, May 9, 1949.

HON. DON S. CHAPMAN, *Assemblyman, Churchill County, Fallon, Nevada*.

DEAR ASSEMBLYMAN CHAPMAN: The following is a reply to your oral request for an opinion as to the authority of the State Agricultural Society to limit the cash awards at the annual fair held at Fallon, Nevada, to boys' and girls' 4-H Clubs and students in Vocational Education, in order that the expenses of conducting the fair may be kept within the appropriation made for this purpose by the Legislature.

We are of the opinion that the awarding of cash prizes for exhibits at such fair is a matter that is within the powers of the board of the State Agricultural Society, under rules and regulations adopted and declared by such board.

Section 5 of the Act to provide for the management and control of the State Agricultural Society by the State, which defines the general powers of the board, contains the following language, "and shall have power to make all necessary changes in the constitution and rules of the society to adapt the same to the provisions of this act, and to the management of the society meetings and exhibitions." Since its amendment in 1915 this section has provided for an annual fair or exhibition by the society of all the industries and industrial products of the State at the city of Fallon, Churchill County, Nevada.

The Legislature in 1949 did not amend this section. An unconditional appropriation of \$5,000 for the fiscal year ending June 30, 1950, and for the fiscal year ending June 30, 1951, was made for the support of the annual State Fair. There is no provision in the Act directly relating to premiums or awards. This is an authority to be exercised under rules and regulations of the society which may be made suitable to meet the provisions of the Act.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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



**755. Veterans Service Commissioner—Failure of Legislature to Make Appropriation for Office and Other Expenses Preclude Payment Thereof.**

CARSON CITY, May 10, 1949.

H.E. DEVILLIERS: Reference is hereby made to your letter of May 6, 1949, wherein you request the opinion of this office with respect to the failure of the Legislature in 1949 to make an appropriation for the fiscal year beginning July 1, 1949, for your office. You inquire whether your secretary would be entitled to her paid vacation after July 1, 1949, or whether she would have to take it prior to that time. You also inquire as to whether she could be retained after the first of July for any work that may not have been completed by that time.

OPINION

It is the opinion of this office that the appropriation made by the Legislature in 1947 was for the biennium ending June 30, 1949, and that any funds remaining in such appropriation on July 1, 1949, would be reverted to the General Fund in the State Treasury. This has been the rule for many, many years in the State.

The Legislature having failed to make an appropriation for the ensuing biennium, it is the opinion of this office that no funds remaining in the 1947 appropriation on July 1, 1949, could be used for the purposes of your office, either for the payment of a paid vacation for your secretary thereafter or for any other purpose. We are further of the opinion that if your secretary desires a paid vacation, it should be taken prior to July 1, 1949.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**756. Mining—Chapter 126, Statutes of 1949, “Collar to Collar Law”—Applicable to Open-Cut and Open-Pit Mines.**

CARSON CITY, May 11, 1949.

HON. A.E. BERNARD, *Inspector of Mines, Carson City, Nevada.*

DEAR MR. BERNARD: Reference is hereby made to your letter of April 18, 1949, together with the attached correspondence of Norman H. Hearn, an attorney of San Francisco, California, inquiring whether Assembly Bill No. 52, now chapter 126, Statutes of 1949, is to be construed as relating to the hours of labor in open-cut mines as well as underground mines. Press of business in this office has prevented an earlier reply to your inquiry. We gather from the correspondence that it is thought the Act of 1949, amending section 10237, N.C.L. 1929, is not a sufficient amendment of the law to bring within its purview open-cut or open-pit mines or workings for the reason that section 10237, prior to its amendment, related to underground workings only and that a separate section, to wit, section 10240, N.C.L. 1929, established the hours of labor in open-cut or open-pit mines which was not expressly amended by the 1949 Act.

OPINION

Chapter 126 of the 1949 Statutes is a statute providing the often stated rule of time of work in mines as the collar to collar law, and as applied to underground workings there can be no doubt

as to its applicability and validity. After a close examination of the original Act and the amendatory Act of 1949, we are of the opinion that if there is any doubt as to its being applicable to open-cut or open-pit workings, such doubt is to be resolved in favor of the act as also relating to the open-cut or open-pit mines.

It is one of the canons of statutory construction that in construing statutes the primary purpose is always to ascertain the intention of the Legislature, and this from the language used. There can be no doubt as to the intent of the Legislature with respect to the open-cut or open-pit mines in the enactment of the 1949 Act. It said, "The time employed, occupied or consumed in leaving the surface of any tunnel, open-cut or open-pit workings, for the point or place of work therein, and returning thereto from said place or point of work" shall not exceed eight hours. The intent is most clear.

It may be that many years ago section 10237 and section 102240 were sections of separate and distinct Acts of the Legislature and were this the case now there might become ground for holding that chapter 126 did not relate to open-cut or open-pit workings. However, these particular sections were by the compilers of the Revised Laws of 1912, duly authorized thereto by legislative action, compiled in "An Act concerning crimes and punishments and repealing certain acts relating thereto," approved March 17, 1911, and thereby became sections 6554 and 6557 of the 1912 revision. Section 6554 was amended in 1927 as it appears as section 10237, N.C.L.

1929. The 1929 compilation carries the entire crimes Act under the original title of 1912 revision. Chapter 126 of the 1949 Statutes was enacted under the same title.

The situation then is that we are construing two sections of the same Act. The 1949 amendment, insofar as it makes applicable the collar to collar rule to open-cut and open-pit mines, is inconsistent with the provisions of section 10240, N.C.L. 1929, in that it shortens the actual laboring time at the place of work in such mines, and being the latest expression of the legislative will controls over the earlier statute.

It is our considered opinion that chapter 126, Statutes of 1949, is applicable to open-cut and open-pit mines.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**757. Mining—Road Construction Not a Deductible Item for Purposes of Taxation.**

CARSON CITY, May 16, 1949.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Mr. R.E. Cahill, Secretary.

GENTLEMEN: This will acknowledge receipt of your letter dated May 4, 1949, submitted to this office on the same date.

You state your request for an opinion is the result of an audit made by the Nevada Tax Commission respecting the return on proceeds of mines of a mining company. It appears that the company constructed 27 miles of road from a point to the mine at a cost of \$199,276.

The company adopted a policy of amortizing the cost of the road facilities on a basis of \$2 per ton of ore mined. As a result the company claimed the following deductions under section

6580, 1929 N.C.L., 1941 Supp.

December 31, 1947 .....	\$23,205.72
June 30, 1948 .....	29,354.84
December 31, 1948 .....	38,699.44

The Nevada Tax Commission denied these deductions from the semi-annual statements and the company protested the disallowance. The action of the Commission is submitted to this office for an opinion.

We are of the opinion that the decision of the Nevada Tax Commission denying the deductions is in accord with the provisions of the statute. The deductions to be allowed from the gross yield of each semiannual period are deductions only for actual cost of maintenance and repairs to facilities mentioned in subsection 5 of section 6580, 1929 N.C.L., 1941 Supp., and not the cost of construction of such facilities.

The amortization of the cost of the road facility would come within the provisions of subsection 6 of section 6580 above mentioned, in which depreciation at the rate of not less than 6 percent nor more than 10 percent per annum of the assessed valuation, may be allowed on the machinery, equipment, apparatus, works, plants and the facilities mentioned in subdivisions 5 of the section.

Section 6580, 1929 N.C.L., 1941 Supp., which relates to gross yield and net proceeds of mines to be computed and deductions for ascertaining net proceeds enumerated, quoting only that part deemed relevant to the question, reads as follows:

The Nevada tax commission shall, from said statement and from all obtainable data, evidence and reports, compute in dollars and cents the gross yield and net proceeds of each semiannual period. The net proceeds of each semiannual period.

The net proceeds shall be ascertained and determined by subtracting the gross yield the following deductions for costs incurred during such six months period, and none other:

1. The actual cost of extracting the ore from the mines.
2. The actual cost of transporting the product of the mine to the place or places of reduction, refining and sale.
3. The actual cost of reduction, refining and sale.
4. The actual cost of marketing and delivering the product and the conversion of the same into money.
5. The actual cost of maintenance and repairs of:
  - (a). All mine machinery, equipment, apparatus and facilities.
  - (b). All milling, smelting and reduction works, plants and facilities.
  - (c). All Transportation facilities and equipment except such as are under the jurisdiction of the public service commission as public utilities.
6. The actual cost of fire insurance on the machinery, equipment, apparatus, works, plants, and facilities mentioned in subdivision 5 of this section.
7. Depreciation at the rate of not less than six percent nor more than ten percent per annum of the assessed valuation of the machinery, equipment, apparatus, works, plants, and facilities mentioned in subdivision 5 of this section. The percentage of depreciation shall be determined for each mine by the tax commission; and in making such determination of commission shall give due weight to the character of the mine and equipment, apparatus, works, plants, and

facilities mentioned in subdivision 5 of this section. The percentage of depreciation shall be determined for each mine by the tax commission; and in making such determination the commission shall give due weight to the character of the mine and equipment and its probable life.

Subsection 5 reads: "The actual cost of maintenance and repairs of:" then follows subdivisions (a), (b) and (c). The language in the first part of the subsection refers to each item in the subdivisions. It is not the actual cost of the facilities mentioned, but the actual cost of maintenance and repairs of such facilities.

A road to the mine would be a transportation facility, but the cost of construction would not be a deductible allowance under the provisions of the statute as an offset to the gross yield in any semiannual statement for the same reason that the cost of mining machinery, equipment, construction of milling, smelting and reduction works would not be an allowed deduction. It is only the maintenance and repairs of these items that may be shown in the statement.

The road is not a business expense, but is a capital investment. In *Acer Realty Co. v. Commissioner of Internal Revenue*, 132 F(2) 512, the Court held that money paid for the requirement of something of permanent use or value in one's business is a capital investment. In *Cripple Creek Coal Co. v. Commissioner of Internal Revenue*, 63 F(2) 829, it was held by the Court that payments by a local company involving the cost of a spur track was a capital investment, and not deductible as ordinary and necessary expenses.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**758. Corporations—Fees—Chapter 176, Statutes of 1949, no Retroactive Effect.**

CARSON CITY, May 20, 1949.

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

DEAR MR. KOONTZ: Reference is hereby made to your letter of May 19, 1949, requesting the opinion of this office as to the proper construction and application of the amended fee bill pertaining to corporations, the same being found in chapter 176, Statutes of 1949.

We note that you are somewhat apprehensive concerning the retroactive effect of the statute. It is our opinion that the statute has no retroactive effect whatsoever.

The point mentioned in your letter concerning the filing of certificates of amendment of articles of incorporation, increasing the authorized capital stock thereof, presupposes that the original articles of incorporation had already been filed and the fee therefore paid pursuant to the prior law and that the increase in the capital stock is the basis of computing the fee for filing such certificate of increase. We think the example given in your letter is correctly worked out and that in the final analysis the fee to be charged is simply the fee computed according to the provisions of the statute upon the difference between the original capital stock of the corporation, plus the increase, and the amount of the original capital stock, less the increase, thus arriving at a fee for the increased capital stock alone.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**759. Labor—Employment Agencies—Commissioner Has Authority to Pass on Qualifications and Past Conduct—Commissioner May Refuse to Issue Further Licenses if Community is Being Adequately Served.**

CARSON CITY, May 23, 1949.

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

DEAR MR. GIBSON: This will acknowledge your letter dated May 17, 1949 received in this office May 18, 1949.

You request an opinion as to the right of the Labor Commissioner to refuse a license for a private employment agency when in his opinion the field is adequately covered by existing agencies under the provisions of section 2838, 1929 N.C.L., 1941 Supp. You also inquire as to the authority of the Commissioner to refuse to grant a license to an applicant when he has reliable information that such applicant has had a license to engage in such business cancelled in two other States.

We are of the opinion that the Act relating to employment agencies, which makes it the duty of the Labor Commissioner to enforce its provisions, gives him the authority to pass upon the qualifications and consider the past conduct of an applicant before issuing a license.

We are also of the opinion that the Commissioner, using reasonable discretion, has the authority to refuse to issue further licenses when in his opinion the community is being adequately served by existing agencies.

Section 2837, N.C.L. 1929, which defines how a license to engage in the business of an employment agency may be procured, requires that an application for a license shall, in addition to other requirements, state the business or occupation engaged in by the applicant for at least two years immediately preceding the date of the application.

Section 2838, N.C.L. 1929, as amended in 1931, section 2838, 1929 N.C.L., 1941 Supp., which provides what the license shall show and also gives certain power to the Labor Commissioner, contains the following language: "When, in the opinion of the labor commissioner, a community is being adequately served by a free employment service, he shall have the authority to deny the establishment therein of any other employment agency."

The title of the Act and its provisions determine that the license fee is imposed for the purpose of regulation and not for revenue. The statute requires compliance with certain conditions before a license is issued, and fixes a punishment for a violation of the provisions of the statute after a license is issued. The Act, is, therefore, a legislative enactment under the "police power," and has for its object the improvement of social and economic conditions affecting the community and general welfare.

As stated in 33 Am. Jur. page 344, "It is generally recognized that, except where justified under police power, license laws creating monopolies in the ordinary business or callings of life in which every citizen has a right to engage on terms of equality are invalid." "It is a rule, however, that if reasonable facilities for engaging in the business are given, regulations restricting it within the police power, or imposed out of regard for the health or welfare of the community, do not constitute a prohibition or illegal restraint of trade, or a monopoly."

The policy of the Act is to afford reasonable facilities for persons to engage in the business of employment agencies, and to protect the persons seeking employment against the evils of imposition and extortion. It is significant that the Labor Commissioner is charged with the enforcement of the Act.

The requirement in section 2837 above, that the application shall be made to the Labor Commissioner in writing and shall show the business or occupation engaged in by the applicant for at least two years immediately preceding the date of the application, must be interpreted with reference to the general object of the Act and with the view of giving it full and complete effect. The former business or occupation of the applicant and the manner of conducting the same would serve as a guide to the Commissioner as one of the conditions to justify the issuance of the license, otherwise it would be a fugitive expression and meaningless.

While the Act does not specify the basis upon which an application for license may be denied, we cannot conclude that the Legislature has required the Commission to enforce the Act and then prohibited the means by which the purpose of the Act may be accomplished.

In *Gibson v. Mason*, 5 Nevada, on page 311, the Court said: "It is a rule of construction that when anything is required to be done, the usual means may be adopted for performing it. So always it is the first great object of the courts in interpreting statutes, to place such construction upon them as will carry out the manifest purpose of the legislature, and this has been done in opposition to the very words of an act."

The right of the Labor Commissioner to refuse to grant further licenses for employment agencies in localities where in his opinion the communities are being adequately served is determined by the provisions of section 2838, *supra*. This section gives the Labor Commissioner authority to deny the establishment of an employment agency when in his opinion a community is being adequately served by a free employment service. The section uses the term free employment service, but if a community is being adequately served by a licensed employment agency, it appears that this condition should be considered by the Commissioner, and would be within his discretion in the granting of further licenses in the same community.

In the case of *Pasadena v. San Gabriel*, 25 P(2) 516, it was held by the work Court that where the business, although lawful in character, may work harm in its conduct, the granting or refusing of a permit to operate may be confided to the reasonable and proper discretion of an officer, without imposition of rules and regulations to guide their action. In enacting laws the Legislature cannot deal with the details of every particular case, and reasonable discretion as to the manner of executing a law must necessarily be given to administrative officers. *Winter v. Barrett*, 186 N.E. 113; 89 A.L.R. 1398.

In *People v. Brazee*, 149 N.W. 1053, a case involving the exercise of the police power in the licensing of employment agencies, the Court said: "It is presumed that public officials will perform their duty without prejudice or dishonesty. Their failure to act within the limits of their delegated authority may be reviewed in a proper form."

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**760. Veterans Service Commissioner—Salary Available—No Appropriation for Clerk Hire.**

CARSON CITY, May 25, 1949.

MR. H.E. DEVILLIERS, *Deputy Veterans' Commissioner, Veterans' Service Commission, Post Office Box 83, Las Vegas, Nevada.*

DEAR MR. DEVILLIERS: Reference is hereby made to your letter of May 24, 1949, received in this office May 25, 1949, wherein you request the opinion of this office as to your status as Deputy Veterans' Commissioner from and after July 1, 1949, in view of the fact that the 1949 Legislature failed to provide any appropriation in the appropriation statute of 1949 for the ensuing biennium for the salaries of the Veterans' Commissioners and for any other purposes of the Veterans' Commissioners' Act. You also inquire whether your salary would automatically be paid after July 1, 1949 as long as your commission remained in effect, or whether it would be necessary to bring suit to collect such salary.

#### STATEMENT

The office of Veterans' Service Commissioner was created in 1943. Chapter 189, page 26, 1943 Statutes. At that time only one Commissioner was provided. An appropriation of \$10,000 was made for the ensuing biennium, the salary of the Commissioner was fixed and provision made for office and travel expense. This Act was materially amended in 1947, and provides for a Veterans' Commissioner and Deputy Veterans' Commissioner, fixing their powers and duties, terms of office and the location of their offices. Chapter 252, page 779, Statutes of 1947.

Section 5 of the 1947 Act expressly provides the salaries of the Commissioner and the Deputy Commissioner as follows:

The salary of the veterans' service commissioner shall be forty-two hundred (\$4,200) dollars per year, and the salary of the deputy veterans' service commissioner shall be thirty-three hundred (\$3,300) dollars per year, to be paid in the same manner as other state officers.

The section then provides the authority of each Commissioner to employ necessary clerical and stenographic assistance, purchase office equipment and supplies, and allowed them necessary travel and administrative expenses. This portion of the section, however, contains no stated amount of money that could be used for the purposes mentioned and no salaries were therein fixed, other than it is there provided. "All said expenses shall be within the limits of the appropriation made for the purposes of this act."

The 1947 Legislature appropriated the following sums for the then ensuing biennium for the Veterans' Service Commission:

Salary of commissioner \$8,400, salary of deputy commissioner \$6,600, salary of two stenographers \$9,240, travel expense \$4,000, supplies, and equipment \$1,500. (1947 statutes 860.)

Thus the Legislature in 1947 not only fixed the salaries of the Commissioners in the statute itself, but also incorporated in the appropriation bill the moneys necessary to pay such salaries and also the salary of the stenographers and all other expenses.

In 1949 there were two bills introduced in the Legislature, one in the Assembly and the other in the Senate, wherein it was sought to abolish the office of the Veterans' Service Commissioner. Both bills failed of passage. See A.B. 308, p. 82, Final Assembly History; S.B. 228, p. 63, Final Senate History.

The general appropriation bill introduced in the 1949 Legislature for the ensuing biennium contained a section providing an appropriation for the Veterans' Service Commission in the total amount of \$31,500 which covered the salaries theretofore fixed for the Commissioner and deputy Commissioner, and also the other expenditures authorized in section 5 of the 1947 Act. See section 27, S.B. 42. This section 27 providing the appropriation for the Commission was stricken from the bill during its passage through the Legislature and the bill became the general appropriation statute without any appropriation therein for the use of the Commission. See chapter 125, Statutes of 1949.

The question then, is there now any legal appropriation made by the Legislature for the administration of the Veterans' Service Commissioner Act for the biennium beginning July 1, 1949?

### OPINION

An examination of the law on the above question discloses that the answer thereto must be divided: (1) With respect to the appropriation for the salaries of the Veterans' Commissioner and the Deputy Veterans' Commissioner, and (2) with respect to the appropriation for the payment of clerks, stenographers, and for office equipment, supplies, travel and miscellaneous administrative expenses and for the Commission.

An exhaustive examination of the law, and the cases upon the instant question as decided by the Supreme Court of Nevada, discloses that both phases of the question have been directly passed upon and determined in the case of *State ex rel. Davis v. Eggers*, [29 Nev. 469](#). In that case it appears that section 3 of an Act creating a State Industrial and Publicity Commission, approved March 29, 1907, provided, "the chairman of such commission shall receive as compensation for his services, to be paid out of the treasury of the State of Nevada, the sum of twenty-five hundred dollars per annum, payable in equal monthly installments, upon the first day of each and every month \* \* \*." The section further provided "that the chairman and other members of such commission shall be allowed necessary mileage and actual expenses of travel incurred in traveling upon official business of the commission \* \* \*" upon the filing of an affidavit by one or more of the members of the Commission with the State Treasurer that such money was appropriated for traveling expenses and no maximum amount therefor was set forth in the statute.

The Legislature in 1907 provided no appropriation for the Commission for any purpose in the general appropriation bill.

Relator Davis, chairman of the Commission, submitted claims for his salary and certain traveling expenses to the State Board of Examiners, which Board approved the claims, the State Controller upon demand for payment of the claims refused to honor the same upon the ground that the Legislature had made no appropriation of moneys in the State Treasury for the payment thereof.

The relator thereupon brought mandamus against the Controller to compel payment of the claims. The Supreme Court, after an exhaustive examination of the question and the authorities pertaining thereto held that section 3 of the Act constituted a sufficient appropriation of the salary of the chairman of the Commission, but, as such section failed to prescribe any maximum expenditure for traveling expenses, the Act was void insofar as it authorized payment of such expenses by State, under section 19 of Article IV of the Constitution providing that "No money shall be drawn from the treasury but in consequence of appropriation made by law."

The Court, in passing upon the sufficiency of the appropriation to pay the salary of the chairman of the commission, said:



Under our advanced, protective system, no officer or individual has control of the public moneys.

The provision that no moneys shall be drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the legislature, which stands as the representative of the people. No particular words are essential so long as the will of the lawmaking body is apparent. It has been held in a number of decisions that the word "appropriate" is indispensable. It is not necessary that all expenditures be authorized by the general appropriation bill. The language in any act which shows that the legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient. It is customary to create a legislative fund at the beginning of the session, and separate acts appropriating money are usual at every session.

It is provided by an act approved March 8, 1879 (Stats. 1879, p. 108, c. 102), entitled "An act authorizing the payment of salaries of officers fixed by law";

SECTION 1: All state officers whose salaries are fixed by law shall be entitled, from and after the passage of this act, to receive same on the first of each calendar month; provided, that nothing in this act shall be construed to mean the payment of salaries in advance. (Comp. Laws, 2088)

SEC. 2: The controller is hereby authorized and directed to draw his warrant, and the state treasurer to pay same, in accordance with the first section of this act. (Comp. Laws, 2089.)

The court based its opinion as to the authority of the Controller and the Treasurer to pay the claim of the chairman for his salary upon the foregoing statute, in view of the absence of express direction to such officers to so pay the claim in said section 3 of the Act then in question. The statutory provisions of the 1879 Act are now sections 75597560, N.C.L., 1929. Section 7559 was changed to provide semimonthly pay days for State and county officers and employees.

Section 7576, 1929 N.C.L., 1941 Supp., section 7560, N.C.L., was not changed, it provides: "The controller is hereby authorized and directed to draw his warrant, and the state treasurer pay the same in accordance with the first section of this act." The Court then said: "By an examination of numerous acts providing for the compensation of our state officers, it will be found that generally no fund is specified for the payment of their salaries." Later in the opinion the Court referring to this statement said:

In *State v. Westerfield*, [23 Nev. 473](#), 49 Pac. 121, an item in the general appropriation bill read: "For salary of one teacher and one assistant teacher at the state orphans' home, two thousand four hundred dollars, payable out of the general school fund." The court held that the general school moneys could not be applied to the orphans' home, and treated the words "payable out of the general school fund" as unconstitutional, null, and void, and the appropriation as if they had been omitted. It was said in the decision: "We hold that the legislature has made a valid appropriation for the payment of the salary in question, and that the same is payable out of the general fund in the state treasury the same as the salary of the governor and most of the other state officers, and the same as other appropriations in which no specific fund is named. \* \* \* It will be observed that it is not required that the fund out of which the appropriations are to be made shall be named in the appropriation act."

The 1949 Legislature having refused to repeal the Act providing for the Veterans' Service Commission by failing to pass the bills introduced for that purpose then such Act is still in full force and effect, and the failure to include an appropriation in the general appropriation statute for the administration of such act, insofar as the salaries of the Commissioner and Deputy are

concerned, cannot serve as a repeal thereof. *State ex rel. Abel v. Eggers*, [63 Nev. 372](#).

We think that the foregoing analysis of the law demonstrates that the 1947 Act constituted the Veterans' Service Commissioner and the Deputy Veterans' Service Commissioner State officers, their duties are State-wide. Section 5 of the Act provided and provides that their salaries so concretely stated therein shall be paid as other State officers are paid. We think such statute in this respect provided and provides a valid continuing appropriation for such salaries until the Legislature by direct express action shall change, modify such salaries or repeal the Act in its entirety. It is our considered opinion that insofar as the said salaries are concerned an appropriation is and will be available therefor on and after July 1, 1949 and until otherwise ordered by the Legislature, and that there will be no necessity for the bringing of a suit to collect such salaries.

We come now to the question of whether section 5 of the 1947 Act provides a sufficient appropriation for the payment of clerks and stenographers, the payment for equipment and supplies and necessary travel and administrative expenses, in view of the fact no stated for maximum amount of money therefor appears in the section. The following quotation from *State ex rel. Davis v. Eggers*, *supra*, will we think answer the question in the negative. The Court said:

The petitioner's claim for traveling expense is viewed in a different light from his demand for salary. By a perusal of the language in this regard in section 3, it will be observed that not only no fund is specified, but there is no language directing payment of the state treasury such as is contained in the provision for the salary. Section 6 of the act directs that the commission shall have the right to solicit and receive private contributions, but shall accept no money or other considerations from any firm or individual in payment of specific services or favors rendered. Section 8 provides that there may be allowed to such commission by the commissioners of the several counties a sum not exceeding in amount \$250 per year from each county in the state to be used by the commission for the purpose for which it is established and for the best interests of the various counties and the state. There are no words in the entire act stating that the traveling expenses shall be paid from moneys donated by individuals or collected from the counties, or from the state treasury. It is not necessary to determine whether there is any implication in regard to a fund or moneys from which these expenses might be paid, for the fatal objection to their payment is the fact that no maximum or other amount is specified in connection with them at any place in the act. (*Ingram v. Colgan*, 106 Cal. 118, 38 Pac. 315, 39 Pac. 437, 28 L.R.A. 187, 46 Am. St. Rep. 221; *Institute v. Henderson*, 18 Colo. 105, 31 Pac. 714, 18 L.R.A. 308.)

As all appropriations must be within the legislative will, it is essential to have the amount of the appropriation, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the legislature when they have not yet been incurred, fixed by the legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum either in the general appropriation bill or in the act authorizing them, specifying the amount above which they cannot be allowed.

We therefore conclude that section 5 of the 1947 Act contains no provision providing an appropriation for clerk hire and the other expenses set forth in the section and that there is and will be no valid appropriation therefor from and after July 1, 1949 and thereafter until the Legislature shall make provision therefore.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**761. Gambling—Recreation Hall Davis Dam—License Required.**

CARSON CITY, May 28, 1949.

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

DEAR MR. JONES: Your letter of May 17, 1949, received May 19, 1949, poses the question whether a gambling license is required under the following circumstances:

The management of the Recreation Hall at Davis Dam supplies a room, furniture and cards for the playing of poker by patrons (who presumably win from and lose to each other mutually during the progress of the play). Up to 1 a.m. any player may purchase a new deck of cards for \$2 at any time. After 1 a.m. any player may purchase a new deck of cards for \$2 at any time. After 1 a.m. the players at each table are required to purchase a deck of cards every fifteen minutes, at the same price per deck. It is implicit that no table can be used after 1 a.m. unless the above rule is obeyed. It does not appear, nor is it material, whether any agent of the house takes part in the games.

Our answer is that a license is required under the above circumstances.

Section 1 of the State Gambling Act, as amended by chapter 93, Statutes of 1949, effective March 19, 1949, specifies what games require licensing. These include stud poker and draw poker and this applies not alone to those who carry on, maintain or expose for play such games, but those who receive directly or indirectly any compensation or reward for permitting the game to be played.

Section 10a of the same Act, as amended by the same chapter 93, Statutes of 1949, is substantially the same except that the names of the games are omitted, but are comprehended by the generic term of "any gambling game."

Section 9 of the gambling law, as amended by Statutes of 1945, page 492, creates a general exception to the definition of "gambling games" as follows:

\* \* \* Nothing in this act shall be construed to prohibit social games played solely for drinks or cigars served individually, or games played in private homes or residences for prizes \* \* \*. (See 1929 N.C.L. 1941 Supp., sec. 3302.08, 1945 Pocket Part.)

We do not find the instant case comes within the above exception. A requirement that the players must purchase cards at \$2 per deck every fifteen minutes takes the game out of the category of a social game, and if the facts are as set forth, it would seem clear that a license is required.

Very truly yours,

ALAN BIBLE, *Attorney General*.

By HOMER MOONEY, *Deputy Attorney General*.

**762. Public Schools—Lincoln County High School—Must Hold Election to Purchase Adjacent Property.**

CARSON CITY, May 31, 1949.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated May 25, 1949, received in this office on the same date.

You request an opinion as to the authority, under the statutes, of the Lincoln County Board of Education to purchase property adjacent to the county high school as a site for school purposes at a cost of \$6,000 without a special election as provided in section 285 of the School Code.

You write that the number of children attending high schools in Lincoln County, according to the available statistics, is Panaca High School 152, Alamo District High School 28, and that you have been advised that the county high school will have during the present year sufficient money in the treasury to purchase the property, although no capital outlaw in this sum was set aside in its budget.

We are of the opinion that the school in question does not come within the exemption defined in section 285 of the 1947 School Code, and that the expenditure in excess of \$5,000 for the purchase of property for school purposes must first be authorized by law governing school elections.

The Board of Education could not contract for the purchase of property unless the payment for the expenditure has been specifically set aside for such payment in the budget.

Section 149 of the 1947 School Code provides that the county high school shall be under the same general supervision and shall be subject to the same laws rules and regulations governing the other schools of the State school system.

Section 151 provides that the County Boards of Education shall have the same powers and duties as are prescribed by law for Boards of Trustees.

Section 274 of chapter 31 of the School Code gives the trustees authority to call meeting of the registered electors of the school district in order to secure by vote the authority to procure or sell schoolhouse sites, or to erect, purchase, sell, hire or rent schoolhouses for the district.

Section 285 contains the following language: "Notwithstanding the provisions of chapter 31 of this school code, no school site shall be purchased nor any schoolhouse erected or repaired at a greater expense than five thousand (\$5,000) dollars unless the same is first authorized by a majority vote of the school district cast at a school election called and held as provided by the law governing school elections \* \* \*." Then follows certain exceptions under a proviso that in any school district having five hundred or more children enrolled, as shown in the last preceding annual report of such school district, the school trustees thereof, without vote of the electors of the school district, may purchase any school site that they may deem advantageous to the future use of the school district.

County high schools are supported generally by taxation of the property of the entire county, but the enrollment of all children in the entire county could not be taken in consideration in

arriving at the minimum of five hundred children enrolled to bring a high school within the exemption under the foregoing section.

Sections 181.03 and 181.04 define the procedure for distributing the State High School Fund which is on a teacher and average daily attendance basis in each high school.

The county high school in question, having an enrollment of 152 as shown in the last preceding annual report, could not be considered to come within the exemption provided in section 285 of the School Code.

Although the school district having the required enrollment is given authority to pay the cost of such expenditure either wholly or in part from any funds to the credit of the school district not required for other purposes, this authority is restricted by the provisions of section 239 of the School Code.

Section 239 contains the following language: "It shall be unlawful for any governing board or any board member thereof of any school district, county high school, or district high school, or educational district to authorize, allow, or contract for any expenditure unless the money for the payment thereof has been specially set aside for such payment by the budget." The penalty for the violation of this provision may result in removal from office.

The Board of Education could not contract for the purchase of the property unless the money for the payment of the expenditure has been specifically set aside in the budget. Where the district does not come within the exemption named in section 285, the expenditure greater than \$5,000 must be authorized as the result of an election called and held as provided by law for school elections.

The manifest purpose of the Legislature as shown by chapter 31 of the School code, defining the powers and duties of trustees, is to submit any question involving the purchase of school property to the registered electors. Section 285 of this chapter expresses in negative terms the purchase of school property where the expenditure is greater than \$5,000.

In *Walker v. Moran*, 42 Nevada 111, the Court said: "Where an existing right or privilege is subject to regulation by a statute in negative words, the mode so prescribed is imperative."

There is a positive prohibition respecting the expenditure of over \$5,000, with certain exceptions, and a strict compliance with the provisions defined is required of the officers exercising the authority for the protection of public or private rights.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

cc: Mr. Lloyd Denton, President, Lincoln Bountly Board of Education, Caliente, Nevada.

**763. Taxation—Aviation Gas—Taxes Not Refunded as Provided in Motor Vehicle Fuel Act Transferred to State Airport Fund.**

CARSON CITY, June 3, 1949.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Roy M. Whitacre, Supervisor, Gasoline Tax Division.

GENTLEMEN: This will acknowledge receipt of your letter dated May 31, 1949, received in this office June 1, 1949.

You refer to chapter 246, Statutes of Nevada 1949, and section 3 of the Act which provides that unrefunded gasoline tax paid on the sale of aviation gasoline shall be set aside into a State Airport Fund for the purposes of the Act; and to the amendment to the State Motor Vehicle Fuel Act, chapter 316, Statutes of 1949.

You request an opinion as to the interpretation of the statutes, and whether or not the State Airport Act sets aside both the county and State unrefunded tax on aviation fuel to the State Airport fund.

We are of the opinion that the State tax of four cents and the one and one-half cent county tax collected on fuel used for aviation purposes, and not refunded on a claim as provided in the Motor Vehicle Fuel Act, is transferred to the State Airport Fund for purposes of the State Airport Act.

Chapter 246, Statutes of 1949 is an Act to authorize and enable the State of Nevada to develop a State-wide system of airports and landing areas to serve the aviation needs of the State and in connection therewith to accept Federal aid, and for such purpose setting aside tax funds collected on the sale of aviation fuel and not refunded under the Motor Vehicle Fuel Act.

Section 3 of the Act provides that all licensed dealers who handle aviation fuel shall report on such forms and in such detail as the Tax Commission may require. For the purpose of carrying out the provisions of the Act the Tax Commission is authorized and required to set aside solely for such use, the unrefunded taxes collected from the sale of aviation fuel.

Section 6570.05, 1929 N.C.L., 1941 Supp., section 5 of the Motor Vehicle Fuel Act, contains a provision under which a person who shall buy and use any such fuel for purposes other than in and for the propulsion of motor vehicles shall be reimbursed for the tax paid, upon presenting to the Tax Commission an affidavit as required by the provisions of the section.

Under the provisions of the Motor Vehicle Fuel Act the Commission credits a county with the gross amount of fuel tax collected in the county, deducting any refunds made under section 5 of the Act and remits the balance to the county. The gross sales do not show a segregation of fuel used for aviation purposes. The refunds deducted from the gross included refunds for aviation use as well as for other purposes exempted under the section.

Chapter 246, Statutes of 1949, the State Airport Act, authorizes the State, out of the moneys made available by the Act to plan, establish, develop, construct, enlarge, maintain, and operate airports, and to enter into agreements with any other public agencies for joint action pursuant to carrying out the purposes of the Act.

Section 3 contains the following language: "For the purpose of carrying out the provisions of this act, the Nevada tax commission is authorized and required to set aside and earmark, solely for such use, the unrefunded taxes collected from the sale of aviation fuels. Such funds so designated shall be transferred by the state controller to a state airport fund."

The unrefunded taxes collected are transferred by the State Controller solely for the purposes of the Act.

Chapter 316, Statutes of 1949, amended section 2.1 of the Motor Vehicle Fuel Act. This section provides that the county tax shall be allocated quarterly by the State Treasurer to the counties in which the tax payment originates. The one-half cent tax and the one cent tax under the provisions of this section is used for road purposes only.

The Legislature in the State Airport Act has segregated the tax for aviation fuel that has not been refunded under the Motor Vehicle Fuel Act and directed that such tax be transferred into the State Airport Fund to be used solely for the purposes of the airport Act. This will apply to both

the State and county unrefunded tax on fuel for use in aviation and not to use on roads.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**764. Osteopaths—May Not Legally Practice Medicine and Surgery as Defined by Nevada Statutes for Medical Doctors.**

CARSON CITY, June 3, 1949.

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

DEAR MR. JOHNSON: This will acknowledged receipt of your recent letter concerning the practice of osteopathy in the State of Nevada.

May those presently licensed as osteopathic physicians and surgeons in the State of Nevada legally practice medicine and surgery as defined by the Nevada statutes for the practice of Nevada medical doctors?

The answer is in the negative. Osteopaths may not prescribe or administer medicines, nor perform operative surgery. Our statutes show the legislative intent to separate the fields of practice between the original schools of medicine and surgery and the newer healing arts of which osteopathy is an example.

While we have no decisions from our own Supreme Court on the subject a detailed examination of the decisions of other States construing similar statutes discloses that only the great weight of authority supports our opinion, but that it is practically the unanimous view.

We are well aware that many medical men complain that the osteopaths are invading their field and many osteopaths claim that they are not limited to the traditional method of healing by manipulation without the use of medicines or operative surgery. This office has issued several opinions on osteopathic cases, as hereinafter set forth, but has constantly suggested that the statutes might well be clarified by the Legislature or subjected to the formal interpretation of the courts. We renew that suggestion.

The Medical Practice Act of 1905 (Secs. 4091-4097, N.C.L. 1929) was repealed and a new Act adopted by the Legislature of 1949 (Chapter 169, page 348, Statutes of 1949).

Section 25 of the new Act authorizes the Board of Medical Examiners to apply to the courts for an injunction against any person “practicing any branch of medicine, surgery or obstetrics as defined by section 17 and 21 of this act, without a license.” This section permits for the first time a remedy free from the harshness of a criminal prosecution while at the same time opening the door to such a complete exposition of the law as is to be found in nearly every other State in the Union.

Section 17 of the new Act is substantially the same as in the earlier law of 1905. It provides in part:

For the purpose of this act the words “practice of medicine, surgery and obstetrics” shall mean to open an office for such purpose; or to give surgical assistance to, or to suggest, recommend or prescribe, or direct, for the use of any person, any drug, medicine, appliance, or other agency,

whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure of relief of any wound, fracture or bodily injury or deformity. \* \* \*

Section 9 of the new Act requires an applicant to pass an examination in anatomy, physiology, materia medica and therapeutics, chemistry, bacteriology, pathology, toxicology, obstetrics, surgery, general medicine, diseases of the skin, eye, ear, nose, throat and genito-urinary system.

The Osteopathy Act of 1925 (Secs. 4990-5005, N.C.L. 1929) must be read to determine how far osteopaths might go in the practice of that branch of the healing art. Section 1 defines osteopathy as follows:

The word osteopathy as used in this act is the name of that system of the healing art which places the chief emphasis on the structural integrity of the body mechanism as being the most important single factor in maintaining the well being of the organism in health and disease.

This is precisely the same as the statute of West Virginia (Stats. 1923) and substantially the same as the statute of Nebraska (Stats. 1927, page 488).

In most other States the definition includes the element of manipulation by hand and expressly excludes the administration of drugs or medicine or the practice of operative surgery. As to the effect of excluding such a prohibition in the definition, see *State v. Gleason*, 79 P.2d 911.

Section 12 of the Nevada Osteopathic Act relates to the duties and rights of osteopathic physicians:

Osteopathic physicians shall observe and be subject to all state and municipal regulations relative to reporting all births and deaths in all matters pertaining to the public health, with equal right and obligation as physicians of other schools of medicine, and such reports shall be accepted by the officer of the department to which the same are made. Osteopathic physicians and surgeons licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine. Osteopathic physicians licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or the holding of offices in public institutions.

This is exactly the same as the statute of West Virginia passed in 1923.

This office by Opinion No. 67 (1943-1944 Report, page 177), ruled that an osteopath might give obstetrical care. This was a construction of section 12 of the Act. This opinion relied on *State v. Wagner* (Nebraska), 297 N.W. 906, hereinafter summarized and also on the Minnesota case of *Stoike v. Wiseman*, 208 N.W. 993.

On page 151 of the same report Opinion No. 51 ruled under the same section 12 that osteopathic physicians were qualified to act as an examining physician in a sanity hearing.

These opinions, it must be noted, do not go so far as to construe the section giving osteopaths the same rights and privileges as physicians and surgeons of other schools of medicine as extending to osteopaths the rights to administer medicines or perform operative surgery. To do so would destroy the distinction between osteopathy and medicine and surgery, a distinction plainly intended by the Legislature in passing one Act for each school of the healing art. All persons treating human ailments must report contagious diseases, must report births and deaths, must preserve professional confidences. They have the right to perform these duties regardless of the school of the healing art to which they belong.



The following summary of some of the many cases in harmony with our views and constituting the overwhelming weight of authority.

A case in which the statute (adopted in 1927) is very similar to our Nevada statute of 1925 is that of *State v. Wagner* (Nebraska Supreme Court 1941), 297 N.W. 906.

In that case the State was denied an injunction to restrain Wagner from engaging in the practice of medicine and operative surgery or publicly professing to be a physician, surgeon or obstetrician. On appeal the judgment was modified in part.

Defendant was licensed as an “osteopathic physician and surgeon” and claiming authority thereunder had performed various operations requiring the use of the knife. He likewise assisted at childbirths, administering anesthetics on occasion.

The question stated by the Court on appeal was whether the Medical Practice Act limited such activities to doctors licensed thereunder, or, alternatively whether the Osteopathy Act licensed such activities. The Court held the answer could be given on appeal as a matter of fact judicially noticed. The Court therefore decided the case, despite the assertions and denials as to how much authority was reserved or conferred by the two statutes, as a matter of common knowledge.

After summarizing the declarations of the inventor of osteopathy, the dictionary definitions, and the conclusions of the courts based on the same foundations, as to what osteopath is and is not, the Court then inquired whether the statutes had altered such accepted meanings. The Court quoted from the Nebraska statute of 1927 on osteopathy, Art. 17, Public Health Laws (Sec. 71-1701 et seq. Comp. St. Nebraska 1929) and also Art. 14 of the Public Health Laws (Comp. St. Nebr. 1929, Sec. 71-1401 et seq.).

The Court concluded that “an osteopathic physician and surgeon is not authorized under the Statutes of Nebraska to engage in the practice of *operative surgery*” (emphasis supplied). The

Court went further and found that an osteopath was authorized to practice obstetrics. Both these conclusions were arrived at in consideration of the statutes, no less than the traditional concepts, and the latter was by reason of Article 24 on Vital Statistics of the Public Health Laws (Comp. St. Nebr. 1929, sec. 71-2401 et seq.) requiring birth certificates to be signed by the “physicians in attendance.”

The argument of the decision of the Court on appeal includes the following excerpts: The well-settled definitions of osteopathy, in the writings of Dr. Andrew Taylor Still, its founder, and in the writings of recognized practitioners, as well as in the dictionaries and the decisions of the courts, all uniformly hold that the system of osteopathy administers no drugs and uses no knife. See *Nelson v. State Board of Health*, 108 Ky. 769, 57 S.W. 501, 50 L.R.A. 383; *State Board of Medical Examiners v. Baudendistel*, 140 A. 886, 6 N.J. Misc. 249; *Harlan v. Alderson*, 55 Cal. App. 263, 203 P. 1014. With these definitions and observations in mind, the licensing statutes must be examined to determine the extent to which this definition has been modified in this state by legislative action. Section 71-1701, Comp. St. 1929, provides: “For the purpose of this article in the following classes of persons shall be deemed to be engaged in the practice of osteopathy: 7. Persons publicly professing to be osteopaths or publicly professing to assume the duties incident to the practice of osteopathy. 2. Persons who treat human ailments by system of the healing art which places the chief emphasis on the structural integrity of the body mechanism as being the most important factor for maining (maintaining) the organism in health.” Section 71-1702, Comp. St. 1929, sets out certain exceptions which are not relevant in this suit.

It should be noted that the Nebraska and Nevada definitions of osteopathy are the same.

Respondent argues that, as the act of 1919 (Comp. St. 1922, sec. 1874) contained the provision that “osteopathic physicians shall perform only such operations in surgery as was fully taught in the school or college of which the applicant is a graduate at the time of his attendance,” it thereby recognizes operative surgery as a branch of osteopathy. This contention is too broad. Much of the difficulty in this class of cases has arisen because of the varied use of the term “surgery.” It originated from the Latin “chirurgia,” meaning “hand work” or, as another writer puts it, “to work with the hand.” See American Illustrated Medical Dictionary, 16th Ed.; *State v. Gleason*, 148 Kan. 1, 79 P.2d 911. This is the meaning attributed to it in all the earlier writings on the subject of osteopathy and accounts for the general usage of the word in designating an osteopath as an osteopathic physician and surgeon. The invasion of the field of medicine and operative surgery as it is generally understood seems to be based on an attempt to broaden the definition of the term “surgery” as formerly used so as to include operative surgery. The field cannot be so extended. The words in the 1919 Act must therefore be construed as referring to operations in surgery consistent with the practice of osteopathy as originally defined, which excludes the practice of operative surgery in its commonly accepted meaning.

We conclude therefore that an osteopathic physician surgeon is not authorized under the statutes of Nebraska to engage in the practice of operative surgery and that the trial court was in error holding to the contrary.

It will be noted that the present law does not specifically require an osteopath to file birth certificates with the department of public welfare, the requirement being that the birth certificate shall be filled out by the physician in attendance. To obtain a license to practice osteopathy, respondent was required to exhibit a diploma issued by a regular school of osteopathy wherein the curriculum included instruction in certain subjects required by statute, one of which was obstetrics. He was also required to pass an examination in the required subjects. While these facts alone would not authorize respondent to engage in the practice of obstetrics.

In the case of *State v. Gleason* (Kan. 1938), 79 P.2d 911, the Attorney General commenced a suit to oust Gleason from the practice of medicine and surgery. The Supreme Court decided the legal questions involved before the trial on the facts. The remedy was authorized by a special law. (Note—The Medical Practice Act as amended in 1949, sec. 25, chapter 169, Stats. 1949, authorizes an injunction suit to restrain the illegal practice of medicine and surgery.)

It was claimed that Gleason, a licensed osteopath since 1915, was not authorized to practice medicine and surgery, but only to practice osteopathy “as the same was taught in legally incorporated colleges of osteopathy of good repute” (G.S. 65 1201).

The defendant claimed that as an osteopath he was authorized to practice medicine, surgery and drug therapy because such was taught as a branch of osteopathy in reputable colleges of osteopathy.

Section 6 of the Kansas Act of 1901 concerning medicine and surgery provided that “all persons who practice osteopathy shall be registered and licensed as doctors of osteopathy, as hereinbefore provided, but they shall not administer drugs or medicine of any kind nor perform operations in surgery.” (This exception is not in the Nevada Act and never was a part thereof, although it is commonly found in the Acts of most other States.)

The Kansas osteopathic statute of 1913 required an examination “as to their qualifications for the practice of osteopathy, in writing, in the subjects of anatomy, physiology, physiological chemistry and toxicology, pathology, diagnosis, hygiene, obstetrics and gynecology, surgery, principles and practice of osteopathy and such other subjects as the board may require.”

The Board was authorized to issue to a successful applicant “a certificate granting him the right to practice osteopathy in the State of Kansas as taught and practiced in the legally incorporated colleges of osteopathy of good repute (G.S. 1935, 65-1201).

The Court recited that section 5 of the early Act required osteopathic physicians to observe all State and municipal regulations for the control of contagious diseases, reporting births and deaths and all matters pertaining to the public health “the same as all schools of medicine” (G.S. 1935, 65-1204).

The Court appointed out that since the Statute of 1901 and the Statute of 1913 one board issued licenses to “practice medicine and surgery” while another board issued licenses to “practice osteopathy.” The Court says:

By these statutes and subsequent amendments thereof, the legislature has clearly recognized a distinct difference between the “practice of medicine and surgery” and the “practice of osteopathy.”

The court then disposed of a point germane to a situation that exists in Nevada.

Counsel for defendant call our attention to the fact that the phrase that those licensed to practice osteopathy “shall not administer drugs or medicines of any kind nor perform operations in surgery,” contained in 1901 statute \* \* \* was omitted in the 1913 statute \* \* \*. They argue that the intentional removal of this restriction on osteopaths \* \* \* indicates a legislative intent to authorize osteopaths to administer drugs and perform operations in surgery without restriction. It seems clear the legislature intentionally omitted the prohibitory phrase contained in the 1901 act from the act of 1913 (Ch. 290), but it does not follow that thereby the legislature intended to confer unrestricted authority on osteopaths to administer drugs and perform operations in surgery. Considering the fact that surgery in its primitive and broadest sense includes adjustment of bones, muscles, ligaments and nerves by manual operation, and that skill in doing so is taught in osteopathic schools and colleges, and occupies a major place in the science or system of osteopathy, and in the practice of osteopathy, the prohibition against osteopaths performing operations in surgery contained in the 1901 act was, at its best, an inaccurately used expression, and should have been omitted for that reason alone. The science or system of osteopathy, generally speaking, strongly opposed the use of drugs as remedial agencies in treating the sick, afflicted, or injured, and osteopathic schools and colleges of good repute contained no course for the study of materia medica; hence; there was no real occasion to prohibit osteopaths from using drugs, since they made no claim or pretence of doing so, nor did they study to qualify themselves for such use. Broadly speaking, theirs was a drugless system of healing. Surgery, as well as obstetrics (Yard v. Gibbons, 94 Kan. 802, 149 P. 422), and each of the other subjects in which osteopaths were required to take an examination, were taught in the osteopathic schools and colleges of good repute, in harmony with the osteopathic theory or system of healing, and not as taught in the medical colleges and universities. So the word “surgery,” as used in this statute, meant, in the main, surgery by manual manipulation. The general use of a knife or other instruments in surgical operations was regarded as unnecessary and opposed to the osteopathic system of treatment. Apparently the legislative intent of the act of 1913 (Ch. 290) was to recognize the system of osteopathy as then taught in its schools and colleges of good repute, and to authorize its practice by those who believed in and conformed to its teachings. Our legislature recognized that there is a broad field for the use of such a system of the healing art. If, as is suggested by counsel for defendant, osteopathic schools and colleges of good repute, and those who practice osteopathy, have abandoned their fundamental theory that surgery, in the main

should be confined to manipulation without the use of the knife and other instruments, that fact never has been recognized by the legislature or the courts of this state.

The court then disposes of another contention that might be urged in this State, that is, that by declaring it did not apply to osteopaths the medical Act set no limitation on practice of medicine by osteopaths. The Court held:

This contention cannot be sustained. It would render ludicrous and nugatory the work of the legislature in treating the practice of medicine and surgery as one thing and the practice of osteopathy as another, and in establishing two state boards, one of medical registration and examination and the other of osteopathic registration and examination, each authorized to issue certificates to practice for the respectively different purposes. Defendant argues that in the interpretation of statutes all the language used in the statute should be given full force and effect. That may be stated as a general rule, but a more important rule is that in determining the legislative intent in enacting a statute the general purpose of the legislature, as shown by the statute as a whole, is of primary importance. Words, phrases and figures used in the statutes should be construed in harmony with that general purpose. If, standing alone, a phrase will render that general purpose nugatory, it should be disregarded, if need be, in order to give purpose to the legislative enactment.

#### **[discontiguous text]**

State Board of Examiners in Optometry, 190 Ga. 751, 10 S.E. 2d 740; State v. Sawyer, 36 Idaho 814, 214 P. 222; State v. Stoddard, 215 Iowa 534, 245 N.W. 273, 86 A.L.R. 616; State ex rel.

Wheat v. Moore, 154 Kan. 193, 117 P.2d 598; State v. Johnson, 84 Kan. 411, 114 P.390, 41 L.R.A., N.S., 539; State v. Hopkins, 54 Mont. 52, 166 P. 304, Ann. Cas. 1918D, 956; State ex rel. Johnson v. Wagner, 139 Neb. 471, 297 N.W. 906; State v. Chase, 76 N.H. 553, 86 A. 144; State v. Bonham, 93 Wash. 489, 161 P. 377, L.R.A. 1917D, 996; Arnold v. Schmidt, 155 Wis. 55, 143 N.W. 1055. The osteopath “heals by means of a system of rubbing and kneading the body, applying hot or cold baths, and prescribing diet and exercise for the treatment, relief, and cure of bodily infirmity or disease, without the use of medicine, drugs, or surgery.” 21 R.C.L.,

Physicians and Surgeons, sec. 2. See, also, State v. McKnight, supra.

The article on Physicians and Surgeons, 41 Am. Jur. sec. 2 and 26 summarizes on page 134 the great weight of authority in saying:

To illustrate, osteopathy has been defined in rather widely varying terms but all of the definitions agree in substance that it is a system of treatment of certain parts and tissues of the body by manipulations with the hands, without the use of medicine, drugs or surgery.

Citing—State v. Hopkins (Mont.), 166 P. 304; Keiningham v. Blake (Md.), 109 A. 65, 98 A.S.R. 747.

Section 26, on page 155, pays particular attention to osteopaths. It is here said:

It is not infrequently provided by statute and commonly held by courts that a license to practice osteopathy does not give the holder any right or authority to prescribe or give drugs or any internal curative medicine or perform surgical operations.

Citing—*Re Randel*, 85 N.E. 1067; Note: 86 A.L.R. 626; *State v. Bonham* (Wash.), 161 P. 377.

It is to be noted that the definition of osteopathy in section 1 of the Nevada law (Section 4990, N.C.L. 1929) is the same as that found in the Nebraska statute, which definition is very thoroughly analyzed and the limits of osteopathy defined in the case of *State v. Wagner*, *supra*.

Likewise, the standards of education, section 7 coupled with the supplemental definition of school or college in section 8 of the Nevada law (Sections 4996-4997, N.C.L. 1929) are similar to those found in other States. It is to be noted that section 8 of the Nevada law significantly omits materia medica and therapeutics. Courts have repeatedly said that one must know what he professes to understand and practice, but is not necessarily permitted to practice all that has been taught to him, except that he may practice whatever is properly osteopathy.

Section 12 places osteopathic physicians under the general obligations to observe the health and vital statistics laws and the reports are treated with equal credence as those of other practitioners.

Osteopathic physicians when licensed shall, with respect to the treatment of cases and the holding of offices in public institutions have the same rights as physicians and surgeons of other schools of medicine. This is the last sentence in the section and is preceded by a sentence which reads, "Osteopathic physicians and surgeons licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine."

This additional sentence in section 12, followed by its substantial repetition and qualified by a definite limitation, cannot be regarded as setting up two different sciences of the healing arts and giving to each the right to do exactly the same thing. This sentence, we believe, is definitely limited by the sentence following it and when read in connection with the entire Act cannot be held to wreck the distinction pervading the law between the practice of medicine and surgery, as historically known, and the practice of the new healing art which from the beginning has stressed the claim that it is different.

We conclude that an osteopath licensed to practice in the State of Nevada must properly identify himself not as a physician and surgeon, but as an osteopathic physician and surgeon, and we do not believe that such osteopathic physicians and surgeons are entitled to practice medicine and surgery as defined in the Nevada statutes for Nevada medical doctors.

Very truly yours,

ALAN BIBLE, *Attorney General*.

**765. Nevada State Police—Private Detectives—Funds at Disposal of—Superintendent—Balance Does Not Revert.**

CARSON CITY, June 10, 1949.

EDWIN E. GILY, *Superintendent, Nevada State Police, Carson City, Nevada*.

DEAR MR. GILY: This will acknowledge receipt of your letter dated June 6, 1949, received in this office June 7, 1949.

You request an opinion with reference to chapter 85, Statutes of 1947, the same being the Act to provide for the licensing and regulation of private detectives, and the amendment of the Act by chapter 113, Statutes of 1949. You wish to know if the balance of funds accumulated from fees collected for the issuing of detective licenses revert to the General Fund at the end of the fiscal

year or remain in the fund as a balance for the next fiscal year.

We are of the opinion that the money placed in the State Treasury to the credit of the Nevada State Police Private Detective Agency Contingent Fund is at the disposal of the Superintendent of the Nevada State Police for the administration of the Act, and any balance at the end of the fiscal year does not revert to the General Fund. It is carried over into the next fiscal year for the administration of the Act.

Section 22 of chapter 85, Statutes of 1947, provides: "all receipts under this act shall be reported at the beginning of each month, for the month preceding, to the state controller, and the entire amount received shall be paid into the state treasury to the credit of the Nevada state police private detective agency contingent fund. This fund shall be used by the superintendent of the Nevada state police for the administration of this act."

Chapter 113, Statutes of 1949, amends sections 3 and 6 of the Act, but does not change section 22, quoted above.

See Attorney General's Opinion No. A-15, Biennial Report for 1938-1940, in relation to an appropriation made for the State Board of Publicity which was subject to the control of such Board and no time limitation appeared in the statute. It was held that the same should be at the disposal of the Board until expended, unless otherwise directed by the Legislature.

Expenditure requirements will be subject to section 11 and other sections of chapter 299, Statutes of 1949, the Act providing a State budget and creating the office of Director of the Budget, in effect from and after July 1, 1949.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**766. Counties—Church Property—No Exemption From Payment of Court Filing Fees.**

CARSON CITY, June 14, 1949.

HONORABLE ROBERT E. JONES, *District Attorney, Las Vegas, Nevada*.

Attention: Hon. A.W. Ham, Jr., Deputy District Attorney.

DEAR MR. JONES: Reference is hereby made to your letter of June 10, received in this office June 13, 1949, wherein you advised that in order for church property to be conveyed, sold, mortgaged, etc., it is necessary for the trustees of the church to file a petition in the District Court for approval of such sale. A controversy has arisen upon the amount of the fee to be charged for the filing of such action. You inquire whether there is any exemption from payment of court filing fees for churches who file such a petition.

We have examined the law very carefully and beg to advise that we find no statutory exemption whereby church trustees required to file the petition in question could be exempted clerks' fees or court filing fees.

So far as we are able to ascertain, chapter 18 of Statutes of 1933 contains the clerk's fees for Clark County, and we find no exemption of the kind in question here. It is clear from such statute that the filing of the petition for permission to sell real property on the part of church trustees falls within the provision of the foregoing statute reading as follows:

On commencement of any action or proceeding in the District Court, \* \* \*

except probate or guardianship proceedings, to be paid by the party commencing such action or proceeding \* \* \* seventeen dollars, said fee to be paid in addition to the court fee now provided by law.

We assume from your letter that the trustees mentioned therein are trustees of a religious association as provided in sections 3215-3222, N.C.L. 1929, and that the proceedings in question fall within the provision of section 3219 as amended at 1949 Statutes, page 55. On the other hand, if it is not a religious association or corporation but solely a church entity without being incorporated, then, of course, the trustees would be in the same position as the trustees under the foregoing sections and unless there is a specific statutory provision exempting the payment of clerk's fees or court fees, then such exemption does not exist.

There is a religious corporation Act known as the Corporation Sole Act, as found at sections 3223-3230, N.C.L. 1929. Under this Act it is provided in section 3226, as amended at 1941 Statutes, page 91, that such a corporation sole could not only acquire property but was given the power to grant, sell, convey, rent or otherwise dispose the same. There is no provision requiring filing of a petition in the court. According to your letter, however, this Act has no application.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**767. Public Service Commission—Public Liability Act—No Appropriation for Purpose of Administering.**

CARSON CITY, June 15, 1949.

PUBLIC SERVICE COMMISSION OF NEVADA, *Carson City, Nevada.*

GENTLEMEN: Pursuant to your recent request for the opinion of this office as to whether there is any appropriation of public moneys whereby the Public Service Commission can administer chapter 127, Statutes of 1949, the same being the Public Liability Act, we herewith submit the following.

OPINION

Chapter 127, Statutes of 1949, constitutes the Public Service Commission the commissioner charged with the duty of administering such chapter, which we briefly denominate Public Liability Insurance Act as related to accidents caused by the operation of motor vehicles on the public highways. The Act is quite comprehensive in its provisions, and no doubt entails considerable work on the part of the Public Service Commission. The question is whether there is any appropriation of money that the Public Service Commission can use in the administration of the Act.

The Act itself contains no appropriation. Neither does the general appropriation bill contain any appropriation relative to the Act in question. The general appropriation bill contains an appropriation for the Public Service Commission in the total amount of \$45,816. Section 16, chapter 125, Statutes of 1949. In addition thereto, we find, in section 12 of the appropriation bill, an item of \$1,400 for necessary printing of the Public Service Commission. Such items

constitute the expressly stated appropriations for the Public Service Commission.

Chapter 133 of the 1949 Statutes is the Act consolidating the Motor Vehicle Registration Act, the Chauffeurs and Drivers Licensing Act, and the Motor Carriers Licensing act, and that part of the State Highway Patrol under the supervision of the Superintendent of the State Police. The Public Service Commission is charged with the duty of administering all of these Acts, and in such Act the Legislature provided an appropriation of \$425,000, plus the revenue derived from collection of fees for the registration and license of motor vehicles. However, it is clear from the reading of chapter 133 that the appropriation therein made, particularly as it was made from the Highway Fund, was intended for the administration of the various Acts so consolidated as relating to the construction, repair and maintenance of the operation of State highways, a great portion of which funds are derived from the gasoline and fuel oil tax and which funds under our constitutional provision cannot be diverted to any purpose save and except such administrative costs as are actually incurred in the construction, operation and repair of the highways as above stated.

The Public Liability Insurance Act on the other hand, in our opinion, has no relation whatever to the construction and operation of highways. In brief, such Act is simply an Act providing for the security of the payment of judgments that may be awarded due to injury and damage occasioned by motor vehicle accidents. We must conclude in this respect that none of the appropriation made under the consolidation Act can be used for administrative purposes of the Public Liability Insurance Act.

The question then arises from what source will be the Public Service Commission secure funds for the administration of the Act in question. In our opinion the brief answer to such question is that it will be incumbent upon the Public Service Commission to administer such Act to the best of its ability within the appropriation provided for the Commission in the general appropriation bill. There is no other source of funds for the administration of the Act.

The Public Service Commission is in this position: That it is a public administrative body upon which the Legislature has cast additional duties and burdens and has seen fit not to provide additional money for the carrying out of such duties and burdens. Yet the rule is as stated in 43 American Jurisprudence, page 80, section 264. Such rule in brief is this: "one who accepts a public office does so cum onere, and is considered as accepting its burdens and obligations with its benefits. He thereby subjects himself to all constitutional and legislative provisions relating thereto and undertakes to perform all the duties of the office, and while he remains in such office the public has the right to demand that he perform such duties. If, during his incumbency, the duties of his office are increased, he must perform such duties without additional compensation, unless extra compensation is provided by competent authority."

The 1949 Legislature increased the number of working hours for each of the State offices that had formerly been working 33 hours per week so as to require them to work 40 hours per week. Chapter 294, page 597, 1949 Statutes. It is likewise to be noted that compensation was proportionately increased to take care of the additional number of working hours imposed by the Legislature. It may be that the Legislature felt that the Public Service commission as presently constituted with the increased number of hours could handle the additional burden placed upon it in the administering of Public Liability Insurance Act.

It is the settled law in this State, following our constitutional provision, that no money can be withdrawn from the State Treasury except pursuant to an appropriation made by law. In the instant matter it is our opinion that no appropriation, even by inference, has been made for the



purpose of administering the Public Liability Insurance Act, and, as stated above, it will be necessary for the Public Service Commission to administer such Act to the best of its ability within the appropriation provided for the commission in the general appropriation bill.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**768. Agriculture—State Board of Stock Commissioners—Furnishing of Bonds—  
Interpretation of Section 3828, N.C.L. 1929, as Amended.**

CARSON CITY, June 15, 1949.

DR. WARREN B. EARL, *Director of Animal Industry, State Department of Agriculture, Cladianos Building, Reno, Nevada.*

DEAR DR. EARL: Pursuant to your request of this date, we are furnishing herewith our opinion as to whether the 1949 amendment to section 3828, Nevada Compiled Laws 1929, of the Act creating the State Board of Stock Commissioners, as found in chapter 168 of the 1949 Statutes, requires the present executive officer, director of the Division of Animal Industry, and the director of the Division of Plant Industry to furnish a bond conditioned upon the faithful performance of their duties, in view of the fact that the present executive officer and directors have been or were appointed long prior to the adoption of the amendment in question.

OPINION

Subdivision E of section 3 as amending section 3828, N.C.L. 1929, provides:

Any executive officer or director appointed under the provisions of this section, shall before entering on his duties file a bond as provided by law, in the sum of five thousand (\$5,000), conditional upon the faithful performance of his duties.

This provisions may be subject to two different constructions, one being that an officer already in office under a prior appointment would not be required to furnish such a bond until his reappointment. The other construction, which we think is the correct one is that it was and is the intent of the Legislature that from and after the effective date of the Act, which will be July 1, 1949, the officers therein mentioned should furnish the bond so required. In our opinion this latter construction is the safest and will be a better safeguard for the incumbent officers, and, certainly no criticism can be leveled at any person if the bond is given at this time.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**769. Real Estate—Licenses May Be Issued Without Examination to Persons Previously  
Licensed as Real Estate Salesmen.**

CARSON CITY, June 17, 1959.

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 June 14, 1949, wherein you request the opinion of this office as to whether amendment to section 14 of the Real Estate Brokers Act, as found in chapter 204, page 439, Statutes of 1949, means that wholly unlicensed persons, wholly unlicensed persons, who have been actively engaged in the real estate business communities within the State of less than 3,000 population, may be issued real estate brokers' or salesmen's licenses without written examination, or whether such amendment would permit the granting of such licenses to persons who have been licensed heretofore in communities of less than 3,000 population prior to the enactment of such amendment. You inquire whether, in our opinion, the Board should issue licenses without examination to persons previously licensed as real estate salesmen, or, whether the Board should only grant brokers' licenses without examination to persons who were previously unlicensed persons.

### OPINION

The 1949 amendment in question reads as follows:

Any unlicensed person who has been actively engaged in the real estate business and performing the acts defined in sections 67 and 8 of this act at a definite place of business in an incorporated city or unincorporated town, or any other community or place within the state having a population of less than 3,000 according to the official census of 1940, for a period of at least one year within the three-year period prior to June 1, 1949, and any person who has heretofore been issued a real estate broker's license which has not been revoked or canceled for any of the causes stated in this act, but which is not now in effect, may secure a license as a real estate broker or real estate salesman without written examination; provided, such person shall make proper application for such a license on or before June 1, 1949, pursuant to and in accordance with the provisions of sections 9, 10, 11, 12 and 13, and otherwise comply with all the provisions and requirements of this act.

Strictly speaking, a strict construction of the foregoing statute would require its application to persons who prior to the adoption of the amendment had been wholly unlicensed as real estate operators, either brokers or salesmen, with the exception that any person who has heretofore been issued a real estate broker's license, which has not been revoked or canceled for any of the causes stated in the law, but which is not now in effect, may secure a license as a real estate broker or real estate salesman without written examination. As to this latter expression, we are of the opinion that such language means that a real estate broker, who had heretofore acquired a license which has not been revoked but now in effect, could either secure a broker's license or a salesman's license without written examination.

Coming now to the main question involved as to whether unlicensed persons in communities of less than 3,000 population can secure licenses under the terms of the amendment without written examination, we are faced with one difficulty because of the ambiguous language contained in the Act, that is to say, the Act says any unlicensed persons who has been actively engaged in the real estate business and performing the acts defined in sections 6 and 8 of the Act shrouds the matter in doubt, if a strict construction thereof is had for the simple reason that

section 6 relates solely to the composition of the Board or Commission and defines no acts of a real estate broker or salesman. The same can be said of section 8 of the Act except that such section simply says that licenses shall be granted only to persons bearing a good reputation for honesty, etc., and that the applicant shall be of the age of twenty-one years or over, but does not define the acts of a real estate broker or salesman. So, if we were to confine our opinion to a strict construction of the amendment, it might be that we would have to confine it to the members of the Board or Commission, which certainly is not nor was not the intent of the Legislature. We, therefore, conclude that such unlicensed persons are eligible to secure licenses under the terms of the amendment without taking a written examination.

You state in your letter that a small number of persons have been licensed as real estate salesmen in communities having a population of less than 3,000 persons and that a number of such persons now seek to secure real estate broker's licenses without examination under the 1949 amendment. Prior to the 1949 amendment the Real Estate Brokers Act was not made applicable to communities of less than 3,000 population and if any real estate brokers or salesmen were licensed under the old Act, it was a voluntary act on their part, but at the same time, no doubt, brought them within the provisions of the Act under the administration of the Real Estate Board.

We think that such is the proper construction to be placed upon the acts of such persons. If such persons were properly licensed, no doubt they were required to pass the necessary oral and written examination provided in the Act and we think, as to such persons today, they would be entitled if in good standing to a renewal of their licenses under the 1949 Act without examination, save and except, that if in the discretion of the Commission it was deemed necessary that real estate salesmen should pass the necessary test to become real estate brokers, the Commission would be wholly within its power under the statute to require such an examination, either oral or in writing.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**770. Public Schools—State Superintendent Empowered to Make All Needful Contracts and Agreements With Schools for the Blind.**

CARSON CITY, June 18, 1949.

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

DEAR MISS BRAY: This will acknowledge receipt of your letter dated June 14, 1949, received in this office June 15, 1949.

A summary of the facts stated in your letter, and upon which you request advice as to your authority to take action, is as follows: You anticipate that the County Commissioners of Mineral County will make application to you, under the provisions of section 2311, N.C.L. 1929, to place a child who is totally blind and now of school age in an institution for the blind. The parents of the child who are residents of Mineral County are unable to pay for the support and education of the child.

Before reaching school age the child was placed in the Nursery School for Visually

Handicapped Children in Los Angeles and cared for at no expense to the parents or to this State. For the past year the child has resided at the Nursery School and City School for the Blind. She has outgrown the Nursery School and may now attend the city school, but there are no facilities at this school to room and board the child. The education at this school is without charge, but provision must be made for the placement and payment for the care and maintenance of the child outside the school.

The question presented concerns the authority of the Superintendent of Public Instruction to contract with the Los Angeles City School for the Blind, with the assistance of the Nursery School and Child Welfare Service, to pay State funds for the care and maintenance of the child outside the school while receiving education at the school.

We are of the opinion that the Superintendent of Public Instruction is authorized under the statute to make such an agreement, and to pay the expenses out of the State fund appropriated for this purpose.

Section 2310, N.C.L. 1929, as amended by chapter 33, Statutes of 1943, provides: "The superintendent of public instruction is authorized to make arrangements with the directors of any institution for the deaf and dumb and the blind in any state of the United States possessing any such institution for the admission, support, education, and care of the deaf and dumb and the blind of this state, and for this purpose is hereby empowered to make all needful contracts and agreements to carry out the provisions of this act."

One of the specific purposes of the Act is to provide for the education, support and care of children who are blind and capable of receiving education when the parents or guardians are unable to pay for the same. In order to carry out this purpose, the Superintendent of Public Instruction is empowered to make all needful contracts and agreements with the directors of any institution in any State.

Sections 2 and 4 of the Act define the conditions precedent to bring such blind person within the terms of the Act, and when placed in an institution the cost and expenses of maintenances shall be paid by the State.

The terms "support," "maintenance," and "care," as used in the statute are of the same import as "education." The term "institution," when considered with the purposes of the Act, is not used in a technical sense, and should be given the broader meaning as that of a process of instituting education, care and maintenance for the person, whether or not it is confined to one establishment for all the purposes. The Act is a remedial statute. The rule of construction of such a statute, as declared in the case of *Tobin v. Gartiez*, [44 Nev. 179](#), is that a term which is not technical in its meaning should, especially when used in a remedial statute, be liberally construed in favor of the parties obviously entitled to its protection.

The power of the Superintendent of Public Instruction to make all needful contracts and agreements to carry out the provisions of the Act is ample to authorize an agreement with the Los Angeles City School for the Blind as proposed in your inquiry, and to pay the necessary expenses out of the State fund appropriated for such purpose.

Very truly yours,

ALAN BIBLE, *Attorney General*.

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

**771. Veterans—Deputy Veterans' Service Commissioner May Be Continued in Office Irrespective of Whether Chief Office is Filled.**

CARSON CITY, June 18, 1949.

HONORABLE VAIL PITTMAN, *Governor of Nevada, Carson City, Nevada.*

DEAR GOVERNOR PITTMAN: Reference is hereby made to your recent verbal request to this office as to whether the Deputy Veterans' Service Commissioner, whose headquarters is in Las Vegas, can be continued in office, in view of the fact that the Veterans' Service Commissioner has resigned and there is a vacancy in that particular office.

OPINION

An examination of the 1947 law, the same being chapter 252, Statutes of 1947, discloses that while the Legislature has designated a Veterans' Service Commissioner and a Deputy Veterans' Service Commissioner, yet, it seems to us to be clear that they are two separate and distinct offices in that the chief service commissioner apparently has no control whatever over the deputy. The chief commissioner does not appoint the deputy, as such deputy is appointed by the Governor. Each is assigned the same duties in the statute. However, it is clearly apparent that the so-called deputy commissioner has a district composed of Clark, Lincoln, Nye and Esmeralda Counties and maintains his office at Las Vegas. The chief commissioner has all the remaining State as his district and maintains his office in the same city as the State branch office of the U.S. Veterans' Bureau maintains its State administrative bureau, which, in this case, is Reno.

It is our opinion that the Deputy Veterans' Service Commissioner can still be continued in office, irrespective of whether the chief office is filled.

Very truly yours,

ALAN BIBLE, *Attorney General.*

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

**OPINION NO. 49-772 PUBLIC EMPLOYEES RETIREMENT SYSTEM—SCHOOL TEACHERS—Refund of Contributions.**

Carson City, July 1, 1949

Miss Mildred Bray, Secretary, Public School Teachers Retirement Salary Fund Board, Carson City, Nevada

Attention: J. R. Warren

Dear Miss Bray:

This will acknowledge receipt of your letter of June 6, 1949, in which you request our opinion as to the following questions:

1. Is a teacher who is granted retirement under the Teachers Retirement System at the end of the 1948-49 school year entitled to a refund of contributions?

The answer to this inquiry is in the negative.

Subsection 2(a) of section 9(2), chapter 124, Statutes of 1949, states: “all moneys paid in by the members of the previously existing system shall be restored to them, *unless their benefits have already accrued and they are receiving a retirement salary under the previous act.*” (Italics added.)

This section, in our opinion, is sufficiently clear and is subject to only one interpretation. If a teacher has been granted retirement under the Teachers Retirement System at the end of 1948-1949, he is not entitled to a refund of contributions.

2. Is a teacher who has received a refund contributions eligible to retire under the Teachers Retirement System before July 1, 1950?

The answer to this inquiry is also in the negative; provided that we believe that the teacher may repay the contributions and thus make himself eligible to retire under the Teacher Retirement System.

The Act is very clear in section 9(2), subsection 2(a), stating that teachers may receive back the contributions paid under the teachers system. This obviously assumes they are not retiring under this system, but intend to take advantage of the State system. If they do receive a refund of contributions from the teachers’ system, it therefore follows that they cannot retire under the teachers’ system.

However, it is our opinion that a teacher who has received a refund of contributions from the teachers’ system may repay the contributions and then be eligible to retire under the teachers’ system.

3. Could a teacher who has received a refund of contributions return the refund and thus be eligible to retirement benefits before July 1, 1950?

The answer to this inquiry is in the affirmative and is adequately covered in paragraph 3 of question 2.

There is nothing in the Act expressly covering this situation, but section 9(2), subsection 2(a), states that all moneys paid in shall be restored to them unless their benefits have already accrued and they are receiving a retirement salary under the present Act.

If teachers receive a refund of contributions and subsequently decide to retire and are eligible, it is our opinion that they may repay the refund and retire under the teachers’ system.

Very truly yours,

ALAN BIBLE  
Attorney General

By Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-773 PUBLIC EMPLOYEES RETIREMENT SYSTEM—Teachers 55**  
Years of Age With 30 Years Service.

Carson City, July 11, 1949

Mr. Kerwin L. Foley, Executive Secretary, Public Employees Retirement Board, Carson City,  
Nevada

Dear Mr. Foley:

This will acknowledge receipt of your letter of July 6, received in this office July 7, 1949, in which you ask our assistance in determining the following question:

Mr. Chester V. Davis, superintendent of the Ely schools, has completed 34 years of teaching in Nevada schools as of June 1949. Under the Public Schools Teachers' Retirement System, as an original member, he is eligible for retirement at \$50 a month at any time he chooses to accept retirement. There is no question as to his eligibility for such retirement at any time until July 1, 1950, when the Public Employees Retirement System will begin paying benefits to eligible teachers. He is 55 years of age as of July 3, 1949. Under the Public Employees Retirement System, retirement at the age 55 will be permitted employees with thirty or more years of service after July 1, 1953.

### QUESTION

If Mr. Davis chooses to retire after July 1, 1950, and prior to July 1, 1953, will he be eligible to receive the \$50 a month allowance to which he is now entitled, until July 1, 1953, when he will be eligible for the payments authorized at that time under the Public Employees system?

This office has assured Mr. Davis that, in its opinion, he would be so entitled in view of the fact that benefits conferred by the teachers' system must be preserved to the members thereof.

We agree with the interpretation which you have placed upon Mr. Davis' question, and this may be considered as the official opinion of this office to that effect.

Very truly yours,

ALAN BIBLE  
Attorney General

cc: Mr. Chester V. Davis, Superintendent, White Pine County High Schools, Ely, Nevada.

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**OPINION NO. 49-774 HIGHWAY DEPARTMENT, STATE**—Adjustments of Municipal-Owned Water System Made Necessary By Reconstruction of Highway Are Obligation of Highway Department.

Carson City, July 6, 1949

Hon. W.T. Holcomb, State Highway Engineer, Carson City, Nevada

Attention: Geo. R. Egan, Engineer of Surveys and Design

Dear Sir:

This will acknowledge receipt of your letter dated June 23, 1949, received in this office June 24, 1949.

You request advice as to whether the costs of adjustments of minor parts of the municipal-owned water system on Idaho Street in Elko, made necessary by the reconstruction of U.S. Highway 40, are an obligation of the Highway Department or the City of Elko.

A summary of the facts is that the water system was established about 1885. It was purchased by the City and is owned and operated under provisions of the city charter. The City was

incorporated under the Act approved March 14, 1917. You enclose an except from the regulations for carrying into effect the provisions of the Federal Aid Highway Act concerning construction and contracts, which requires that the Highway Department make a formal finding as to the extent that a public utility is required to move or adjust its facilities at its own expense, or is relieved of that obligation by law or otherwise.

Several opinions have been given by this office covering particular facts concerning the responsibility to pay the costs of adjustments made necessary by the reconstruction of highways. As the City of Elko and the Highway Department have a joint right-of-way over the street in question, Attorney General's Opinion No. 562, Biennial Report 1946-1948, should apply to the present question.

We are, therefore, of the opinion that the adjustments of the parts of the city-owned water distribution system required to be made in the reconstruction of the highway on Idaho Street in Elko are an obligation of the Highway Department.

The opinion rendered Mr. Holcomb on January 20, 1948, was based up on the facts surrounding the removal of the lane irrigation ditch in the construction of the Federal Aid Secondary Road—Holcomb-Huffaker Lane. The easement in that case had ripened into such an easement that at the time in question the State could not well question such easement and the right to its use. It was held that the Department of Highways had the legal right to remove the lane ditch and to pay the expenses of such moving.

Very truly yours,

ALAN BIBLE  
Attorney General

By GEORGE P. ANNAND  
Deputy Attorney General

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**OPINION NO. 49-775 TAXATION**—Property in Transit Through State in Nevada Warehouse Exempt From Taxation.

Carson City, July 12, 1949

Hon. Harold O. Taber, District Attorney, Washoe County, Reno, Nevada

Dear Mr. Taber:

Receipt is hereby acknowledged of your letter of June 29, 1949, received in this office June 30, 1949, wherein you request the opinion of this office upon certain questions propounded to you by Assessor Frank Campbell of Washoe County relating to the application of chapter 77, Statutes of 1949, which statute purports to be an Act relating to the revenues of the State of Nevada and defining personal property in transit through the State as acquiring a no situs for the purpose of taxation. The questions propounded are as follows:

- (1) The meaning of the language "also outside the State of Nevada" as found in Section 30 of said act.
- (2) Whether, if a carload or smaller shipment of goods or merchandise is shipped into Nevada for storage and if the shipment is broken and a portion is shipped to one or more destinations, the owners will lose their right to the status of no situs for taxation on the balance of the shipment.
- (3) Whether a mill company, shipping lumber into Reno for processing window



frames and then shipping the frames east where the glass is put in, comes under the no situs for the purpose of taxation.

(4) If a carload or lesser shipment of goods is shipped from California to Nevada for storage and later all or a portion is shipped back to California, would the owner lose his no situs status?

### OPINION

We think the reading of the statute in question discloses that its purpose is to enable a nonresident owner of personal property to ship the same into the State of Nevada for the purpose of storage in a warehouse within this State and thereafter to ship such personal property to points without the State of Nevada without being required to pay the personal property tax upon such personal property so long as it remains in the warehouse and not sold or disposed of to any person or persons or points within the State of Nevada. We think it is clear from the language of the statute that a Nevada owner of such property, shipping the same into Nevada and storing the same in a warehouse, will not be enabled thereby to escape the personal property taxation of this State for the reason, we think, in such a case the property would then be within the State of Nevada and commingled with the other property within the State of Nevada and thereby subject to taxation.

Answering Query Number (1)—We think the language “also outside the State of Nevada” is to be read in connection with the language immediately preceding it in section 3, that is to say, the language reading, “which was consigned to a warehouse within the State of Nevada from outside the State of Nevada for storage or assembly in transit to final destination, whether specified when transportation begins or afterwards, also outside the State of Nevada.”

This language, we think, means that if the property so stored in a warehouse in Nevada without being at that time specifically designated to a point outside of Nevada may thereafter be so designated to be shipped outside the State, but not to points within the State.

Answering Query Number (2)—We think the answer to this query is that if the balance of the shipment remaining in the warehouse is not so broken into its component parts as to show that the original shipment thereof has been changed after arriving in the warehouse, such balance would not lose its right of no situs for taxation. Otherwise, the property would acquire a situs for taxation by reason of its character being changed from its status in the original package as originally stored in the warehouse.

Answering Query Number (3)—The rule with respect to the processing of personal property after shipment into the State is well stated in 51 Am. Jur. 470, section 455, as follows:

Property brought from another state into a state for the purpose of subjecting the same to a manufacturing process in such state, preparatory to its being shipped to markets or customers without the state, is not deemed in transit so as to prevent acquisition by it of a taxable situs in the state where the manufacturing process takes place.

*See, also, Standard Oil Company v. Combs*, 96 Indiana 179; 49 Am. Rep. 156; Anno. 110 A.L.R. 726.

Answering Query No. (4)—So long as the shipper from California does not dispose of his goods in the State of Nevada or consign them to a point in the State of Nevada, we are of the opinion that if they are shipped back into California, that fact in itself would not cause the owner to lose his no situs status.

The 1949 statute, in effect, establishes an exemption from taxation with respect to personal property which for a period of time is actually within the State of Nevada. The rule governing construction of statutes granting exemptions is that they are to be strictly construed and the person claiming the exemption must point to a statute which clearly provides an exemption from taxation. This rule has been followed by this office for many years and is well stated in 51 Am.

Jur. 526, section 524, and also section 527.

Very truly yours,

ALAN BIBLE  
*Attorney General*

By W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-776 CORPORATIONS**—Secretary of State has no power to refuse to qualify foreign corporation on ground that name is identical with domestic corporation doing business in state, vice versa—does have power to refuse domestic corporations by reason of similarity of names.

Carson City, July 14, 1949

Hon. John Koontz, Secretary of State, Carson City, Nevada

Dear Mr. Koontz:

On July 11, 1949, you addressed a letter to this office requesting an opinion upon the following queries:

(1) Whether the Secretary of State has the power, under the corporation law, to refuse to qualify a foreign corporation desiring to enter this state upon the ground that its name is identical with the name of a domestic corporation already in existence;

(2) Whether the Secretary of State has the power, under the corporation law, to reject articles of incorporation of a domestic corporation upon the ground that its name is identical with a foreign corporation then qualified to do business in this State.

### OPINION

It is well settled under the law of this State that the Secretary of State is purely a ministerial officer insofar as corporations are concerned and that, as a ministerial officer, he can exercise only such powers as are specifically granted in the law. Unless the law relating to corporations provides the power in the Secretary of State to reject articles of incorporation and refuse to qualify foreign corporations upon the ground of the similarity of names thereof, then the Secretary of State has no such power.

*State v. Brodigan*, [44 Nev. 212](#).

The Act regulating and prescribing the manner of qualification of foreign corporations contains no provisions relative to the name or the use of the name of a foreign corporation.

Secs. 1841-1843, N.C.L. 1929, as amended at 1949 Stats. 503.

Does the General Corporation Law of 1925 contain provisions sufficient to warrant the Secretary of State in refusing to qualify a foreign corporation or to reject articles of incorporation of a domestic corporation upon the ground of identical names? We are of the opinion that such statute does not provide such power for the Secretary of State.

Section 1 of the 1925 Act, being now section 1600, N.C.L. 1929, as amended at 1945 Statutes 196, expressly provides that "The provisions of this act shall apply to corporations hereafter

organized in this state, except such corporations as are expressly excluded by the provisions of this act.”

Section 4 of the Act, being section 1603, 1929 N.C.L., 1941 Supp., as amended at 1949 Statutes 158, provides that the name chosen by corporation proposing to incorporate under the statute shall be such as to distinguish it from any other formed or incorporated in this State. Nowhere in such section, nor anywhere in the Act, is the Secretary of State expressly directed to apply such language to a foreign corporation seeking to enter this State.

A case in point is *Home Life Insurance Company v. Home Assurance Company*, 69 N.W. 653. The Michigan statute provided that “corporations organized in this state shall not take any name in use by any other organization of this state, or so closely resembling such name as to mislead the public to its identity.” The Court held that a foreign corporation that had carried on business in the State for several years was held not entitled to relief against the adoption of a name similar to its name by a newly formed domestic corporation upon the ground that a foreign corporation was not an organization of the State within the meaning of the statute.

We think the reasoning in the insurance company case is pertinent here in view of the language of section 1 of the 1925 Corporation Act and that by reason thereof the Secretary of State’s ministerial powers are limited to those matters expressly set forth in section 4 of the act and which said section, in our opinion, does not provide the power in the Secretary of State to refuse to qualify a foreign corporation upon the ground that its name is identical with that of a domestic corporation and/or that he has no power to reject articles of incorporation of a proposed domestic corporation qualified to do business in Nevada.

We have examined the general law on this question very carefully, including long annotations in 66 A.L.R., beginning at page 948, and 115 A.L.R., beginning at page 1241, and find from such cases that unless it clearly appears in the corporation law of a State that the corporation officer or Secretary of State is expressly vested with the power to pass upon the identity of names between domestic corporations and foreign corporations he has no such power.

It may be that the similarity or identity of names between foreign corporations and domestic corporations may lead to confusion and also to the possible misleading of the public, still, if it is desired to vest the power in the Secretary of State to pass upon such questions, then we are of the opinion that that will require legislative action.

However, the failure of the Legislature to vest such power in the Secretary of State does not leave corporations without remedies. The books are full of cases whereby suits for injunction were brought for the very purpose of preventing one corporation from using the same name as another corporation both as to domestic concerns and foreign corporations.

We conclude that the Secretary of State has the power to refuse to file articles of incorporation of proposed domestic corporations by reason of similarity of the names thereof.

Very truly yours,

ALAN BIBLE  
Attorney General

By W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-777 FISH AND GAME**—Persons over 60 years and resident Indians required to purchase deer tags.

Carson City, July 15, 1949

Fish And Game Commission, State of Nevada, Post Office Box 678, Reno, Nevada

Gentlemen:

This will acknowledge receipt of your letter of July 11, 1949, in which you request our opinion as to whether or not those persons over 60 years of age and resident Indians regardless of age are required to purchase a deer tag.

As to your first inquiry regarding persons over 60 years of age, the answer is in the affirmative.

Chapter 146 of the 1949 Legislature enactments is an Act to amend chapter 101, Statutes of Nevada 1947. Section 50 of the 1947 Act provided, "that fishing and hunting licenses and deer tags shall be furnished free of charge to all citizens of the State of Nevada who have attained the age of 60 years or upwards in accordance with the provisions of Chapter 159, Statutes of Nevada 1935."

As you have noted, section 50 of this Act has been amended by chapter 145, section 13 of the Nevada Statutes of 1949, by deleting the words "and deer tags" and increasing the license fees for fishing and hunting licenses. Other than these changes, paragraph 1 of section 13 of the 1949 Act and section 50 of the 1947 Act are identical.

In our opinion the reference to the 1935 Statutes of Nevada, chapter 159, which is included in both the 1947 and 1949 Acts, is only for the purpose of prescribing the method of obtaining, free, whatever privileges are granted in the new Act, the reference to them in the 1935 Act is meaningless. The 1935 Act is not in conflict nor is it authority for granting free deer tags to those over 60 years of age or upwards.

Your second inquiry in effect is whether or not Indians are required to purchase deer tags. The answer is also in the affirmative.

We feel in this regard that Opinion 235 rendered by this office on October 18, 1945 (Attorney General's Report 1944-1946), in which we held that Indians are not required to purchase deer tags is no longer controlling, due to the change in the law. (Chapter 146, sec. 13, 1949 Statutes of Nevada.)

We were of the opinion at that time, because persons 60 years of age or upwards were entitled to a free deer tag, by necessary construction and implication Indians were entitled to the same right although there was no specific provision to that effect. It follows, therefore, that if other persons are not entitled to free deer tags Indians must also purchase their tags. Section 24, chapter 146 of the 1949 Act bears out both of the above contentions, inasmuch as it does not mention the issuance of free deer tags to any person.

Very truly yours,

ALAN BIBLE  
Attorney General

By Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-778 NEVADA HOSPITAL FOR MENTAL DISEASES**—Admission of indigent, feeble-minded minors.

Carson City, July 20, 1949

Dr. S. J. Tillim, Superintendent, Nevada Hospital for Mental Diseases, P.O. Box 2160, Reno,

Nevada

Dear Dr. Tillim:

This will acknowledge receipt of your letter dated June 22, 1949, received in this office June 24, 1949, relative to the admission at the hospital of indigent, feeble-minded minors under the provisions of section 20, chapter 205, Statutes of 1937, amending section 3524, N.C.L. 1929, and chapter 201, section 201, section 19(a), Statutes of 1949.

We wrote you for further information respecting specific cases mentioned, which information you supplied when in the office July 7, 1949.

A summary of your question is the authority of the Superintendent to receive at the hospital, under the provisions of section (19)a, chapter 201, Statutes of 1949, feeble-minded minors who have been placed in institutions outside the State under section 3524, 1929 N.C.L., 1941 Supp., when such institution desires the return of such minors. The reason for the return of certain minors is that they are uneducable. A further question, is the responsibility to pay for the care of such indigent minors at the hospital an obligation of the county from which the minor was committed.

We are of the opinion that when the request is made for the return to the hospital of an indigent, feeble-minded minor, who has been placed in an institution for care and education under the provisions of section 3524, 1929 N.C.L., 1941 Supp., and such return is for the reason that the minor is not capable of receiving education, the minor may be admitted under the provisions of section 19, chapter 201, Statutes of 1949. The admission should be approved by the Superintendent as to the suitability of the minor for care and treatment at the hospital. It appears that the county from which the minor was committed is responsible for its care and treatment at the hospital, shall be held temporarily for the purpose of arrangement with out-of-State institutions for their "proper care and education." When such feeble-minded minors are placed in such an institution the expense of transportation and the expense of care, maintenance, and education of such minors by shall be a charge against and paid by the county from which any such minor was committed. The term "education" is used throughout the section.

The manifest purpose of the Legislature was to afford a feeble-minded minor the opportunity for education. If it be found that such minor is not capable of being educated at institutions established for that purpose and is returned to the hospital, it appears that the purpose of the Legislature as expressed in this section could not be accomplished.

Chapter 201, Statutes of 1949, is an Act concerning the mentally ill of the State, providing for the admission of mentally ill persons without being committed as insane. Section 19 of the Act relates to the admission of persons on a voluntary basis. Subsection (1) provides that in the case of a minor the application for admission shall be made by the parent, guardian or by the person on a voluntary basis. Subsection (a) provides that in the case of a minor the application for admission shall be made by the parent, guardian or by the person entitled to the custody of such minor. The admission under this section is pursuant to rules and regulations established by the Board of Commissioners. The application is made to the Board and approved by the Superintendent as to the suitability of the person for care and treatment.

Section 19(a) of chapter 201, Statutes of 1949, can be harmonized with sections 3524, 1929 N.C.L., 1941 Supp., as each deal with the subject of minors who are mentally ill. When it appears that the purpose of section 3524, 1929 N.C.L., 1941 Supp., cannot be accomplished, the provisions of chapter 201, Statutes of 1949, could be made applicable.

Section 11, chapter 201, Statutes of 1949, provides, except as expressly otherwise provided, persons admitted pursuant to the Act shall be subject to the same rules, and the liability for their support shall be the same, as if such persons had been duly committed thereto by a court of competent jurisdiction. As the liability for the care and education of an indigent, feeble-minded minor at an institution outside the State rests with the county, it appears that this liability would

continue when the minor was returned to the hospital for the reason that it was not subject to institutional education.

The actual cost established by the Hospital for the care of the minor, as indicated by your information, would be considerably less than that paid to out of State institutions, and the welfare of the minor would not be impaired.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-779 TAXATION—MOTOR VEHICLES**—Assessor may make equitable adjustment of assessment—Used car registered in Nevada subject to pro rata tax.

Carson City, July 20, 1949

Nevada Tax Commission, Carson City, Nevada

Attention: R. E. Cahill, Secretary

Gentlemen:

This will acknowledge receipt of your letter of July 13, 1949, received in this office the same date, requesting an opinion regarding the construction of certain features of section 11 of the Motor Vehicle Act of 1931, as amended by Statutes of 1945, and 1949, 480.

You inquire first as to the proper interpretation to be placed on the word “may” in the following provision of the 1949 Act:

A fair and equitable adjustment of the assessed value may be made in cases where the applicant has previously secured a license for another vehicle during the same year and has sold such other vehicle for another vehicle during the same year and has sold such other vehicle.

The intent of the Legislature in the present Act was to give the Assessor the authority to make an adjustment where it could be done fairly and equitably to both the State and the applicant, he is not required to make any adjustment.

Therefore, we are of the opinion that “may” as used in this Act gives the Assessor the option to make an adjustment or not.

Your second inquiry is to the meaning of the words “a new or used motor vehicle being used for the first time,” as found in section 1 of chapter 218 of the 1949 legislative enactment.

Specifically, the question is whether a used car that has been registered in a State other than Nevada is subject to a pro rata tax on a monthly basis, if subsequently registered in this State in the same year.

The answer is in the affirmative.

The portion of the Act to which you refer is as follows:

Any law of the State of Nevada to the contrary notwithstanding, a new or used

motor vehicle being registered for the first time shall be taxed pro rata on a monthly basis, upon the time remaining in the year.

It is settled law that each State has the right to tax the personal property whose situs is in the particular State assessing the tax because that is the State where the property receives the protection of the law and it is that protection that is being paid for. [56 Nev. 38](#), 212 p(2) 173.

If a motor vehicle is registered in this State, the situs of the vehicle is in this State, the situs being for taxation purposes the site, location or place where a thing is.

Therefore, we are of the opinion that under chapter 218 of the 1949 legislative enactment the State of Nevada may validly place a pro rata tax on a monthly basis on any vehicle registered in this State for the first time.

Very truly yours,

ALAN BIBLE  
Attorney General

By Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-780 MINING**—Deficit in boarding house operations and commissaries cannot be charged as deductible item from gross yield to determine net proceeds.

Carson City, July 21, 1949

Nevada Tax Commission, Carson City, Nevada

Attention: R. E. Cahill, Secretary

Gentlemen:

This will acknowledge receipt of your letter dated June 22, 1949, received in this office on the same date.

You inquire if a boarding house deficit or company-operated store or commissary deficit is a proper charge as a deductible item under the statute defining the net proceeds of mines.

We are of the opinion that deficit in boarding house operations and commissaries cannot be charged as an operation expense item deductible from the gross yield to determine the net proceeds of mines for the purpose of taxation.

Section 6580, 1929 N.C.L., 1941 Supp., quoting the first part of the section, provides: "The net proceeds shall be ascertained and determined by subtracting the gross yield the following deductions for costs incurred during such six months period, and none other." Then follows under the first four items the actual cost of extracting the ore from the mines, the actual cost of transporting the product of the mine to the places of reduction, refining and sale, the actual cost of reduction, refining and sale, and the actual cost of marketing and delivering the product and the conversion of the same into money.

Under subsection 5 it is the actual cost of maintenance and repairs of mine machinery, equipment, apparatus and facilities, milling, smelting and reduction works, plants and facilities and transportation facilities and equipment. In each of these subdivisions the word facilities

relates to the specific items. The term "facilities" is used in deduction for fire insurance and in depreciation, and in each case it refers to items and facilities mentioned in subsection 5.

The last part of the section provides: "The several deductions hereinabove mentioned in this section shall not include any expenditures for salaries, or any portion thereof, of any person not actually engaged in the working of the mine or in the operation of the mill, smelter, or reduction works, or in the operation of the transportation facilities or equipment, or in the superintending the management of any thereof, or not actually engaged in the State of Nevada in office, clerical, or engineering work necessary or proper in connection with any such operations."

From an inspection of the statute, so far as extracting ore from the mine is concerned, it is clear, and the deductible items are specifically mentioned. The term "actual costs" of extracting the ore, transporting the product, refining and sale, marking and delivering, as well as the actual cost of maintenance and repairs of the items mentioned in subsection 5, have a definite and fixed meaning and only the direct costs and expenses are contemplated as deductible items.

It was not the intention of the Legislature to permit deductions of every conceivable item of expense, but to confine deductions within the items enumerated. This is supported by the other specific items mentioned. Actual cost of fire insurance on certain items, all moneys expended for premiums for industrial insurance, actual cost of hospital and medical attention and group insurance for all employees, unemployment compensation, social security, the actual cost of development work and all moneys paid as royalties are specifically enumerated.

The loss sustained in maintaining a boarding house or commissary is not, in the strict sense, actually expended for producing the ore any more than salaries of officers not actually engaged in the working of the mine, mill or smelter.

It was the intention of the Legislature to prescribe a definite and fixed method for arriving at the net proceeds of mines by adopting the actual cost basis and money expended for the specified items. Any other construction would render the statute indefinite and uncertain and leave an open field for deduction, which, in our opinion, was never intended.

*See State v. Tonopah Extension*, 49 Nevada 428; *Anaconda Copper Co. v. Junod*, 227 P. 1001; Attorney General's Opinion No. 210, 1934-1936 Report.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-781 ARCHITECTURE**—Contractor may be granted certificate as individual—Person previously engaged in practice entitled to registration if qualified.

Carson City, July 22, 1949

State Board of Architecture, 210 West Second Street, Reno, Nevada

Attention: Mr. Edward S. Parsons, Acting Secretary.

Gentlemen:

This will acknowledge receipt of your letter dated July 12, received in this office July 13,



1949.

You request advice as to the interpretation of subsection 4, section 33, chapter 220, Statutes of Nevada 1949, an Act relating to the practice of architecture, in connection with section 1474.10, 1929 N.C.L., 1941 Supp., defining the term "contractor" under the Act creating a State Contractors' Board.

You suggest that it does not seem possible that a man can hold a contractor's license and an architect's license, that he must be either one or the other, and present the question, "Can a man receive a salary from a contractor, or make a profit out of contracting while acting on the same job as the owner's agent?"

You also inquire as to the authority of the Board in granting a certificate to practice to an applicant, without examination, under paragraph 3 of section 21 of the Act.

We are of the opinion that there is nothing in the Act to prohibit the granting of a certificate to a contractor as an individual, if he can qualify under the provisions of the Act.

A person who is doing architectural work solely as an employee of a licensed contractor is one of the exemptions mentioned in the Act. Under section 34, such a person doing architectural work in that capacity would sign his drawings with his true appellation, but could not use any form of the title architect.

Answering your second question, we are of the opinion that a person who has been engaged in the practice of architecture in this State when the Act was approved, and makes his application within one year after the date of approval of the Act, is entitled to registration, provided he shall present proof of competency and qualifications to the Board. The sufficiency of such proof is a matter for the Board to decide, subject to appeal by the applicant to the District Court.

Section 19, chapter 200, Statutes of Nevada 1949, provides that any person who is at least 21 years of age and good moral character, may apply for academic and technical examination for certificate and registration under the Act. The sections following define the qualifications.

Section 33 provides certain exemptions from the provisions of the Act. Paragraph 4 provides as follows: "Practice of architecture solely as an officer or as an employee of the United States, or of a licensed contractor in this state."

Section 34 provides: "This act shall not be construed so as to prevent persons other than architects from filing application for building permits or obtaining such permits providing the drawings for such buildings are signed by the authors with their true appellation as engineer or contractor or carpenter, and so forth, but without the use of any form of the title architect, nor shall it be construed to prevent such persons from designing buildings and supervising the construction thereof for their own use."

Section 19 of the Act defines the practice of architecture which includes supervision of construction. Such work would comprehend contracts coordinating all the processes which enter into a complete building.

Section 1474.10, 1929 N.C.L., 1941 Supp., is section 2 of the Act relating to contractors, and defines the term "contractor" as synonymous with the term "builder." This Act exempts from its provisions a licensed architect or licensed engineer, which implies, that although a licensed architect may be a contractor, he is not a builder and is therefore exempt under the Act.

The purpose of the Act regulating the practice of architecture is to furnish protection to the public by preventing incompetent persons from assuming to act in a particular capacity. There is nothing in the Act which would exclude a licensed building contractor from securing the registration as a licensed architect if he could qualify. His relations with the owner as contractor or agent is governed by the law of contract and agency.

The rule expressed in 3 Am. Jur., page 1000 is, that as a general rule, it may be said as far as the preparation of plans is concerned, an architect acts as an independent contractor, but so far as regards the performance of his supervisory functions with respect to a building under construction, he ordinarily acts as the agent and representative of the person for whom the work

is being done. An architect may however, occupy the position of an independent contractor where he undertakes to execute the entire work with sole control thereof and of the employment and management of those engaged therein. The question is one of fact which is determined by the circumstances in the particular case.

Paragraph 3, section 21, which is the subject of your second question, should be read in connection with the entire section as to competency and qualification. The sufficiency of proof presented appears to apply to the individual applicant rather than a general rule.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-782 NEVADA HOSPITAL FOR MENTAL DISEASES**—Distinction between attendants and professional or practical nurses is question of fact.

Carson City, July 22, 1949

Dr. S. J. Tillim, Superintendent, Nevada Hospital for Mental Diseases, P.O. Box 2460, Reno, Nevada

Dear Dr. Tillim:

This will acknowledge receipts of your letter dated July 12, 1949, received in this office July 14, 1949.

You call attention to a circular letter sent out by the Nevada State Board of Nurse Examiners and issued pursuant to the Act, approved by the 1949 Legislature to provide for the examination, licensing and regulation of the statutes.

We are of the opinion that your inquiry conveys a question of fact to be determined in each particular case. The term practical nurse is not a technical legal term. Its scope can be decided in cooperation between the hospital authorities and the Board of Nurse Examiners.

Section 2, chapter 154, Statutes of Nevada 1949, provides that the practice of practical nursing shall apply to any person who for compensation performs such duties as are required in the physical care of the sick and carries out medical orders prescribed in connection therewith by a licensed physician and who has a knowledge of simple nursing procedures as distinguished from the professional knowledge, training and skills required for professional nursing.

The Act provides that it shall be unlawful for any person to practice or offer to practice practical nursing or to use any title, abbreviation, sign, card or device to indicate that such person is practicing practical nursing unless he or she holds a valid license issued under the provisions of the Act.

Section 8 of the Act provides that no provision of the law shall be construed as prohibiting the incidental care of the sick by domestic servants and persons primarily employed as housekeepers as long as they do not practice nursing within the meaning of the Act.

The word "practical" is not a technical legal term.

*Bell Publishing Co. v. Garrell Engineering Co.*, 170 S.W. (2) 197; *People v. Steinberg*, 73 N.Y.S. (2) 475; Words and Phrases, Permanent Edition.

Practical nurse is a term well known, and has been used and understood for many years. The statute in question distinguishes it from professional nursing and applies the term to such duties

as carrying out medical orders prescribed in the physical care of the sick by a licensed physician.

The distinction between an attendant employed at the Nevada Hospital For Mental Diseases and those who perform the duties of a professional nurse or that of a practical nurse is a question of fact that may well be decided by cooperation between the Nevada State Board of Nurse Examiners and the authorities at the Nevada Hospital for Mental Diseases.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

cc: Mrs. C.C. Taylor

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**OPINION NO. 49-783 CORPORATIONS**—Reservation of corporate names.

Carson City, July 22, 1949

Hon. John Koontz, Secretary of State, Carson City, Nevada

Dear Mr. Koontz:

Receipt is hereby acknowledged of your letter of July 11, 1949, requesting the opinion of this office upon the following stated queries. Due to press of business in this office the opinion has been delayed.

1. Whether it is proper for this office to reserve a corporate name for continuous successive periods of ten days each; or whether one is entitled to one reservation for a single, nonconsecutive period of ten days.
2. Whether such a reservation may be made by a subsisting domestic corporation contemplating a change in its corporate name.
3. Whether or not persons proposing to form a corporation in another State, are entitled to reserve its proposed name, as incidental to qualification to do business in this State, and whether such reservation would prevail against a proposed domestic corporation.
4. Also, whether or not qualified foreign corporations are entitled to the subject reservation in contemplation of a change of name in the foreign jurisdiction.

### OPINION

Answering query number 1—It is the opinion of this office that it would not be proper for your office to reserve a corporate name for continuous successive periods of ten days each. The statute contemplates one period of ten days only, otherwise a corporate name could be reserved indefinitely.

Answering query number 2—A subsisting domestic corporation contemplating a change in its corporate name may reserve a name for one ten-day period.

Answering query number 3—As pointed out in our opinion to your office dated July 14, 1949, the 1925 Corporation Act of this State is designed for and to be used for domestic corporations only and, in our opinion, does not provide the right of persons proposing to form a corporation in another State to reserve its proposed name in this State pending qualification herein.

Answering query number 4—We are of the opinion that the answer to query number 3 is a complete answer to query number 4.

Very truly yours,

ALAN BIBLE  
Attorney General

By W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-784 REAL ESTATE—Dead line for filing applications for licenses may not be extended.**

Carson City, July 25, 1949

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 July 12, 1949, requesting the opinion of this office as to whether the Real Estate Commission may grant licenses to applicants therefor who have not filed their applications for such licenses in accordance with the provisions of section 14, page 439, of the Real Estate Brokers Act, as amended at 1949 Statutes, page 441. Your inquiry is, in brief, can the Commission extend the dead line provided in such statute beyond the date therein fixed as of June 1, 1949, for the filing of applications for licenses as provided in said amendment?

**OPINION**

A careful examination of the statute in question discloses that, in our opinion, there is no power vested anywhere in the act whereby the dead line of June 1, 1949, may be extended and thus permit the filing of applications for licenses after that date. The language providing the dead line is clear and express and any change therein would, in effect be judicial legislation, which is not permitted by our Constitution, and courts may not so legislate.

We think such provision was written into the law for the benefit of those previously engaged in the business in communities of less than three thousand population and that in order to avail themselves of the privilege of obtaining a license without examination the applicants should have and, in fact, must have filed their applications on or before June 1, 1949.

Very truly yours,

ALAN BIBLE  
Attorney General

By W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-785 AGRICULTURE**—Chapter 215, Statutes of Nevada 1949, applies to State Board of Stock Commissioners.

Carson City, July 25, 1949

Department Of Agriculture, State of Nevada, P.O. Box 1027, Reno, Nevada

Attention: Dr. Edward Records, Executive Officer

Gentlemen:

This will acknowledge receipt of your letter dated July 22, received in this office July 25, 1949.

You request an opinion as to whether or not chapter 214, Statutes of Nevada 1949, applies to the State Board of Stock Commissioners.

We are of the opinion that chapter 214, Statutes of Nevada 1949, applies to the State Board of Stock Commissioners.

Section 3827, 1929 N.C.L., 1941 Supp., as amended by chapter 313, Statutes of Nevada 1949, provides that the State Board of Stock Commissioners shall consist of five members appointed by the Governor. The members are required to take the official oath, and furnish a bond. Chapter 168, Statutes of 1949, amends section 3828, N.C.L., 1929, which defines the members, their powers and duties.

Subdivision F, which was not amended, provides that the Board shall make a report in writing to the Governor on or before the 15th day of January, biennially, giving a statement of the transactions of the Board, and provides for the printing of the same.

Chapter 214, Statutes of 1949, section 1, provides as follows: “notwithstanding any other provision of law, each and every state board, bureau, commission or agency, which is composed of appointed members, shall report annually, in detail, all moneys, from whatsoever source derived, received or disbursed by such board, bureau, commission or agency.”

The following sections define the date when the report shall be made to the Governor, provides for the filing of a certified copy with the Secretary of State, and that members may be subject to removal from office upon failure to comply with the Act.

The State Board of Stock Commissioners is composed of members appointed by the Governor and is a State Board within the meaning of the Act.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-786 MOTOR VEHICLES**—Form for transferring title—No provision in statute.

Carson City, July 26, 1949

Mrs. Louise Lindsey, Director, Motor Vehicle Department, Carson City, Nevada

Dear Mrs. Lindsey:

This will acknowledge receipt of a letter from Mr. M.C. Oglesby, County Assessor of Clark County, dated July 20, submitted to this office July 22, 1949, by your office for an opinion.

The letter submits a form used in California for the transfer of title to motor vehicles of a value less than \$1,000 registered in the name of a person, deceased, where no administration of the estate was had.

You request an opinion if there is any provision in the Nevada statutes authorizing this type of instrument in transferring title to motor vehicles.

We are of the opinion that there is no provision in the Nevada statutes authorizing such form of transfer.

The form submitted is authorized by Article 5132, section 185 of the California Vehicle Code, which reads as follows:

#### TRANSFER WITHOUT PROBATE

Upon the death of an owner or legal owner of not more than one vehicle registered hereunder and not exceeding a value of one thousand dollars without such decedent's leaving other property necessitating probate, the surviving husband or wife or other heir in the order named in section 630 of the Probate Code, unless such vehicle is by will otherwise bequeathed, may secure a transfer of registration of the title or interest in the deceased upon presenting to the department the appropriate certificate of ownership and registration card, if available, and an affidavit of such person setting forth the fact of such survivorship or heirship and the names and addresses of any other heirs, and, if required by the department, a certificate of the death of the deceased. The department, a certificate of the death of the deceased. The department when satisfied of the genuineness and regularity of such transfer shall transfer the registration accordingly.

Section 4435.14. 1929 N.C.L., 1941 Supp., provides the procedure for transfer of title in a vehicle. Subdivision (e) contains the language, "In the event of the transfer by operation of law of the title or interest of an owner in and to a vehicle as upon inheritance, devise or bequest, \* \* \* the registration thereof shall expire and the vehicle shall not be operated upon the highways until and unless the person entitled thereto shall apply for and obtain the registration thereof, \* \* \*."

Chapter 131, Statutes of 1947, which amends section 4435.09, 1929 N.C.L., 1941 Supp., provides when certificate of ownership may issue on proof of ownership.

Section 9882.117, 1929 N.C.L., 1941 Supp., provides how estates, the gross value of which does not exceed one thousand dollars, may, by order of the Court, be set aside without administration.

As this State does not have a statute similar to that of California in such cases, the proof of ownership required by the department is an order of the Court.

Very truly yours,

ALAN BIBLE  
Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-787 FISH AND GAME—CARP**—Regulation that is retroactive may not be added to permits previously issued.

Carson City, July 27, 1949

Nevada Fish and Game Commission, P.O. Box 678, Reno, Nevada

Attention: S. S. Wheeler, Director

Gentlemen:

This will acknowledge receipt of your letter of July 19, 1949, received in this office July 20, 1949, requesting an opinion on the following question:

Does the Fish and Game Commission have the power to add a regulation to a permit that has been granted, and which will not terminate until a fixed future date, which will increase the payment of the license fee for seining carp although the present permit contains a fee that is definite in amount?

The answer to this inquiry is in the negative.

Chapter 101, section 27, of the 1947 Statutes of Nevada, as amended by chapter 146, section 10, of the 1949 legislative enactment, reads as follows:

Carp and other coarse fish may be taken in the waters of all districts and in Walker, Winnemucca, Pyramid, Lahontan, and Topaz lakes at any time during any year; provided, that a permit be obtained by the person or persons intending to catch carp or other coarse fish from the fish and game commission who must provide a suitable inspector or game warden to inspect catches of carp and fix a license fee for the privilege; provided further, that no permit or inspection shall be required to take carp or other coarse fish during any open season on game fish in said waters.

Nothing in this section shall prohibit the state fish and game commission by general regulations applicable to specified districts, or the respective county game management boards in their territory, by regulations declared and made public, from imposing such stricter control over fishing for carp or other coarse fish, including a limitation of any open season, as may be deemed expedient to prevent abuse of fishing privileges generally, nor to regulate the size or control the use of minnow traps.

According to the provisions of the above statute, the Fish and Game Commission does not have the right and power to fix a license fee for the privilege of taking carp and other coarse fish, and in doing so they may enter into a valid and binding contract with those who are granted permits.

The permit you have been issuing gives the permittee a vested right to take carp and other coarse fish by seines, nets and traps for a definite price and for a definite time. Therefore, this is a valid contract between the Fish and Game Commission (a subdivision of the State of Nevada) and the permittee.

Section 27, as amended by chapter 146, Statutes of 1949, does give the Commission the right to impose stricter control by general regulations which are declared and made public, however, there is nothing in the statute that gives it a retroactive effect and clearly it was not the intent of the Legislature that it be given such effect.

Therefore, it is our opinion that the Fish and Game Commission cannot add a regulation that is retroactive and will impair the obligation they have by contract to those persons who have been issued permits.

Very truly yours,

ALAN BIBLE  
Attorney General

By Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-788 PUBLIC SCHOOLS**—Deputy Superintendent of Public Instruction—  
Salaries.

Carson City, July 28, 1949

Honorable Mildred Bray, Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will answer your recent oral request concerning the salaries to be paid to your Office Deputy and to your District Deputies.

Section 23 of the 1947 School Code, chapter 63, page 102, provides, insofar as pertinent to this inquiry that the salary of the Office Deputy shall be fixed by the State Board of Education, and shall be paid out of the state distributive school fund in the same manner as the salaries of other state officers are paid.”

Prior to the 1949 legislative session, the salary of the Office Deputy was set at \$3,300 plus a 10 per cent additional compensation, or a total of \$3,630 per annum (sec. 7, chap. 213, p. 701, 1947 Stats. of Nevada). The salary of the Deputy Superintendents of Public Instruction was set at \$3,900 per annum by the State Board of Education pursuant to section 27 of the 1947 School Code.

The 1949 Legislature in its General Appropriation Act, chapter 125, approved March 23, 1949, appropriated the sum of \$7,260 for the salary of Office Deputy (sec. 35 of the General Appropriation Act) and appropriated the sum of \$39,000 or \$3,900 per annum for the salaries of the District Deputies. (Section 36 of the General Appropriation Act.)

Thereafter and on March 29, an Act, chapter 294, was approved requiring all State officers, departments, boards, commissions and agencies to maintain not less than a 40-hour week.

On the same day under the provisions of chapter 278, the salaries of the deputies, clerks and stenographers in the office of the Secretary of State, Attorney General, State Controller, State Treasurer, State Mining Inspector, Surveyor General, Superintendent of Public Instruction, Labor Commissioner, State Bank Examiner, official reporter of the Supreme Court, Governor’s office, secretary of Nevada Tax Commission, and the Legislative Counsel, were increased over the prior set salaries and were increased over the amount set forth in the previously enacted General Appropriation Act. Specifically included in this chapter and in section 7 thereof, the salary of the Office Deputy of the Superintendent of Public Instruction was fixed at \$3,900 per annum.

After the adjournment of the 1949 Legislature, a regular meeting of the State Board of Education was held, at which time it was the unanimous vote of the State Board of Education that the salaries of the Office Deputy and the Deputy Superintendents of Public Instruction were to be set effective July 1, 1949 at \$4,500 per annum. You advise us that this increase was made by the State Board of Education in accordance with the authority vested in them under the School Code of 1947, and was increased from \$3,900 to \$4,500 to agree with comparable raises given to other State offices and departments because of the fact that the State working hours had been increased to 40 hours per week.

You now ask:

1. Under the above set of facts, to what salary is the Office Deputy entitled?
2. To what salary are the Deputy Superintendents of Public Instruction entitled?

1. In our opinion the Office Deputy is entitled to a salary of \$3,900 per annum.



Section 7, chapter 213, of the 1947 Act, and section 7, chapter 278, of the 1949 Act, each specifically fixed the Office Deputy's salary, and in view of the fact that both of these chapters are later expressions of the legislative will, it is our opinion that they must control over the authority given to the State Board of Education to fix such salary. The subsequent action of the State Board of Education in attempting to set the salary at \$4,500 is rendered null and void by reason of the later legislative acts definitely fixing such salary.

2. It is our further opinion that as to the Deputy Superintendents of Public Instruction the action of the State Board of Education is controlling and the salaries fixed by such State Board, pursuant to legislative authorization is confirmed.

We have therefore held in response to an inquiry from the State Controller that notwithstanding the fact the salaries of the State Engineer and his Deputies were fixed at a figure higher than that appropriated in the General Appropriation Act of 1949, the Act setting the salary controlled and must be paid under our Supreme Court opinions and the former opinions of this office. See chapter 208, 1949 Statutes of Nevada, as compared with section 17, chapter 125, 1949 Statutes of Nevada.

We have also ruled to exactly the same effect insofar as the State Librarian's salary is concerned. See chapter 276, 1949 Statutes of Nevada, as compared to section 21, chapter 125, 1949 Statutes of Nevada.

Our present opinion rests upon the former opinion of this office, No. 279, 1938-1940 biennium.

It is to be noted under the above set of facts that the State Department of Education made its increases based upon a subsequent increase in the number of working hours required for each of the deputies. As noted above, such increase in working hours has uniformly resulted in an increased salary commensurate with the increase in the hours of work. We are not unmindful of the fact that the Act authorizing the State Board of Education to set Deputies' salaries does not set the maximum sum which can be paid. This defect raises a serious question in view of former expressions set forth in Opinion 279 noted above, and, if the State Board of Education were to attempt to increase the salaries of the Deputies beyond a pro-rata increase for increased hours, we would have serious doubts as to their authority to do so. However, under the facts and circumstances set forth in your inquiry, we are of the opinion that the setting of a \$4,500 annual salary is authorized by section 27 of the 1947 School Code, and that the State Board of Education acted within its jurisdiction.

In order to avoid future confusion and possibly attacks upon the action of the State Board of Education in setting salaries, it is respectfully suggested that you request the next session of the Legislature to either set the specified amount of the Deputies' salaries or at least set the maximum limit beyond which the State Board of Education cannot go.

Very truly yours,

ALAN BIBLE  
Attorney General

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**OPINION NO. 49-789 UNIVERSITY OF NEVADA—Jurisdiction of building activities—**  
State Planning Board.

Carson City, July 29, 1949

Honorable Silas E. Ross, Chairman, Board of Regents, Post Office Box 2407, Reno, Nevada

Dear Mr. Ross:

This will acknowledge receipt of your letter dated July 25, received in this office July 25,

1949.

You request an opinion relative to the jurisdiction over all building activities performed by the State of Nevada under University authority. The fact related is that the University proposes to recompose two buildings moved into the Clark Field are from the Army Air Base for housing male veterans. Limited funds under the budget prevent complete changes to meet all the requirements of the Reno city building code, particularly the electric wiring. The city building authority wishes to cooperate but are limited by code requirements and cannot issue necessary permits.

We are of the opinion that the answer to your question may be found under section 12 of the Planning and Zoning Act of 1941, as amended. The Board of Regents submit the proposed character of structure to the governing body of the established planning commission, and if it be disapproved by the commission the decision may be overruled by a vote of not less than two-thirds of the entire membership of the Board of Regents.

Section 9(a), Articles XII, of the Reno charter, as amended by chapter 233, Statutes of 1945, provides for the specialized or uniform building or plumbing or electric codes.

In *State v. Lincoln County P.D.*, 60 Nevada 401, the Court held "There is no constitutional limitation on the power of the legislature to create municipal corporations and confer on them such function it considers necessary or expedient."

9 American Jurisprudence, page 202, section 6. "The courts are not entirely agreed as to the applicability of municipal building regulations erected within the municipal limits by or under the authority of the state, \* \* \*. However, a legislative grant of police power to a municipal corporation will not be deemed a cession of the legislature's prerogative to govern for itself the institutions of the state which may be located within such municipality, unless it may be clearly gathered from the latter act that such was the legislative intent."

The intent of the Legislature appears to be expressed in the Planning and Zoning Act of 1941. Section 1 of this Act defines "building code." Section 12, being section 5063.11, 1929 N.C.L., 1941 Supp., which provides for submission of proposed improvements, contains the following language:

\* \* \* provided, however, that if the authorization, acquisition, financing, or acceptance of such street, park, or other public way, ground, or open space, or the construction or authorization of such public building or structure be vested by law or charter provisions in some governmental body, commission or board other than the governing body of such city, county, or region, then such governmental body, commission, or board having such jurisdiction shall first submit to the planning commission the location, character, and extent of such public improvement for its approval. IN the event that the planning commission shall disapprove the same, its disapproval may only be overruled by such other governmental body, board, or commission by a vote of not less than two-thirds of its entire membership. Failure of the commission to act upon such submission within forty days from and after the date of the official submission to the commission by the governing body or by such other governmental body, board, or commission shall be deemed approval by the planning commission.

The University of Nevada has no governmental police powers. The Legislature has delegated polices powers to a municipality for the protection of lives, health and property within its boundaries.

Very truly yours,

ALAN BIBLE

Attorney General

By George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-790 FISH AND GAME**—Game warden in possession of a badge but who has not taken oath of office is without authority to arrest.

Carson City, July 29, 1949

Nevada Fish and Game Commission, P.O. Box 678, Reno, Nevada

Attention: Frank W. Groves, Assistant Director

Gentlemen:

This will acknowledge receipt of your letter of July 22, 1949, received in this office July 25, 1949, requesting our opinion as to the following questions:

What authority does one have who is in possession of a game warden's badge, but has not taken an oath office?

Section 4925, N.C.L. 1929, requires that members of Legislature and all officers, executive, judicial and ministerial, shall, before entering upon the duties of their respective offices, take and subscribe to the following oath, etc.

Game wardens, who are appointed by the Fish and Game Commissioners as prescribed in section 10, chapter 101, 1947 Statutes of Nevada, are officers as described in section 4925, N.C.L. 1929, and therefore they *shall* take the oath of office. As the Legislature, in enacting the law, used the word "shall" it is obvious that their intent was that an oath of office was mandatory and not merely permissive. Therefore, it is our opinion that a person who is in possession of a game warden's badge, but who has not taken an oath of office, has no authority to arrest than any other private citizen.

It would be difficult to set down a general rule that would cover your second question, which is:

Is one who is in possession of a badge and who has not taken an oath of office guilty of false arrest in the event he made an arrest?

It is very improbable that two cases with identical factual situations would arise, consequently each particular case would have to be decided and ruled on as it arises. If you will forward the exact facts of the situation you have in mind, we will gladly render our opinion, basing it on these particular facts.

Very truly yours,

ALAN BIBLE  
Attorney General

By Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-791 COMMUNITY PROPERTY**—Interpretation of Nevada law.

Carson City, August 10, 1949

Hon. George W. Malone, U.S. Senator from Nevada, Senate Office Building, Washington, D.C.

Dear Senator Malone:

This will acknowledge receipt of your letter of July 15, 1949, received in this office July 22, 1949, requesting our opinion as to the correctness of Commissioner Straus' interpretation of the Nevada community property laws.

We are more than glad to give you our opinion in this matter, but whether or not the Secretary of the Interior is obliged to follow it is not up to us to determine. We are merely interpreting the Nevada statutes regarding community property and applying this interpretation to the facts contained in Commissioner Straus' letter to you with reference to Mrs. Lillian Vander Laan's rights, if any, under our law.

Actually the only issue involved is the status of Mrs. Vander Laan at the time the lease was entered into, that is, she to be considered as a "lessee-occupant" within the purview of Public Law 553, although the lease was from the Defense Homes Corporation to Mr. Vander Laan and signed by him alone.

Section 3360, N.C.L. 1929, which gives to the husband the entire management and control of the community property, with a like absolute power of disposition, refers only to his right to sell, encumber or make gifts of the community property without the wife's signature or consent, or to defend an action in behalf of the community without joining the wife as a party. This particular statute is fully discussed and interpreted in the case of *Nixon v. Brown*, [46 Nev. 439](#), 214 P. 524, wherein the Court concluded that the husband as manager may dispose of a proportionate amount of community property without the wife's signature or consent. This statute does not however, permit the husband to utilize community funds for the purpose of entering into agreements, leases, sales, etc., and thereby defeat the rights of his wife, as the principal purpose in adopting the community property law is for the protection of the wife, and whatever property is acquired during marriage in exchange for or through the use of property already owned usually possesses the same character as that used to acquire it.

The definition of community property in Nevada is a negative definition and is derived from the following statutes.

Section 3355, N.C.L. 1929, provides as follows: "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."

Section 3368 (sec. 14), N.C.L. 1929: "The earnings and accumulations of the wife and of her minor children, living with her, or in her custody, while she is living separate from her husband, are the separate property of the wife."

Section 3369 (sec. 15), N.C.L. 1929: "When the husband has allowed the wife to appropriate to her own use the earnings, the same with the issues and profits thereof, is deemed a gift from him to her and is with such issues and profits her separate property."

Assuming one of the parties' earnings which are community funds were used when the lease in question was entered into and the rent money was paid with community funds, the interest obtained therefrom would be a community interest. There is nothing in the above definition that would alter such a conclusion.

As stated in *In re Wilson's Estate*, 56 N.C.L. 353, 53 P(2) 339: "The true test of the separate or community character of property acquired during marriage ordinarily lies in whether it was acquired by community funds and community credit or by separate funds."

Obviously, a leasehold interest is a property interest and therefore Mrs. Lillian Vander Laan did have an interest in this property at the time the lease was executed, and the fact that her name or signature did not appear in the document will not defeat this interest. If she had such an interest, she also must be considered as a lessee—occupant because that is the particular interest that was created.

We sincerely hope that the above interpretation will be of some assistance to you.

Very truly yours,

ALAN BIBLE  
Attorney General

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**OPINION NO. 49-792 AGRICULTURE—FERTILIZER—Term "Commercial Fertilizer" defined.**

Carson City, August 16, 1949

Mr. Harry E. Gallaway, Field Inspector, Department of Agriculture, P.O. Box 1027, Reno, Nevada

Dear Mr. Gallaway:

This will acknowledge receipt of your letter dated August 8, 1949, received in this office August 9, 1949.

You enclose advertising brochure of the Frazer Products, Inc., for an organic compost, and request an opinion whether or not this product comes within the provisions of chapter 303, Statutes of Nevada 1949, the same being an Act to regulate the sale and distribution of commercial fertilizer.

We are of the opinion that the product in question comes within the provisions of the statute, as it is produced by conventionalized methods for soil enriching or soil corrective purposes.

Section 2 of the Act defines the term commercial fertilizer to include alunite, gypsum, lime phosphate in its natural form and any other commercial fertilizer, imported, manufactured, prepared or sold for fertilizing, manurial, soil enriching or soil corrective purposes.

Section 2 provides that every lot or parcel of mixed commercial fertilizer sold or distributed shall have a plainly printed statement, clearly and truly certifying as follows:

- (a) The net weight of the contents of the package, lot or parcel;
- (b) The name, brand, or trademark
- (c) The name and principal address of the manufacturer or person responsible for placing the commodity on the market;
- (d) The minimum percentage and source of nitrogen in available form;
- (e) The minimum percentage and source of potash ( $K_2O$ ), soluble in distilled water;
- (f) The minimum percentage and source of available phosphoric acid ( $P_2O_5$ ), and also the total phosphoric acid content.

The content of any other material from which a benefit is claimed shall be stated.

Section 7 of the Act requires the State Department of Agriculture to direct a qualified chemist

to make proper analysis and tests to determine the percentage of nitrogen in available form, the percentage potash soluble in distilled water, the percentage of available phosphoric acid, the percentage of calcium sulphate hydrate, and to inspect the labels and determine whether or not they conform to the provisions of the Act.

Section 8 makes provision for an umpire in the event the manufacturer fails to agree with the analysis of the chemist.

In the few cases cited in Words and Phrases, Permanent Edition, Vol. 16, under fertilizer, the Federal Court in *Heller v. Magone*, 38 F. 908, held that under the Tariff Act providing all substances expressly used for manure were on the free list, and that all substances whether provided for by or in that name, or covered by general language descriptive of their origin or qualities, which will subserve the purpose of enriching the soil, and thus increasing the crops to be raised upon it, should be free.

The intent of the Legislature in the enactment of the Act regulating and defining commercial fertilizers is to protect the users of the product from misrepresentation. The Act excepts any animal manure which has not been artificially treated, but section 3, which requires a formulate statement of certain chemical contents in the product, also requires: "The content of any other material from which a benefit is claimed shall be stated."

Definitions given by Webster for the word "compost" include: "A mixture for fertilizing or renovating land; esp. a fertilizing mixture composed of peat, leaf mold, manure, lime, etc., mingled and decomposed." "To mingle, as different fertilizing substances, in a mass where they will decompose and form into a compost."

The Act includes products prepared or sold for fertilizing, manurial, soil enriching or soil corrective purposes. The labeling as to weight, name and address of the manufacturer as well as the contents is evidently to assure the purchaser that the advertised product is what is represented to be. The statute makes it the duty of the State Department of Agriculture to verify these facts and provides a license to control distribution.

This commercial product requires a certain process in its manufacture to achieve the results claimed for it, and whether the finished product is the result of organic or inorganic action or combinations, it is sold for the purpose of enriching the soil and increasing the crops to be raised upon it, and in our opinion it comes within the language and the intent of the Legislature as expressed in the statute.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-793 PUBLIC SCHOOLS**—Advertisement for bids—Furniture for school purposes defined.

Carson City, August 16, 1949

Hon. Harold O. Taber, District Attorney, Washoe County, Reno, Nevada

Attention: John C. Bartlett

Dear Sir:

This will acknowledge receipt of your letter dated August 5, 1949, received in this office August 8, 1949.

You present your interpretation of the word "furniture" as found in section 286, chapter 63, Statutes of Nevada, and distinguish it from equipment and supplies that may be used in the course of instruction. You also advised that if they purchased in lots of less than \$500 throughout various times during the year, the mere fact that they spent more than \$500 in toto would not require advertising.

We are of the opinion that your advice to the school trustees is a correct interpretation of the term "furniture." It is our opinion that the term as used in the statute is confined to the necessary equipment for a school building and does not include appurtenances supplied for instruction purposes. The fact that purchases for a year amount to more than \$500 could not be determined until after purchases were made and would not come within the limitation, but the need for the year could not be purchased under one contract with provision for interval payments in amounts less than \$500.

Section 286 of the 1947 School Code, chapter 63, Statutes of Nevada 1947, quoting that part deemed applicable reads as follows: "Whenever the trustees of any school district shall decide to erect any new school building that is to cost more than five (\$500) dollars, or to repair or add to any old school building, which repair or addition is to cost more than five hundred (\$500) dollars, or to purchase school furniture that is to cost more than five hundred (\$500) dollars, they shall advertise for bids for the contract to erect the said new building, or to make the repairs or addition \* \* \*."

The following section which provides for the letting of the contract to the lowest and best bidder also uses the language, "the erection of any school building, or upon the repair or addition to any school building, or upon the purchase of school furniture."

Chapter 207, Statutes of 1947, amended this section, 287, using the same language quoted above, and added a proviso to the effect that after advertising twice and no satisfactory bid is received the construction may be on a cost-plus-a-fee basis.

The word "furniture" is used throughout the sections in connection with school building and would therefore be confined to the necessary appendages to the building and be distinguished from appliances and appurtenances used for instruction purposes.

See Words and Phrases, Permanent Edition, Vol. 17, under title Furniture-Schoolhouses. *McGee v. Franklin Pub. Co.*, 39 S.W. 335: "The term 'furniture' as used in the Act of 1893, sec. 81, authorizes school trustees to buy furniture for schoolhouses, embraces only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that may be used in instructing the scholars." This case is cited in *Bodine v. Johnson*, 222 P. 993, and the definition of furniture given in that case is adopted by the Court, which held that the term furniture could not be construed to include the purchase of a motor truck for transportation purposes.

Contracts made to avoid the limitations provided by statute was the subject of the case of *Specialty Co. v. Washoe County*, 24 Nevada 359, wherein the Court held that the purchase of furniture in total sum of \$1,498.60 entered into by the County Commissioners, without advertising, was void, although the payments were to be made upon four claims, each of which were less than \$500. The Court held that a fraud upon a statute is a violation of the statute.

Very truly yours,

ALAN BIBLE

Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-794 WELFARE**—Department authorized to make rules and regulations for administration of old-age assistance.

Carson City, August 16, 1949

Mrs. Barbara Coughlan, Acting Director, Division of Public Assistance, P.O. Box 1331, Reno, Nevada

Dear Mrs. Coughlan:

This will acknowledge receipt of your letter dated August 10, 1949, received in this office August 11, 1949.

You request an Attorney General's certification relative to chapter 327, Statutes of Nevada 1949, and its validity to grant authority to the Nevada State Welfare Department to administer the program of Old-Age Assistance and to make rules and regulations binding on local subdivisions.

Chapter 327, Statutes of Nevada 1949, is a valid enactment by the Legislature creating the Nevada State Welfare Department. The State Welfare Department so created is the single State agency of the State of Nevada and its political subdivisions in the administration of any Federal funds granted to the State to aid in the furtherance of any services, including Old-Age Assistance, Blind Assistance, Aid to Dependent Children, General Assistance, Child Welfare Services, and such other welfare activities as now are or hereafter may be authorized or provided for by the laws of this State and vested in the department.

The said State Welfare Department is authorized to make rules and regulations for the administration of the Act, which rules and regulations shall be binding upon all recipients and local units.

The Act assents to the purposes of the Act of Congress of the United States, entitled the "Social Security Act," approved August 14, 1935, and to such additional Federal legislation as is not inconsistent with the purposes of the State Act.

The Act accepts the appropriations of money in pursuance of the Social Security Act and authorizes the receipt of such money into the State Treasury for the use of the State Welfare Department in accordance with the conditions imposed by the Federal Social Security Act, and in accord with the State Act.

The Act did not specifically prescribe an effective date and, therefore, under the statutes, became effective July 1, 1949.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-795 NEVADA HOSPITAL FOR MENTAL DISEASES**—Assistant



resident physician must be qualified physician.

Carson City, August 17, 1949

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 August 9, 1949, received in this office August 11, 1949.

You present a problem involving the employment of an assistant resident physician under the provisions of chapter 169, Statutes of Nevada 1949, which is a new Act regulating the practice of medicine and surgery.

You call attention to chapter 98, Statutes of 1947, which amended the Medical Practice Act by adding a new section authorizing the State Board of Medical Examiners to issue permits to a properly qualified applicant to serve as resident medical officer in any hospital in Nevada subject to the provisions of section. This provision is not contained in the new Act, and, as stated in your letter, it will impose a grave hardship upon the functions of the Hospital unless some way is found to permit engaging a physician without the prerequisite of a general license to practice medicine and surgery secured under the provisions of the new Act.

During the recent conference we had in this office on this subject you pointed out the difficulty of securing a physician licensed for general practice, due to the limited funds provided for this purpose. Your request is, whether we can find within the law a remedy for this situation.

*The Supreme Court v. Kruttschnitt*, [4 Nev. 178](#), held that whenever the interpretation of a statute will result in manifest injustice the courts will scrutinize the Act to see if it will admit of some other interpretation, for it is not to be supposed that any legislative body passes an Act for the purpose of doing a manifest wrong.

Section 21 of chapter 98, Statutes of 1947, provided that the State Board of Medical Examiners shall have authority to issue permits to any proper qualified applicant to serve as medical officer in any hospital in Nevada subject to certain restrictions.

Chapter 169, Statutes of 1949, is a new Act revising the whole subject matter of the former law, and specifically repeals the former Act and all amendments, as well as all Acts and parts of Acts in conflict therewith.

Section 17 of the Act defines the term "practice of medicine, surgery and obstetrics" in explicit language and fixes a penalty for a violation of the Act.

Section 21 of the Act contains in part the following language:

It shall be the duty of said state board of medical examiners at its discretion to examine any person pretending to a knowledge of any branch or branches of medicine, surgery or obstetrics not provided for elsewhere in the statutes of Nevada, and to establish and maintain a system of a state licensure for the practice thereof.

The branches provided for elsewhere in the statutes would be dentistry, osteopathy, chiropractice, chiropody, optometry, faith or Christian Science healing, nursing and veterinary, as these are excepted from the Act in section 1 thereof.

The branches over which the State Medical Board in its discretion may issue licenses could not be construed to embrace the authority to issue limited permits to persons practicing medicine and surgery as a medical officer in a Nevada hospital as provided in chapter 98, Statutes of 1947, as this amendment was specifically repealed in section 27 of chapter 169.

A ramification, outgrowth or branch of the practice curing, relieving or palliation of any ailment would indicate the practice of massage, naturopathy and similar practices.

Section 6 of the Act concerning the insane of the State, as amended by chapter 277, Statutes of 1947, which provides for the appointment of resident and resident assistant physician does not specifically provide that such physician be licensed to practice in the State. It does require that the persons be physicians who shall hold a degree of Doctor Medicine. This statute, however, would not permit the Hospital Commissioners to employ a physician to practice in violation of the Act regulating the practice of medicine.

It therefore appears that there is no remedy for the situation presented under the present statutes.

*Gill v. Goldfield Con. M. Co.*, [43 Nev. 1](#):

Where a statute is revised, or one act framed from another, some part being omitted, the parts omitted are not revived by construction, but are considered to be annulled.

Eureka Bank Cases, [35 Nev. 85](#); *State v. Wilson*, 82 Am. Dec. 163.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

cc: Mrs. C.C. Taylor

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**OPINION NO. 49-796 FISH AND GAME**—Deputy game wardens must be residents of Nevada.

Carson City, August 17, 1949

Nevada Fish and Game Commission, P.O. Box 678, Reno, Nevada

Attention: Frank W. Groves, Assistant Director

Gentlemen:

This will acknowledge receipt of your letter of August 9, 1949, received in this office August 10, 1949, requesting the opinion of this office as to the following inquiry:

May the Fish and Game Commission deputize one as a warden who is not a resident of Nevada in order that he may validly arrest Nevada violators inside the boundaries of Nevada?

The answer to this inquiry is in the negative.

Article XV, section 164 of the Nevada Constitution, in the first sentence provides as follows:

“No person shall be eligible to any office who is not a qualified elector under this constitution

\* \* \*.”

A deputy game warden is obviously an officer of the State and holds an office within the meaning of this provision, therefore, one not a resident of Nevada would not be eligible to be deputized as a deputy game warden.

Very truly yours,

ALAN BIBLE  
Attorney General.

By: Robert L. McDonald  
Deputy Attorney General.

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**OPINION NO. 49-797 INSURANCE**—Naval ammunition depot—Benefit association for employees—Ladies' auxiliary.

Carson City, August 24, 1949

Honorable Jerry Donovan, Insurance Commissioner, Carson City, Nevada

Attention: Mr. G.C. Osburn, Insurance Deputy

Dear Sir:

This will acknowledge receipt of your letter dated August 12, received in this office August 15, 1949.

You request an opinion as to the present status of the employees of the Naval Ammunition Depot at Hawthorne, organized under section 3656.122, 1929 N.C.L., 1931-1941 Supp., which provided for the forming of benefit association for employees who are engaged in one hazardous occupation.

You inquire if this association is still exempt from the provisions of the Insurance Act since the passage of chapter 217, Statutes of 1949, which provides a code for fraternal benefit societies, and repeals sections 3656.122-3656.128, 1929 N.C.L., 1931-1941 Supp., insofar as the same are inconsistent with the provisions of the Act.

You state that the organization does not operate on a lodge system and does not have any ladies' auxiliary, and inquire if it could include in its members the wives of husbands of the employed members.

In our opinion there is no provision in the Insurance Act or the Fraternal Benefit Society Act to include wives of the employed members, but the association in question could establish a ladies' society or ladies' auxiliary and include them in the organization.

Section 3656.122, 1929 N.C.L., 1931-1941 Supp., which is section 122 of Article 16 of the Insurance Act, defines certain societies which are exempt from the Act. Subdivision (1) exempts societies which provide only benefits for bodily injury, disablement, or death of its members, who shall be persons engaged in one hazardous occupation.

Chapter 217, Statutes of Nevada 1949, provides a code for the State of Nevada for fraternal benefit societies.

Section 2 of the Act defines a lodge system.

Section 32 provides for the exemption of certain societies and uses the following language: "(1)

Excepts as herein provided the following societies shall be exempt from compliance with this chapter and need not be licensed, and shall also be exempt from all other provisions of the insurance laws of this state, not only in governmental relations with the state but for every other purpose; \* \* \*."

Subdivision (b) under this section provides: "Orders, societies or associations which admit to membership only persons engaged in one or more crafts of hazardous occupations, in the same or similar lines of business, and the ladies' societies or ladies' auxiliaries to such orders, societies or associations; \* \* \*."

This Act revises and codifies the laws of the State relative to fraternal benefit societies add

defines the lodge system, but exempts associations such as the employees benefit association of the Naval Ammunition Depot at Hawthorne.

The exemption in the Insurance Act and the Fraternal Benefit Society Act is the same for this class of association. Section 32 of the 1949 Act adds to this exemption the ladies' society or ladies' auxiliaries to such association.

Such a society is not included in the lodge system in either of the Acts.

Section 3656.122, 1929 N.C.L., 1931-1941 Supp., is not inconsistent with section 32 of chapter 217, Statutes of 1949. This section grants an additional privilege to such associations to include the ladies society or ladies' auxiliary and there is no provision in either state that forbids such an association from organizing such auxiliary.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-798 REAL ESTATE**—No per diem allowance provided—Travel allowance determined by board.

Carson City, August 26, 1949

Honorable Vail Pittman, Governor of Nevada, Carson City, Nevada

Dear Governor Pittman:

Receipt is hereby acknowledged of your letter of August 25, 1949, wherein you request the opinion of this office upon the following matter, quoting from your letter:

The Reno Real Estate Board has questioned the expenditures made by the Nevada State Real Estate Board and have stated to me that between 1947 and at the time of the meeting of the 1949 Legislature, members of the Board have drawn as much as \$50.00 a day per diem.

It has been suggested by some of the members of the Reno Real Estate Board that I obtain an opinion from you relative to per diem and traveling allowances that members of the Board were entitled to receive under the 1947 Real Estate Act.

### **OPINION**

Your inquiry presents a question to be answered pursuant to the State Real Estate Board Act of 1947, the same being chapter 150, Statutes of 1947.

The moneys received by the State Real Estate Board under such Act are moneys received for licenses issued and fees charged by such Board. Sections 19 and 6 of said Act. Section 6 provides as follows:

All moneys received for licenses shall be held by the treasurer of the board subject to its order. Said money shall be used to meet the expenses of the board for stationery, books of record, blanks, and other supplies, clerical and stenographic charges, office rent, the actual expenses of the members of the board in attendance upon meetings, and such other expenses as shall be reasonably necessary for

carrying out the provisions of this act. Members of the board shall serve without compensation, but shall receive their actual expenses in attending upon meetings or in the transaction of other business of the board, insofar as the money received from licenses is sufficient therefor, but not otherwise. The payment of money from the funds of the board shall be made upon the written order of the president, countersigned by the secretary-treasurer.

No other section of the Act provides for the expenditures of funds of the Board. It is most clear that the only expenditure of the funds that can legally be made by the Board or under its sanction are for the purposes mentioned in the statute, to wit, stationery, books of record, blanks, and other supplies, clerical and stenographic charges, office rent, the actual expenses of the members of the Board in attendance upon meetings, and such other expenses as shall be reasonably necessary for carrying out the provisions of the Act. There is no provision for the payment of per diem to members of the Board, to the contrary the Act provides: "*Members of the board shall serve without compensation, but shall receive their actual expenses in attending upon meetings or in the transaction of other business of the board.*" (Italics ours.)

It is our considered opinion that no per diem allowance or payment to the members, or either of them, of the State Real Estate Board was or is provided in the 1947 Act. And we are further of the opinion that the travel allowance fixed and determined by the Board, commensurate with the condition of its treasury.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-799 STATE DEPARTMENTS AND BOARDS**—Annual reports required.

Carson City, August 26, 1949

Mr. Forrest M. Bibb, Director of the Budget, Office of the Governor, Carson City, Nevada

Dear Mr. Bibb:

Reference is hereby made to your letter of August 3, 1949, requesting the opinion of this office whether chapter 214, Statutes of Nevada 1949 embraces: (1) All agencies of the State consisting of one or more appointed officials, or (2) only certain agencies which do not administer full-time programs in Nevada.

Under date of August 2, 1949, you requested my advice on this question, and at the time I gave you my unofficial opinion to the effect that the Act in question was all inclusive. This will confirm that opinion.

### **OPINION**

Section 1 of chapter 214, Statutes of 1949, provides:

Notwithstanding any other provision of law, each and every state board, bureau,

or agency which is composed of appointed members, shall report annually, in detail, all moneys, from whatsoever source derived, received or disbursed by such board, bureau, commission or agency.

Section 2 provides that such annual report shall be made to the Governor.

The language of section 1 of the Act is clear and express. It means that every State board, bureau, commission or agency composed of appointed members shall report annually, in detail, all moneys from whatsoever source derived, received or disbursed. Such language draws no distinction between boards consisting of one or more appointed members and boards that do not administer full-time programs in this State. All boards, bureaus, commissions or agencies in this State composed of members appointed by the respective appointing powers of the State come within the meaning and intent of the Act.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-800 PUBLIC EMPLOYEES RETIREMENT**—Teachers retired as of July 1, 1950.

Carson City, August 26, 1949

Mr. Kerwin L. Foley, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada

Dear Mr. Foley:

This will acknowledge receipt of your letter of August 22, 1949, received in this office the same date, in which you request us to determine what, if any, are the legal objections to the following proposed methods of payment of retirement allowance to presently retired members of the Public School Teachers Retirement System on and after July 1, 1950.

1. Persons retired as of July 1, 1950, under the provisions of the Public School Teachers Retirement System will receive such greater benefits as the Public Employees Retirement System may provide if they have met the age and service requirements of the Public Employees Retirement Act for such benefits.

2. Persons retired as of July 1, 1950, under the provisions of the Public School Teachers Retirement System who do not meet the age and service requirements for retirement under the Public Employees Retirement Act will continue to receive the benefits available under the Teachers system until they have met the requirements of the Public Employees system at which time they will receive the greater benefits of the Public Employees System.

3. Retired school teachers receiving greater benefits under their system than would be available under the Public Employees Retirement System will continue to receive the same benefits and payments will not be reduced.

This is to inform your office that we have concluded that there are no legal objections to the above proposed methods of payment.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-801 ARCHITECTURE**—Bylaws of state board not inconsistent with Chapter 220, Statutes of Nevada 1949.

Carson City, August 26, 1949

Mr. L. A. Ferris, Chairman, Nevada State Board of Architecture, 577 La Rue Street,  
Reno, Nevada

Dear Mr. Ferris:

I have examined the copy of the Bylaws of the State Board of Architecture of Nevada, and find nothing therein to be inconsistent with chapter 220, Statutes of Nevada 1949.

Section 11 requires the secretary-treasurer to make an annual report immediately after the 30th day of June for printing and distribution.

This section might also contain a provision to comply with chapter 214, Statutes of 1949 which requires that every board which is composed of appointed members shall on or before August first of each year make a report to the Governor, covering the transactions for the prior year.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-802 TAXATION**—Western Automobile Leasing Company—Automobiles may be registered without payment of personal property tax if not brought into or used in this state.

Carson City, August 26, 1949

Nevada Tax Commission, Carson City, Nevada

Attention: Mr. R.E. Cahill, Secretary

Gentlemen:

Reference is hereby made to the previous correspondence with your office relating to the matter of the licensing and taxation of automobiles of the Western Automobile Leasing

Company, particularly to your letter of August 1, 1949 together with the annexed letter of the company of July 27, 1949 and your letter of August 5, 1949, giving further details of the proposed operations of the company. Extraordinary press of business in this office has prevented an earlier reply and opinion.

It appears that the Western Automobile Leasing Company is desirous of moving its headquarters and business to Nevada. It is engaged in the business of purchasing fleets of automobiles and then leasing them to governmental agencies and corporations in eleven Western States. It proposes to register such automobiles in Nevada under Nevada law. All automobiles purchased and owned by it will be registered in this State irrespective of whether any of them will ever enter and/or be used in Nevada. The company proposes to purchase Nevada license plates after the automobiles have been purchased in Nevada for delivery at the factory. The automobiles would then be driven to the State or States other than Nevada for the use there by the lessees thereof. The inquiry is, under such facts, are such automobiles subject to the Nevada personal property tax.

### OPINION

We have given much thought to the foregoing proposition and the query relating thereto, due to the importance of the matter of taxation. We are of the opinion that the query is answered and governed by the opinions of this office rendered to District Attorney Robert E. Jones of Clark County under date of December 28, 1948, a copy of which opinion is annexed hereto. This opinion deals with an analogous proposition of the power of the County Assessor to levy and collect personal property taxes on motor vehicles belonging to the Fleet Lines, Inc., a Nevada corporation domiciled in Nevada and engaged in common carrier service by motor vehicles, but which vehicles while registered and licensed in Nevada were never in the State or used in the State. It will be noted that after an exhaustive examination of the law we concluded and held:

1. That the County Assessor was not prohibited from registering automotive equipment of the company even though such equipment was not subject to the personal property taxation in this State.

2. That the law governing taxation of tangible personal property is that such property 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 the automotive equipment of the Fleet Lines, Inc., assessed by the County Assessor, not being in and/or used by the company in the State of Nevada was not subject to personal property tax.

There has been no change in the law, since the rendition of the above opinion, relative to the levy and collection of personal property taxes on motor vehicles in the situation disclosed therein.

Section 11 of the Motor Vehicle Registration Act as amended at 1949 Statutes 480, still contains the phrase "if such vehicle be subject to taxation in the State of Nevada." The 1949 amendment simply provides a pro rata tax on a monthly basis upon motor vehicles registered for the first time in Nevada.

We are of the opinion that the company in question here may register their automobiles in this State subject to the delivery at the factory and so long as none of such automobiles are brought within the State, commingled with the property of the company in Nevada and/or used in Nevada that it may so register them without payment of personal property tax in this State. However, if any such automobiles are brought within the State and used here they will be subject to such tax.

Respectfully submitted,

ALAN BIBLE  
Attorney General



By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-803 MINING**—Lunch time is a matter of contract between mine owner or operator and miners employed.

Carson City, August 29, 1949

Mr. A. E. Bernard, State Inspector of Mines, Carson City, Nevada

Dear Mr. Bernard:

Reference is hereby made to your request of recent date for an interpretation of section 10237, N.C.L. 1929, as amended at 1949 Statutes 197, relating to the employment of men underground in mines for a period of time not exceeding eight hours within any twenty-four hours, excepting in cases of emergency. The 1949 amendment being known as the “collar to collar” law. Your inquiry is: IF the miners are brought to the surface during the eight-hour period for lunch, on whose time and how is such time computed which is consumed in the travel to and from the surface and in the eating of lunch?

#### **OPINION**

The pertinent 1949 amendment provides:

And the eight hours shall include the time employed, occupied, or consumed from the time of entering the collar of the shaft or portal of the tunnel of any underground mine until returning to the surface from said underground mine, or the time employed, occupied, or consumed in leaving the surface of any tunnel, open cut or open pit workings, for the point or place of work therein, and returning thereto from said place or point of work.

In 1928 Attorney General Diskin, in reply to the following query—”Where men are employed in underground workings and are required to remain underground to each lunch, would that time apply on the eight hours underground, as prescribed in the Revised Laws of 1912, section 6554, as amended, Chapter 105, Statutes 1927” (now section 10237, N.C.L. 1929), held:

I am of the opinion therefore, that, under your inquiry, if men employed in underground mines are required to remain underground to eat lunch, the time so occupied would apply on the eight hours underground as defined by the above and foregoing section. (Opinion No. 210, Aug. 13, 1928, Report of the Attorney General 1927-1928.)

The collar to collar amendment of 1949, in our opinion, made no change in the law as determined by the Attorney General Diskin, relative to lunch time, where the men are required and/or prefer to eat lunch underground. The amendment contains no provision whereby the continuity of the men’s time beginning and ending at the collar of the shaft or the portal of the tunnel is or may be broken for any purpose, so long as the men are underground, whereby the hours of service underground would be extended. However, it is our considered opinion that if the men are brought to the surface for the purpose of eating lunch that the time consumed in

bringing the men to the surface would be charged to the mining company time, that the time then consumed by the men would be charged to their time, and that the time consumed in returning the men to the place of work in the mine would be charged to company time.

In the final analysis we think the question of lunch time is a matter of contract between the mine owner or operator of the mine and the miners employed therein, provided the collar to collar law is observed.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-804 PUBLIC EMPLOYEES RETIREMENT**—Effective date of act with respect to employees reaching age of 55.

Carson City, August 29, 1949

Mr. Kerwin L. Foley, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada

Dear Mr. Foley:

This will acknowledge receipt of your letter in which you request the opinion of this office on the following question:

May a member of the Public Employees Retirement System (other than a school teacher, policeman or fireman) who is credited with thirty or more years of continuous service, leave the employ of a participating employer prior to July 1, 1953, or prior to attainment of age 55 and then eligible for retirement allowance after July 1, 1953.

The answer to this question is in the negative.

Section 11, subsection (3) of chapter 124 of the 1949 legislative enactments reads as follows:

On and after July 1, 1953, a police officer and fireman who has completed thirty years of continuous service or any other employee who has completed thirty years of continuous service and has attained the age of fifty-five shall be retired upon acceptance by the board of his written application to retire. If such police officer and fireman having thirty years of continuous service retires or any other member with thirty years continuous service retires or any other member with thirty years of continuous service retires at fifty-five, he shall receive a service retirement allowance which will be 50% of his average salary for the last five years.

The first line of the above-quoted section states that "On and after July 1, 1953 \* \* \*." In other words, July 1, 1953 or thereafter is the effective date of this particular provision. Therefore, one who has 30 or more years of service and is of the age of 55 on or after the effective date will be eligible for retirement, as is contemplated by the Act. It is a general rule of statutory construction that an Act of the Legislature is not severable as to its effective date unless otherwise provided.

If one were allowed to leave the employ of the participating employer before the effective date of the Act and after the effective date take advantage of the retirement allowance, it obviously would be making a portion of the Act effective before July 1, 1953.

This was not the intent of the Legislature, nor is it the statement of the Act and consequently one can not be considered for retirement under this provision until July 1, 1953.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-805 NOTARY PUBLIC—Revocation of commission—Abstractor's commission.**

Carson City, September 7, 1949

Honorable Vail Pittman, Governor of Nevada, Carson City, Nevada

Dear Governor Pittman:

Reference is hereby made to your letter of August 25, 1949, wherein you request the opinion of this office concerning the legal reasons whereby the Governor may rescind either an abstractor's commission or a notary public's commission. You advise the question arises by reason of a request of a surety company to cancel the bond of a Nevada commissioned abstractor upon the ground such abstractor had removed from the State.

### OPINION

Answering your query with respect to notaries public. Section 4732, N.C.L. 1929, empowers the Governor to appoint notaries public in and for the several counties of the State. Section 4733 provides that the term of office therefore shall be for four years, and that the governor may at any time, *for cause*, revoke the commission of a notary public. Such section, however, does not specify the causes for which the revocation of a commission may be had, and the general State statutory law with respect to removal of officers and appointees does not expressly refer to notaries public.

However, a notary public is deemed a public officer, *State v. Clarke*, [21 Nev. 333](#), and as such, under the law of this State, may be removed from office in accordance with the statutory provisions relating to the removal of incumbents from office in proceedings brought in a court of competent jurisdiction. See sections 4860-4863, N.C.L. 1929, as amended at 1949 Statutes, pages 113, 114.

Where the appointing power is authorized by statute to remove an appointed official for cause and such statute does not specify the cause, the rule is as stated in 43 Am. Jur. 47, sec. 205, as follows:

Instead of enumerating particular causes for the removal of public officers, their superiors in authority may be empowered to remove them for "cause." The phrase "for cause" in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause which the appointing power in the

exercise of discretion may deem sufficient. It is implied that officers may not be removed at the mere will of those that officers may not be removed at the mere will of those vested with the power of removal, or without any cause. Moreover, the cause must relate to and affect the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public.

Applying the rule to the instant question, it is our opinion that the Governor is authorized to revoke the commission of a notary public for a legal cause which relates to and effects the administration of the notary's office and which cause is of a substantial nature directly affecting the rights and interest of the public as affected by the malfeasance, malpractice or nonfeasance of such notary in the performance of his duties. Such legal causes as are stated in section 4861, N.C.L. 1929, as amended at 1949 Statutes, page 114, can be used as a guide in such matters, it is there stated—officer guilty of charging and collecting illegal fees, refusing or neglecting to perform official duties as prescribed by law, or has been guilty of any malpractice or malfeasance in office.

We are of the opinion, however, that if a complaint is lodged with the Governor against a notary public for the purpose of causing a revocation of his commission, that before the revocation is had that the notary be given notice thereof and accorded a hearing on the charges preferred against him.

Answering your query with respect to abstracters. The Governor is empowered to appoint and commission commissioned abstracters for the several counties of the State. Sections 1450 and 1451, N.C.L. 1929, section 1452, provides the term of office shall be four years, and that the Governor may at any time, *for cause*, revoke the commission of an abstractor. Section 1454 requires the commissioned abstractor to take the official oath as prescribed by law and give a bond in the sum of two thousand dollars. The abstractor is also required to provide a seal of office. Section 1458 provides that for any misconduct or neglect in any of the matters in which he is authorized to act, he shall be liable on his official bond, and for a willful violation or neglect subject to a criminal prosecution and removal from office. A reasonable construction of the foregoing sections is that a commissioned abstractor is as much a public officer as a notary public.

We think that a commissioned abstractor, with respect to the revocation of his commission by the Governor, comes within the same rule of law as above pointed out with respect to notaries public, and that his commission could be revoked by the Governor for legal cause as hereinabove set forth. Due notice should be given him of any charges preferred against him with a hearing accorded thereon.

The revocation of the commission of a notary public or of a commissioned abstractor does not, in our opinion, cancel his bond, particularly is this true where the revocation is for legal cause. Injured parties would have the right to look to the bond for payment of any damages incurred by reason of the dereliction of the notary or abstractor.

The mere absence from the State of a notary public or commissioned abstractor is not in itself, in our opinion, sufficient cause for the revocation of the commissions in question.

Very truly yours,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

injuries to students and visitors—Board of Regents and staff may be subject to personal suits.

Carson City, September 9, 1949

Honorable P. W. Hayden, Comptroller, University of Nevada, Reno, Nevada

Dear Mr. Hayden:

Reference is hereby made to your letter of August 31, 1949, wherein you request the opinion of this office of whether the University would be liable in damages resulting from:

1. Injuries sustained by students while engaged in regular laboratory work, and
2. Injuries sustained by students or visitors while on the grounds of the University of Nevada.

### OPINION

An examination of the law concerning the liability of universities and colleges for damages occasioned by injuries to students and visitors discloses such a diversity of decisions of appellate courts that it is impossible in an abstract opinion to state a rule that will govern all cases. In fact each case of injury, in our opinion, must rest upon its own set of facts, subject to the one qualification that the State is immune from an action for torts of its officers and agents unless it has, either by reason of a constitutional provision or an Act of its Legislature, consented to be subjected to a suit therefor.

The University of Nevada is a State-owned institution, governed by a constitutionally authorized Board of Regents elected by the people, and it is a department of the State for educational purposes deemed governmental in character. Sections 4, 7, Article XI, Constitution of Nevada. No constitutional provision or State statute provides that the State or the University may be sued in tort for damages occasioned by personal injury to any person.

The general rule is that “universities or colleges which are public or quasi-public corporations created and existing under state law and exercising a governmental function cannot, in the absence of express statutory authority therefor, be sued.” 5 Am. Jur. 20, sec. 31. It has also been held that a State College is not liable for torts committed by its officers, unless made so by statute. *Hopkins v. Clemson Agr. College*, 221 U.S. 636; *State ex rel. Little v. University of Kansas*, 40 Pac. 656, Anno. 160 A.L.R. 17. The general rule is well summarized in Anno. 160 A.L.R. 20, as follows:

In the United States, public education, including that of elementary, high schools, or college grade, is universally recognized as a public or governmental function of the state. The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is generally immune from tort liability because of its sovereign character, even though it may not be immune from suit, and, accordingly, the state enjoys such immunity with respect to public education, or public schools and public institutions of higher learning, at least in connection with functions or activities which are not of a proprietary nature.

No case with respect to tort liability of the University has arisen in Nevada. The Supreme Court, however, held in *McKay v. Washoe General Hospital*, [55 Nev. 336](#), that a hospital organized under a statute authorizing counties to establish hospitals, but which owned no property, have no income and no method of raising money, and which statute did not provide

*that it could sue or be sued*, could not be sued for negligence of nurse employed therein.

In view of the fact that the University is a State-owned institution governed by an elective Board of Regents and subject to legislative control, and the further fact that it is performing a governmental function in furtherance of higher education, we are of the opinion that such university itself falls within the general rule of immunity from suits from damages for injuries to students and visitors, in the absence of any constitutional or statutory provision consenting to such suits.

However, as pointed out above, there is such a diversity of decisions on the law involve din the instant question that we are constrained to advise that the members of the Board of Regents, the officers and the personnel of the University staff may be subjected to personal suits for damages occasioned by injury to students or visitors. We suggest that the securing of proper insurance against possible injuries would in a large measure obviate the danger of such suits.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-807 AGRICULTURE—STATE DEPARTMENT**—Effect of chapter 259, Statutes 1949, upon transfer of moneys.

Carson City, September 15, 1949

Dr. Edward Records, Executive Officer, Department of Agriculture, P.O. Box 1027, Reno, Nevada

Dear Dr. Records:

This will acknowledge receipt of your letter dated September 2, 1949, received in this office September 6, 1949.

You enclose a letter from the Federal Fish and Wildlife Service and a resolution from the Nevada Grazing Board of District No. 1. As stated in the letter from the Fish and Wildlife Service, it has been the custom in the past to make the checks covering appropriations from the grazing board for predator and rodent control payable to the Stat Department of Agriculture, however, since the passage of chapter 259, Statutes of 1949, it was necessary to deposit these funds in the newly created Woolgrowers Predatory Animal Control Fund. The resolution by the grazing board authorizes you to transfer all funds heretofore contributed from the district for predatory animal and rodent control to the State Woolgrowers Predatory Animal Control Fund. It appears from the resolution that the money contributed was during August and September of 1949. The proposed transaction raises questions on which you request an opinion from this office, due to certain ambiguous provisions in chapter 256 and chapter 259, Statutes of 1949.

1. Can I legally and without criticism make the transfer requested to the State Woolgrowers Predatory Animal Committee?
2. If the answer to question one is “no,” could I legally and properly, if so requested, make such a transfer to the State Predatory Animal and Rodent Committee?
3. If either of the above transfers is legal and proper, should I merely endorse the Elko County warrant I am now holding and the prospective warrants from Eureka and Lander Counties over to the approved committee or should I deposit

same in Stock Inspection Fund in the State Treasury and draw a claim or claims to cover in favor of the approved committee?

It is our opinion that all three of your questions must be answered in the negative, for the reason that chapter 256 and chapter 259, Statutes of 1949, became effective July 1, 1949, and the functions of the State board of Stock Commissioners conducting activities under the title State Board of Stock Commissioners conducting activities under the title State Board of Agriculture, for control of predatory animals and rodents in cooperation with the Federal division of Fish and Wildlife, ceased after that date.

The present statute authorizes each of the committees to enter into agreements with the Federal agencies for the specific purposes mentioned in the Acts, and the contributions should be made on the basis of such agreements.

The Legislature in 1947, under chapter 273, made an appropriation of \$50,000 to be expended by the State Board of Stock Commissioners in cooperation with the U.S. Fish and Wildlife Service for the biennium ending June 30, 1949. The Act provided that the Board should enter into definite agreements with the Fish and Wildlife Service, prescribing the terms and conditions, and the amounts which the State and Federal Governments will respectively contribute thereto for each fiscal year. There was no similar appropriation made by the 1949 Legislature and any balance in this fund would revert to the General Fund of the State on June 30, 1949.

Chapter 256, Statutes of 1949, created a predatory animal and rodent committee composed of members designated from among the members of the State Stock Commission, the State Fish and Game Commission, the State Board of Sheep Commissioners, the State Board of Health and the State Farm Bureau. The Act makes it the duty of the committee to enter into agreements with the Fish and Wildlife Service covering control of predatory animals and rodents for the protection against losses of livestock, poultry, game birds and animals on a State-wide basis. The Act did not provide an appropriation. The committee is authorized to receive contributions which shall be placed in a special fund to be known as the State Predatory Animal and Rodent Control Fund.

Chapter 259, Statutes of 1949, authorizes the State Board of Sheep Commissioners, called the committee, to make a special tax levy on all sheep assessed by the taxing authorities for the purpose of a special fund to be known as the Woolgrowers Predatory Animal Control Fund. The committee is empowered in behalf of the sheep-raising industry to enter into cooperative agreements with the Federal Fish and Wildlife Service in its program of predatory animal control and to contribute money to aid the program from this special fund for this purpose only.

These statutes became effective July 1, 1949, and provided that all Acts and parts of Acts in conflict therewith were repealed. The authority granted the State Board of Agriculture would, therefore, be superseded by chapters 256 and 259, Statutes of 1949.

Chapter 256 gives the Committee the authority to enter into agreements with the Fish and Wildlife Service for the control of predatory animals and rodents for the protection of livestock, poultry, game birds, animals and crops, while chapter 259 empowers the Board, in behalf of the sheep-raising industry, to enter into such agreements for the control of predatory animals.

Therefore, it appears that the allotments from Federal agencies would be based upon the particular agreements governing the use of the money, and in our opinion your Board could not, under the statutes, receive such money and make the transfer as requested.

We return herewith the letter from Mr. Malcolm N. Allison, District Agent, Predator and Rodent Control, and the Resolution of Nevada Grazing Board of District No. 1, Elko, Nevada.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-808 PUBLIC SCHOOLS**—Interpretation sections 184-186 school code 1947—Limitation specified from emergency fund applied only to newly established schools.

Carson City, September 16, 1949

Miss Mildred Bray, State Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will acknowledge receipt of your letter dated September 8, 1949, received in this office September 9, 1949.

You request an opinion as to the interpretation of sections 184, 185, and 186 of the 1947 School Code relative to the apportionment from the Emergency School fund for the relief of school districts established and operating where there has developed a substantial and unexpected increase of resident children enrolled, which increase requires the employment of additional teachers.

You inquire if the limitation of \$500 out of the Emergency School Fund allowed for any one teacher, as provided in section 186, applies to districts already established where such unexpected increase in enrolled children has occurred, or if this limitation applies only to newly established districts.

We are of the opinion that the limitation specified in section 186 of the 1947 School Code for any one teacher applies only to newly established schools. In a situation where a school district already established has developed a substantial and unexpected increase in the number of resident children enrolled since the beginning of the school year requiring the employment of additional teachers, such emergency School Fund may be apportioned to enable the trustees of the district to comply with the positive provision of the statute fixing the minimum annual salary to be paid the teacher.

Section 184 of the 1947 School Code reads as follows: "The emergency school fund or such portion thereof as the state board of education shall deem advisable shall be used as hereafter provided for the relief of school districts newly established after the regular January and July apportionment of any year and not constituted mainly or wholly of resident children and territory therefore included in any already established school district. Such fund shall also be used for the relief of already established school districts wherein there has developed a substantial and unexpected increase since the beginning of the school year in the number of resident children enrolled in such district, said increase requiring the employment of additional teachers."

The first part of the section refers to the emergency fund and how it shall be used as hereinafter provided for the relief of newly established schools.

Section 186 reads as follows: "The money in the emergency school fund or such part thereof as may be necessary shall be distributed to the various districts entitled thereto on the basis of teachers, that is, one (1) teacher to every fifty (50) resident children or a fraction thereof, and not more than five hundred (\$500) dollars shall be allowed for any one (1) teacher. The money thus distributed shall be used only for the payment of necessary school expenses. The superintendent of public instruction shall submit to the state board of education a list of school districts entitled to money from the emergency school fund and estimates of the amount of such money necessary for each of said districts. Upon notice from the superintendent of public instruction that an emergency appropriation has been made from the emergency school fund to any school district as



herein provided, the board of county commissioner shall transfer from the county general fund to the credit of such district the sum of two hundred (\$200) dollars for each teacher as above stated.”

Newly established school districts which receive the apportionment provided in the foregoing section will also receive a supplemental apportionment under chapter 264, Statutes of 1949, which amends section 180 of the School code. The amendment provides that school districts established after the regular July apportionment of the State Distributive School Fund has been made shall be entitled to receive the apportionment to which they would have been entitled from that fund had they been established on July 1, it fixes the basis for the apportionment and directs the Superintendent of Public Instruction to make such supplemental apportionments accordingly.

Thus the newly established schools would evidently be enabled to meet the minimum salary requirement for teachers fixed by the statutes.

The school districts already established in which the unexpected increase of pupils since the beginning of the year required the employment of additional teachers could not receive this supplemental appropriation from the State Distributive School Fund, and the amount allowed in section 186 would not enable the trustees to comply with the provision of the statute requiring the payment of a minimum annual salary of \$2,400 to a teacher.

A rule of statutory construction approved in *Nye County v. Schmidt*, 39 Nevada 456, is that it will not be presumed that one part of a legislative Act will make inoperative or nullify another part of the same section, if a different or more reasonable construction can be applied. Also, it was held that where the legislative body manifests a definite purpose in an Act, it will be presumed that in furtherance of such purpose the lawmaking power formulated the subsidiary provisions in harmony therewith.

The definite purpose of the School Code and the sections in question is to provide the schools with sufficient teachers and pay them not less than the minimum salary specified.

Therefore, section 186 should be construed as applied to that part of section 184 relating to newly established schools, and not construed to make inoperative the last sentence in that section which provides that the fund shall also be used for the relief of already established school districts where additional teachers are required as the result of an unexpected enrollment of pupils since the beginning of the school year.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-809 HIGHWAY DEPARTMENT, STATE**—Exemption from recording fees for deed applies only when state of Nevada is grantee.

Carson City, September 22, 1949

Hon. W. T. Holcomb, State Highway Engineer, Carson City, Nevada

Dear Mr. Holcomb:

This will acknowledge receipt of a copy of a letter addressed to you by Honorable Delle B. Boyd, Recorder and Auditor of Washoe county, Nevada, dated September 14, 1949, and submitted to this office for reply September 21, 1949, by Jim Wallace of your right-of-way

department.

The letter presents cases in which deeds to the State of Nevada, for highway purposes, have been sent to the Recorder for recording. In some cases deeds of partial conveyance affecting the land have accompanied them. The question arises as to the recording fees for these reconveyances.

We are of the opinion that the exemption provided in the special statute regulating the fees of the County Recorder of Washoe County, in respect to deeds offered for recording, applies only when the State of Nevada is grantee, and does not exempt the fee when parties to conveyances or reconveyances record instruments in order to clear record title to property conveyed to the State.

Section 2118, N.C.L. 1929, provides: "Every instrument of writing acknowledged or proved and certified and recorded in the manner prescribed in this act shall from the time of filing the same with the county recorder of the proper county for record impart notice to all persons of the contents thereof and all third parties shall be deemed to purchase and take with notice."

Chapter 69, Statutes of Nevada 1920-1921, being an Act to regulate the fees of the County Recorder of Washoe County, reads in part as follows: "The county recorder of Washoe County,

State of Nevada, shall be allowed to charge, and to collect, the following fees; *provided, however,* that the said recorder shall neither charge nor collect any fees for services rendered to the State of Nevada, or the Count of Washoe, or any city or town within said Washoe County, or any officer thereof in his official capacity \* \* \*."

45 Am. Jur. page 454, paragraph 63, on payment of fees, holds as follows: "The statutes in general provide for the payment of recording fees by those whose interests will be protected by recordation—in case of a deed, the grantee; in case of a mortgage, the mortgagee. It goes without saying that laws providing for the payment of fees or exempting certain classes or individuals from the payment of registration fees are subject to constitutional limitations as to classification and special privileges or immunities."

The grantee under our statute records the instrument to impart notice to all persons of the contents thereof and third parties are deemed to purchase and take with notice. When the State is grantee in a deed to impart notice to all persons of its contents, the recording of such deed is a service to the State by the Recorder which is exempt from the payment of a fee by the State or an officer acting in an official capacity. Reconveyances affecting the land to be purchased by the State, for example, deeds reconveying land under a deed of trust or release of mortgage are recorded for the benefit of the grantee named in the instrument. The recording fee is a service to such party and there is no exemption as to the fee.

To hold that all conveyances and reconveyances between parties in order to show record title in a party from whom the State purchases property would be granting special privileges or immunities to persons who deal with the State in clearing record title to property.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-810 WELFARE**—State board has power to delegate its chairman as executive officer until director is selected and appointed.

Carson City, September 26, 1949

Mrs. Barbara Coughlan, Acting Director, Division of Child Welfare Services, P.O. Box 1331,  
Reno, Nevada

Dear Mrs. Coughlan:

This will acknowledge receipt of your letter dated September 21, 1949, received in this office September 23, 1949, enclosing a copy of the minutes of the State Welfare Board of July 1, 1949, and a copy of a letter from the Child Welfare Representative of the Federal Children's Bureau.

The resolution of the State board authorizes Mr. Shelly, the Chairman of the Board, to act as the executive officer of the Board until an appointment of an over-all director is made. The letter from the Federal Children's Bureau requires a statement from this office saying that it is within the power of the Board to delegate Mr. Shelly to assume these responsibilities.

We are of the opinion that the State Welfare Board has power to delegate its chairman, Mr. Shelly, as executive officer until such time as a director may be selected and appointed in compliance with the statutory requirements.

Chapter 327, Statutes of 1949, section 8, provides as follows: "The state welfare board hereby established shall succeed to and is hereby invested with all the duties, powers, purposes, responsibilities, and jurisdiction under this act, unless otherwise herein expressly provided. The board shall have the power and it shall be its duty to formulate policies and to establish rules and regulations for administration of the programs for which the department is responsible, and shall have the following powers \* \* \*."

The first-mentioned power and duty is to appoint a State Welfare Director in accord with specifications provided in the subdivision of the section.

Section 9 provides: "The state welfare director shall serve as the executive officer of the state welfare department, shall administer all activities and services of the department in accordance with the policies, standards, rules and regulations established by the state welfare board, shall be held responsible for the management of the department and shall have the following powers and duties \* \* \*." Then follows the designated powers and duties.

The statute, as disclosed by section 8, places the responsibility and vests entire jurisdiction in the State Welfare Board, unless otherwise herein expressly provided. When the director is appointed, as provided in the section, then the power is delegated to the director by the statute. The word "unless" as used in the section will have the same meaning as "except that" or until, or up to the time the director is qualified and appointed.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-811 RENT CONTROL**—Approval of removal discretionary with governor.

Carson City, September 29, 1949

Honorable Vail Pittman, Governor of Nevada, Carson City, Nevada

Dear Governor Pittman:

This will acknowledge receipt of your letter dated September, 22, 1949, received the same date in this office and enclosing a letter from Honorable Tighe E. Woods, Housing Expediter.

You call attention to paragraph 3 of this letter which relates to a finding by a board of a city, town or village that there no longer exists in that city, town or village such a shortage of rental housing as to require rent control, and upon what such findings must be based, and particularly to the language: “\* \* \* and the resultant resolution must be approved by the state governor.”

Your question is does “must” in the sense it is used imply that it is mandatory upon the Governor to approve the action of local governing bodies or does it mean that he has discretionary powers.

Section 204 of the Federal Housing and Rent Act of 1947, as amended, under subdivision (J) 3, reads:

The Housing Expedite shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; Provided, however, That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter.

The proviso requires that the resolution is first approved by the governor before being transmitted to the Housing Expediter, which means if not approved by the Governor it cannot be transmitted to the Housing Expediter. This does, not, in our opinion, make the approval mandatory on the part of the Governor.

The Governor may, or may not approve, as he may determine. The language requires the approval before transmittal to the Housing Expediter, it does not command approval.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-812 WATER LAW**—Refund of protest fees.

Carson city, October 4, 1949

Hon. Alfred Merritt Smith, State Engineer, Carson City, Nevada

Attention: Mr. Hugh A. Shamberger, Assistant State Engineer

Dear Sir:

Reference is hereby made to your letter of September 27, 1949, relative to the matter of refunding certain protest fees paid by Marie Anderson et al. in protesting certain applications filed by the Bureau of Reclamation for permits to change the place of use of the waters of the

Humboldt River within the boundaries of the Pershing County Conservation District. It appears that certain applications protested by the above protestants were withdrawn due to errors therein, discovered after publication of notices of applications, and new applications correcting the errors were filed in lieu thereof which in turn were again protested by the same protestants who had paid the protest fees in the first instance, and also who paid the same amount of protest fees in protesting the later applications. It is thought by the protestants that they should be refunded the second protest fees paid by them to the State Engineer. You inquire if such refund can legally be made.

### OPINION

The protest fees in question are provided for in section 7959, N.C.L. 1929, as amended at 1949 Statutes, page 106. Such statute, as far as material here, reads:

The following fees shall be collected by the state engineer, and shall be accounted for and paid by him into the general fund of the state treasury once each month \* \* \*. For filing any protest, \$10 \* \* \*.

The foregoing section of the law contains no provision authorizing the refund of protest fees paid in the instant situation or in any other. Neither does such section authorize the receipt of protest at any time except upon payment of the statutory fee. An examination of the water law in its entirety, as well as the general statutory law of the State, fails to disclose any statute authorizing the refund in question and, in the absence of statutory authority, we are of the opinion no refund in the instant matter can legally be made. Particularly is this true in view of the fact that such protest fees are covered over into the General Fund of the State Treasury and no appropriation thereof has been made by the Legislature for refund purposes. Section 19, Article IV of the Constitution provides:

No money shall be drawn from the treasury but in consequence of appropriation made by law \* \* \*.

It may be that the requirement of payment of the protest fees in the instant matter is a harsh provision in the law as applied to the circumstances of this case. However, the remedy lies in the Legislature by amending the statute to provide refunds in like cases.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-813 HOSPITALS—COUNTY**—Boards of control not authorized to limit surgical privileges to any group of physicians.

Carson City, October 5, 1949

Hon. Harold O. Taber, District Attorney, Washoe County, Reno, Nevada

Dear Tabe:

This will acknowledge receipt of a copy of the opinion you wrote at the request of Mr. Fox, Superintendent of Washoe Medical Center, Reno, Nevada, dated September 29, 1949, and a letter in which you request this office to comment on your opinion.

We also have received copies of the two letters Mr. Fox forwarded to you in which he sets forth his request for the opinion and the reasons for such a request.

Your opinion as to the validity of the following regulation which was stated to you by a member of the Board of Trustees. The members of the staff at Washoe Medical Center would be divided into an "A" panel composed of consulting surgeons, whose surgical privileges would be unlimited at the hospital. Other members of the staff would be classified into "B" panel, whose surgical privileges would be limited and it would be necessary for any member of "B" panel, before performing surgery, to call in a consultant from "A" panel for consultation and assistance in preoperative, operating and post-operative care.

As we have not received any other proposed regulation we will assume that the regulation as you state it in your opinion is the one the Board of Trustees are contemplating enacting and our opinion will be based on this regulation.

At the outset we will state that we concur with your opinion and will add the following for your information and for what assistance it may be.

First, we might mention that whatever the proposed rules may be their validity must necessarily be determined by the applicable Nevada statutes.

Section 2234, N.C.L. 1929, provides as follows:

*When such hospital is established the physicians, nurses, attendants, the persons sick therein, and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there shall be subject to such rules and regulations as said board may prescribe. (Italics ours.)*

Section 2235, N.C.L. 1929, provides as follows:

*In the management of such public hospital no discrimination shall be made against practitioners of any regular school of medicine and surgery recognized by the laws of Nevada, and all such regular practitioners shall have equal privileges in treating patients in said hospital the physician employed by such patient shall have the exclusive charge of the care and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician, subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this act. The said board of trustees shall organize a staff of physicians composed of every regular practicing physician in the county in which said hospital is located, and each physician shall hold his position on said staff so long as he complies with the rules and regulations laid down by the board of hospital trustees \* \* \*. (Italics ours.)*

Obviously these are the two pertinent sections and are determinative of the powers of the Boards of Trustees to enact regulations.

In American Jurisprudence, Volume 26, section 9, at page 592, under the heading entitled "Hospital and Asylums," subheading "Management and Operation," the general rule is stated with supporting case citations as follows:

It seems to be the practically unanimous opinion that private hospitals have the right to exclude licensed physicians from the use of the hospital, and that such exclusion rests with the sound discretion of the managing authorities. This is not, however, the rule applied to public hospitals, since a regularly licensed physician and surgeon has a right to practice in the public hospital so long as he stays within

the law and conforms to all reasonable rules and regulations of the institution. Neither a city nor the authorities of a public hospital can prescribe rules or regulations for the conduct of physicians and surgeons practicing in such hospitals that contravene or conflict with state laws \* \* \*.

One of the cases cited in support of this rule is *Henderson v. Knoxville*, 9 S.W. (2) 697, which you have adequately treated. It should be stated at this time that this particular case on its facts is not exactly in point with our problem but it is available for the purpose of enunciating the general rule regarding public hospitals.

*Seldin v. City of Sterling*, 45 N.E. (2) 329, further enunciate the general rule, although the Illinois statute is not identical to our own as it lacks, among other things, the provision that “the staff of physicians shall be composed of every regular practicing physician in the county in which said hospital is located,” which is present in the Nevada statute. In this case the petitioner brought an action to enjoin the Hospital Directors and the City from enforcing a rule adopted by the Board of Directors. The Court said on page 332 in answer to the petitioner’s contention that the rules were discriminatory:

The rules adopted by the board of directors are those of standard hospitals. The rules governing admission to membership on the staff apply to all physicians alike, and tend to maintain a high degree of skill and integrity in the membership. It is obvious that rules must be adopted to protect patients in major operations from unethical or unskilled practitioners, even though they are licensed physicians. Anybody may be forced to undergo a major operation. The rule in controversy is fundamentally a provision for the public safety and the public welfare. It is in no sense for the personal benefit of the hospital or the board of directors, except in maintaining the standard of excellence and proficiency contemplated by the statute and required by the welfare of the public. It insures the attendance and, if required, the assistance of a practitioners of experience and ability in case the operating surgeon should meet with a condition to which he is not equal, so that nothing may be left undone for the benefit of the patient. Section 44-10 was never intended to prohibit the board of directors of a public hospital from adopting rules that will accomplish that purpose. Its manifest object is only to prevent discrimination, of which there is no evidence in this case.

It must be remembered, however, as stated above, that the Illinois statute does not contain the provision that “the said board of trustees shall organize a staff of physicians composed of every regular practicing physician in the county in which said hospital is located.” In this respect the Nevada statute is much broader, and consequently a regulation such as found in the *Seldin* case would contravene the Nevada statute. However, the Illinois Court does recognize the rule that reasonable regulations are upheld if within the confines of the statute.

In the case of *Hamilton County Hospital et al. v. Andrews*, 84 N.E. (2) 46, which was decided in March 1949 in Indiana, the Court stated that what was determined as a reasonable rule in the *Seldin v. City of Sterling* case would not be so considered by the Indiana Court, but they also acknowledged the rule with regard to reasonable rules and regulations.

We find that the Indiana and Nevada statutes for all practical purposes are identical with one exception. It is not a requirement in Indiana that the staff shall be composed of every regular practicing physician in the county.

The Indiana court set forth the law as follows:

No reputable physician residing in a county of this state having a county hospital, can be discriminated against by such hospital. This is a right which

belongs to him and not his patients. Regularly licensed physicians have a right to practice in public hospitals of this state so long as they stay within the law and conform to all reasonable rules and regulations of the institution. \* \* \* 26 Am. Jur. Hospital & Asylums, sec. 9, page 592; *Henderson v. City of Knoxville*, 1928, 157 Tenn. 477, 9 S.W. (2) 697, 66 A.L.R. 652.

It will be further noted that by the involved rules, appellee's right to practice in the hospital is not only conditioned on his being a member of the staff, but also on his being a member of the Hamilton County Medical Society, an extra governmental agency. His admission to this society depends entirely upon the sole determination of the society. \* \* \* Whether he could ever become a member depends upon conditions beyond his control. By this rule the hospital again delegates its power to determine what physicians who by choice or otherwise, are not members of same.

The Court, however, did uphold under the Indiana statute a regulation whereby a surgeon who was not a member of the staff on March 1, 1947, was required not only to be a physician licensed by the State, but to have had one year service as an intern in an approved hospital, and three years of surgical training which meets the approval of the American College of Surgeons.

From the reading of these recent decisions and the construction they placed on their statutes, we are of the opinion that the Board of Trustees of the Washoe Medical Center do have the right and the power to enact reasonable rules and regulations, assuming they are within the confines of the Nevada statutes. To be within the confines of sections 2234 and 2235, N.C.L. 1929, they must adhere to the following:

(1) They must not discriminate against any practitioners of any regular school of medicine and surgery as recognized by the laws of Nevada (namely the Medical Practice Act). It is our opinion that this sentence is specifically and deliberately drawn so as to apply only to the common known and designated regular school of medicine and surgery and as applied to such regular practitioners the rules and regulations promulgated must apply equally.

(2) The staff of physicians shall be composed of every regular practicing physician in the county in which said hospital is located.

(3) All regular practitioners shall have equal privileges in treating their patients, which obviously means that the same facilities, etc., will be available to all members of the staff.

(4) The patient has the right to choose his own physician who is to have exclusive charge of the patient subject to these nondiscriminatory rules.

Applying these rules to the intended regulation you set forth, we are of the opinion that it is not within the statutory power of the trustees to enact such regulation.

In conclusion we feel that, although the suggested regulation would not be a valid one, the Board of Trustees does have the power to enact reasonable rules and regulations, as stated in the statute, but they must not be in violation of the statute.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-814 HIGHWAY DEPARTMENT, STATE**—Moving and adjusting light standards on highway obligation of department.

Carson City, October 5, 1949



Mr. W. T. Holcomb, State Highway Engineer, Carson City, Nevada

Attention: Mr. Geo. R. Egan, Engineer of Surveys and Design

Dear Mr. Holcomb:

This will acknowledge receipt of your recent letter requesting advice as to whether the costs of the adjustments of the street lighting system and the moving of light standards on Aultman Street in Ely, Nevada, made necessary by the widening of the State highway along this street, is an obligation of the State Highway Department or the City of Ely.

The facts in the situation presented are similar to those submitted for opinions previously rendered by this office. See opinion given to you under date of July 6, 1949, and Opinion No. 562, Biennial Report 1946-1948.

We are, therefore, of the opinion that the cost of adjustment of the light standards of the street lighting system in question is an obligation of the State Highway Department.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-815 FISH AND GAME**—Not imperative that any licenses be sold to nonresidents—Section 50-a constitutional.

Carson City, October 10. 1040/

Mr. S. S. Wheeler, Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada

Dear Mr. Wheeler:

This will acknowledged receipt of your letter of September 23, 1949, received in this office September 26, 1949, in which you request our opinion as to the constitutionality of section 50-a of the Fish and Game Act as found in 1949 Session Laws at pages 292-299. The questionable portions of this section are contained in a letter from Mr. Harlan Heward of Reno, Nevada, to your office and we will base our opinion on the objections as enumerated by Mr. Heward in his letter to you.

At the outset, for the purpose of clarification, we will set forth the general rules regarding fish and game as found in various cases on this particular subject, American Jurisprudence and Amer. Law Reports Annotated.

In Volume 24, page 386, section 16, American Jurisprudence, under the heading "Fish and Game" we find the following statement:

It is well settled that the state may make valid regulations which discriminate against aliens and nonresidents in the enjoyment of the privileges of hunting and taking wild game. The state may, if it sees fit, impose on nonresidents a larger license fee for the privilege of hunting within its borders or more severe penalties for violation of hunting regulations than it imposes upon its own residents.

Nonresidents may even be denied the privilege of obtaining necessary licenses to hunt \* \* \*.

Section 15, at pages 384 and 385, provides as follows:

The guarantee of the equal protection of the laws in the 14th Amendment to the Federal Constitution does not preclude all discrimination as to persons who hunt and kill game within the borders of the state. The state may discriminate against nonresidents or aliens residing within its borders, and even though, as a general rule, the regulation of the acquisition of game which unjustly discriminates against any of the people of the state is void as a denial of the protection of the laws of those discriminated against, not all classifications among the inhabitants of a state is prohibited \* \* \*.

The case of *State v. Starkweather*, 7 N.W. (2) 747, was a Minnesota case where the sole question presented to the court was whether a foreign company licensed to do business in this State is entitled to receive a resident fur buyer's license upon payment of the fee prescribed for residents of Minnesota or whether it must pay the fee prescribed for nonresidents. The statutory provision prescribed that the fees payable for a license to buy furs were as follows: For a local resident \$5, for a resident traveling fur buyer's license \$10, for a nonresident local or traveling fur buyer's license \$200, for a resident wholesale fur buyer's license \$5.

The court in the answer to this question at page 748 stated:

Statutes regulating the taking of wildlife are within the police power of the state. The underlying theory of such statutes is stated in *LaCoste v. Department of Conservation*, 263 U.S. 545, 549, 68 L.Ed. 437 thus, "The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein. (Citing numerous cases.) It is settled law that the state may impose upon its residents. The discrimination in the case of hunting and fishing licenses is justified under the police power on the ground that game, fish and fur bearing animals when not reduced to possession belong to the state, as part of its natural resources, which it can protect and save for its citizens. (Citing numerous cases.)"

In 61 A.L.R., at page 338, under the heading "Fish and Game," we find the following annotations:

It is stated in *State v. Gallop* (1900), 126 N.C. 979, 36 N.E. 180, that a State may confer exclusive right of fishing and hunting upon its citizens and expressly exclude nonresidents without violating Article IV, section 2 of the Federal Constitution, which provides that all citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A State statute requiring nonresidents to procure a license for the privilege of hunting which is not required of residents is not unconstitutional as violating Article IV, section 2 of the Federal Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

In *Re Eherle* 1899; C.C. 98 Fed. 295. A statute imposing a license fee on nonresidents which is not imposed on residents for the privilege fee on nonresidents which is not imposed on residents for the privilege of hunting is not unconstitutional as applied to a nonresident, although he is a stockholder in a corporation owning land within State.

Although not discussed here, there are many other cases stating the general rule to be as set forth above.

The above discussion should clarify the general law in this regard and we will now turn to the specific statute in question and discuss it in the manner and method used by Mr. Heward in his letter to you.

Section 50-a reads as follows:

Notwithstanding any other provision of this act hunting by nonresidents of this state for upland game birds or waterfowl or one or more species of such classes may be limited or forbidden in the circumstances and in the manner following, to wit:

a. Whenever any county game management board shall find an excessive number of birds of the above classes are likely to be taken under normal licensed hunting conditions in the current open season in their county, they may prevent the same in any respect as hereinafter enumerated.

(1) They may provide that no more than a certain number stated of normal hunting licenses may be issued to nonresidents.

(2) They may provide that all nonresident hunting licenses shall specify that upland game birds or waterfowls or species thereof specifically normal may not be hunted by authority of said license.

(3) They may apply the limitation set forth in (2) above only after a specified and stated number of licenses are sold to nonresidents.

(4) They may in conjunction with any of the foregoing plans require the payment of a special permit fee not exceeding ten (\$10) dollars from nonresidents, without which the authority to hunt species of upland game and waterfowl would be restricted or denied.

b. After the county game management board adopts a plan under (a) foregoing it shall be effective only after it is approved by the state fish and game commission in writing. When so approved the plan shall be carried out by the county clerk or officer who issues hunting licenses in said county.

Mr. Heward states his first objection as follows:

I find that the various County Game Management Boards have not presented you with any *finding* that an excessive number of birds are likely to be taken under normal license hunting conditions. Such a *finding* is required by the second paragraph of the section.

We agree with Mr. Heward that the second paragraph of this section does require the County Game Management Board to make a finding that an excessive number of the above classes are likely to be taken under normal license hunting conditions. Whether or not this has been done is a question of fact and must be determined by the State Fish and Game Commission before approving a plan as offered by the County Game Management Board.

Mr. Heward's second point is as follows:

It occurs to me that is impossible for any County Game Management Board to make such a finding relative to migratory birds because such a finding depends greatly upon weather conditions and fly-way results. Furthermore, with reports exceedingly favorable as they are this year, how can the Board make a finding that an excessive number of birds are likely to be taken this year.

This we also determine to be a question of fact, but we do assume that with the varied material and data that is available to the County Game Management Board from sources such as the U.S. Fish and Wildlife Service that they are fully able and qualified to make such a finding.

Mr. Heward's third question is as follows:

What is the situation and what are the legal rights of a nonresident who has taken out the normal nonresident's license prior to action by the County Game Management Board and the approval by the State Fish and Game Commission.

A nonresident or any other person is deemed to know the law and the legal rights of a nonresident are exactly those placed upon him by this section. In other words, if the County Game Management Board adopts a plan and the State Fish and Game Commission approve it, as prescribed by the statute, the nonresident licensee's rights are determined by the provisions so adopted.

Mr. Heward's fourth point is a statement in which he states that he believes "that no county board has made a determination as to whether or not the specified and *stated* number of licenses have been sold to nonresidents."

This is also a factual question and whether or not the County Board has made a determination as to whether a specified and stated number of licenses have been sold to nonresidents we do not know. We do agree, however, that to apply the limitations in (2) this must be done.

Mr. Heward's fifth point is as follows:

Pursuing the discussion set forth in my last numbered paragraph, the statute is exceedingly obscure, and both in subdivision (1) and in subdivision (2) it is difficult to understand whether the number of licenses sold to nonresidents can be limited to *n* licenses or whether on the other hand some licenses must be sold to nonresidents.

It is our opinion, as indicated from our general discussion in the opening paragraphs of this opinion, that it is *not* imperative that any licenses be sold to nonresidents. It is a general principle of law that when a State has the authority to regulate they also have the right to prohibit. Section 50-a (1) states that "they may provide that no more than a certain number stated of normal hunting license may be issued to nonresidents." There is no requirement that any licenses be issued and consequently they may limit it to no licenses. It must also be noted that the opening paragraph of section 50-a expressly provides that hunting by nonresidents for upland game birds or waterfowl may be forbidden.

Mr. Heward states text that he believes the statute to be unworkable on other than a voluntary basis as there is no provision that it is unlawful to hunt without a special permit fee.

With this we do not agree. Section 90, chapter 101 of the 1947 legislative enactment, which has not been amended, reads as follows:

\* \* \* \* \*

Every person who shall violate, or fail to observe any order, ordinance, rule, or regulation enacted, made, or provided by the state fish and game commission under the provisions of this act; and

Every person who, having been granted, licensed, or permitted to do any act or thing under the provisions of this act, who shall exercise such grant, license, or permit in any manner other than as specified in such grant, license, or permit; and

Every person who shall do any act or thing or attempt to do any act or thing, in this act declared to be unlawful, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty (\$50) dollars nor more than five hundred (\$500) dollars, or by imprisonment in the county jail for a period of not less than twenty-five days nor more than six months, or by both such fine and imprisonment. In addition to such fine or imprisonment, the court, upon conviction, may cause to be confiscated all wild animals, wild birds, or fish taken or possessed by the violator, and may in its discretion confiscate any fishing or hunting equipment used in any unlawful taking of fish and game. All confiscated fish and

game shall be placed in the hands of the county game management board of the county in which the conviction is had, for disposal to the needy, or destruction.

It is our opinion that the entire Act must be read and construed together and as section 90 does provide that any person who violates any of the regulations of the State Fish and Game Commission is guilty of a misdemeanor, we feel that the objection to this point is without merit. Consequently the cases cited by Mr. Heward have no application to the Act in question.

Mr. Heward's next question is "what species" are referred to in subdivision (4).

It is our opinion that the species are those determined by the County Game Management Board and the State Fish and Game Commission limited to those types expressly mentioned in the Act.

The next question presented by Mr. Heward is the meaning of the word "excessive" as used in a. of section 50-a.

It is our opinion that the word excessive as used in this section has but one meaning and that is, excessive of normal. Whether or not an excessive number of kinds of the classes designated may be taken can be determined as explained above.

Mr. Heward points out next that "specifically normal" is of doubtful meaning. We agree that as written the words have no application and are meaningless, but after investigating the history of the Act and discussing the above words with your staff, we find that the words were intended to be "specifically named," which obviously clarifies the section.

From the foregoing it is our opinion that, although this particular type of legislation is not the most practical type, it is constitutional and, assuming that the conditions precedent required by the Act are complied with, the County Game Management Boards and the State Fish and Game Commission may validly prohibit or restrict hunting to nonresident hunters.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-816 NEVADA NATIONAL GUARD**—State not liable in event of accidental death—Industrial insurance.

Carson City, October 11, 1949

James A. May, Brigadier General, The Adjutant General, Carson City, Nevada

Dear General May:

This will acknowledge receipt of your letter dated September 16, received in this office September 19, 1949.

Your first question is whether or not the State would be liable in the event of accidental death of a member of the Nevada National Guard.

In our opinion the State would not be liable under the facts as you have stated them.

Second, it is requested as to whether or not the Nevada Industrial Insurance could carry the insurance on members of the Guard for only death benefits and no hospital benefits. In other words, could you insure these men under Public Law 108 for all benefits except death and have

the Nevada Industrial Insurance carry them for death benefits?

There is no legal objection to doing this provided the approval of both the Federal Government and the Nevada Industrial Commission is secured.

Section 9 of the Act creating industrial insurance, as amended by chapter 323, Statutes of Nevada 1949, define the term "employer" as used in the Act, under subsections (a) as follows: "The state, and each county, city, school district, and all public and quasi-public corporations therein; (b) Every person, firm, voluntary association, and private corporation, including any public service corporation, which has any natural person in service."

Section 10, as amended, provides in part as follows: "The terms 'employee' and 'workman' are used interchangeably in this act and shall be construed to mean every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed and includes, but not exclusively; \* \* \*."

Section 7202, 1929 N.C.L., 1931-1941 Supp., contains the following language: "In all cases in which any officer or enlisted man of the national guard of the State of Nevada shall be wounded, injured, disabled or killed while in the line of duty in the service of the ate, such officer or enlisted man, or the dependents of such officer or enlisted man, shall be entitled to receive compensation from the State of Nevada in accordance with the provisions of an act entitled"—then follows the title of the act relating to compensation of injured workmen. This is followed by a proviso, as follows: "provided, that there shall be paid to the Nevada industrial commission quarterly, from the appropriation for the support of the national guard, such sum for premium as may be fixed and agreed upon by the commander-in-chief and the Nevada industrial commission, based upon the number of officers and enlisted men in regular attendance during the said month as shown by the report filed with the adjutant general, who shall certify the same to said commission. In all such cases such officer or enlisted man shall be held and deemed to be an employee of the State of Nevada."

It appears from the foregoing that in addition to the provision of section 9, chapter 233, above, which names the State an employer, and designates the term "employee," that the State under section 7202, 1929 N.C.L., 1931-1941 Supp., accepted the terms of the Act for the National Guard.

The proviso that the agreed premiums be paid is also a condition under section 26 of the Industrial Insurance Act.

Section 28 of the Act provides where the State, etc., is the employer the provisions of this Act for the payment of premiums shall be conclusive, compulsory, and obligatory upon both employer and employee.

The question of the payment such premiums was answered in Opinion No. 504, 1946-1948 Biennial Report of the Attorney General to the effect that they could be paid only from the appropriation for the support of the National Guard.

Section 26 of the Industrial Insurance Act, provides that the employer shall provide and secure compensation according to its terms and in such cases the employer shall be relieved from other liability for recovery damages.

The liability of the State would depend upon the right to bring an action against the State.

Section 22, Article IV of the Constitution of Nevada, provides that provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of the Constitution.

There is no general statute for bringing such an action to determine the State's liability.

In connection with your second question the copy of Public Law 108, submitted, has been read. It provides death gratuity and hospital benefits for officers and enlisted men in the Federally recognized National Guard of the Several States.

The provisions in the Industrial Insurance Act to take care of accident benefits is found under

section 58, chapter 168, Statutes of 1947, which contains a provision that an employer may make arrangements for the purpose of providing accident benefits as defined therein for injured employees.

The question as to whether you could insure the members of the National Guard under Public Law 108 for all benefits except death and have the industrial insurance carry them for death benefits is a matter that should be submitted to the Federal department and the Industrial Commission.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-817 FISH AND GAME**—Deer camps—Separate permits and separate license fees.

Carson City, October 12, 1949

Hon. Frank W. Groves, Assistant Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada

Dear Frank:

This will acknowledge receipt of your letter of October 7, received in this office October 8, 1949.

You request an opinion as to whether or not a commercial deer camp license issued in pursuance to section 84, chapter 146, 1949 session laws, authorizes the individual to whom the license is issued to operate more than one camp under the said license.

Our answer to this inquiry is in the negative.

The pertinent part of section 84 reads as follows:

No person shall operate *a commercial hunting or fishing camp*, establishment, or service unless he shall first apply to the commission for a permit therefor, and pay to the commission an annual license fee of fifty (\$50) dollars for hunting camp and an annual license fee of five (\$5) dollars for fishing camp. The commission may approve the application and shall in that event issue a permit to the applicant.

The final sentence of the second paragraph of section 84 reads as follows:

If any person owning, employed by, or being served by any such a hunting or fishing camp is convicted in court of a game law violation, the commission may immediately revoke the license of that hunting or fishing camp and the commission shall have the authority to refuse the issuance of another license to that camp for a period of two years following the time of conviction.

It must be noted at the outset that wherever the word “camp” is used in this particular section, it is used singularly, which tends to indicate that a permit is necessary for each and every camp and not that one permit is sufficient for several or more camps.

Clearly the Legislature contemplated the situation that could possibly arise if they had not used the word "camp" singularly. One individual might own and operate hunting camps in every county in the State by securing one permit for a fee of \$50.

This is further indicated by the fact that the Act provides for the revocation of the license of "that hunting or fishing camp" for a game violation by one owning, employed by or being served by any camp.

Therefore, in case of a violation the camp license is revoked and not the right of the owner to operate other camps assuming they are licensed. In other words, a violation in a camp in White Pine County would not be ground for revoking the license of a camp in Elko County.

We are therefore of the opinion that every separate deer camp requires a separate permit and separate license fee of \$50.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-818 NEVADA HOSPITAL FOR MENTAL DISEASES**—Not subject to liability or other embarrassment when insane or inebriate persons are committed under court orders.

Carson City, October 13, 1949

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 October 1, 1949, received in this office October 4, 1949.

You submit two inquiries relative to commitments by the Court of persons to the hospital.

The first involves a case where a person was apprehended upon the complaint that such person was insane. The hearing before the court was continued from time to time and the person was by order of the Court placed in the hospital pending the result of the hearing.

The second case if the hospital is exposed to any liability or other embarrassment in accepting and holding persons under Court orders when these are not in conformance with the existing statutes.

Section 3511, 1929 N.C.L., 1941 Supp., sets out the procedure for the commitment of an insane person to the Hospital by the judge of a District Court. There is nothing in the first part of the section that specifically provides for a temporary commitment pending a hearing before the Court. The last part of the section provides that insanity hearings may be held in counties where only one physician resides at the county seat or within fifty miles thereof, and that the judge may temporarily commit such person in the same manner as if two physicians had acted provided that the Superintendent of the Hospital shall cause a physician at Reno or Sparks, Nevada, to attend and examine such person. If such person be found insane also upon such examination, the judge shall modify the temporary commitment or make a new commitment effective to the same extent as if the original commitment had been made by two physicians in the first place.



When the application under oath, as required in the statute, sets forth that a person is insane and so far disordered in his mind as to endanger health, person, or property, it follows that such person must be restrained to await a hearing before the Court. In the majority of the counties there is no place in which to hold such a person but the county jail.

The intent of the Legislature, as indicated by the entire section is to provide that an insane person be placed in the Hospital for care and treatment without unnecessary delay.

In a county other than the county where the Hospital for Mental Diseases is situated the person charged as insane would be committed to the custody of the sheriff pending the conclusion of the hearing. It appears, therefore, that the statute should be liberally construed in favor of the accused, and an order of the Court committing the alleged insane person to the custody of the Mental Hospital to any liability.

In the case of the commitment of an inebriate, section 26 of chapter 201, Statutes of 1949, provides for the commitment of such a person in the following language: "If after a hearing and examination, the judge believes the person charged is an inebriate or disposmania, or that such person is a drug addict, he shall make an order committing such person to the Nevada hospital for mental diseases for an indeterminate period of not less than six months nor more than one year \* \* \*."

These orders are prepared by the District Attorney or an attorney at law and presented to the Court. When these are delivered to you and in your opinion they do not conform to the statutory requirement, you may submit the matter to the attorney in the case with a request to have an order entered to conform to the statute.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-819 NEVADA HOSPITAL FOR MENTAL DISEASE**—Resident physician, assistant resident physician, business manager—Maintenance.

Carson City, October 27, 1949

Mr. J. E. Springmeyer, Legislative Counsel, Carson City, Nevada

Dear Mr. Springmeyer:

This will acknowledge receipt of your letter dated October 11, 1949, received in this office October 12, 1949.

You write that the post-audit and examination of claims as performed by the Legislative Auditor has disclosed that the resident physician, the assistant resident physician, and the business manager at the Nevada Hospital for Mental Diseases are all acquiring household provisions and supplies from markets located in the nearby city, payment for which is made from Hospital funds directly to the markets, or, as in the case of the business manager, as a reimbursement to him for outlays made by him to the markets. Claims upon Hospital funds are properly substantiated under authorization of the Board of Commissioners.

Your questions are as follows:

(1) Are the resident physician, assistant resident physician and business manager each entitled to such maintenance or household provisions and supplies as are available on the hospital grounds, and thereby precluding each and all of them from acquiring such supplies and provisions from any sources outside said grounds?

(2) Do the words "as are available at the hospital" and the words "such maintenance as may be determined by the board" allow the Board of Commissioners to authorize the purchase, and allow the three aforementioned employees to purchase household provisions and supplies from sources outside the Hospital grounds, payment for which is made from Hospital funds directly to the sources or as reimbursement to the employees?

(3) Does the general provision "such maintenance as may be determined by the board" allow the business manager to receive only such maintenance as is available at the Hospital?

Our answer to your second question is in the negative.

Your third question is answered in an opinion from this office under date of April 17, 1947, the same being Opinion No. 446, wherein we held as follows: "We are of the opinion that the salary of the business manager is definitely fixed by statute and that the Board of Commissioners are not authorized to furnish the maintenance provided for therein in the form of a monetary allowance in addition to said salary. The maintenance or means of subsistence allowed the business manager is that which may be determined by the board to be available at the hospital."

Chapter 277, Statutes of 1947, which amended section 6 of the Act concerning the insane, insofar as pertinent to this inquiry reads as follows:

Section 6. \* \* \* The resident physician shall live at the hospital in quarters to be furnished, shall devote his full time to his position, and not engage in private practice, and shall receive as annual compensation therefor the sum of six thousand six hundred (\$6,600) dollars per year, and in addition thereto shall be entitled to living quarters and household provisions and supplies and such other facilities and accommodations as are available at the hospital.

(a) There shall be a resident assistant physician, holding a degree of doctor medicine, to be chosen by the board, and shall serve at the pleasure of the board. The salary of said assistant shall be fixed by the board and shall not exceed the sum of four thousand (\$4,000) dollars per year, and in addition thereto he shall be entitled to living quarters and household provisions and supplies and such other facilities and accommodation as are available at the hospital. He shall devote his full time to his position, and shall not engage in private practice.

\* \* \* \* \*

(c) The boars shall employ a business manager, which shall be a full-time position, who shall serve at the pleasure of the board and be paid a straight salary not in excess of four thousand two hundred (\$4,200) dollars per year and such maintenance as may be determined by the board. \* \* \*

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

in 1945 with Toiyabe National Forest Service valid—Ormsby County.

Carson City, October 28, 1949

Hon. Richard L. Waters, Jr., District Attorney, Ormsby County, Carson City, Nevada

Dear Mr. Waters:

This will acknowledge receipt of your letter dated October 19, 1949, received in this office October 21, 1949.

The facts as stated in your letter are that on September 5, 1945, the Board of County Commissioners of Ormsby County entered into a cooperative fire protection agreement with the Toiyabe National Forest Service for the suppression of fires within Ormsby County. The agreement was entered into under authority granted County Commissioners by chapter 149, Statutes of 1945. You also submitted a copy of this agreement.

The following question is submitted for our opinion: "Is the contract entered into in 1945, by the Board of County Commissioners, which has since gone out of office, the basis for a valid claim against Ormsby County at the present time, with an entirely new Board in office?"

You quote from chapter 149, Statutes of 1945, the language which provides that any authority granted by the Act for entering into cooperative agreements shall be deemed to include authority for canceling, modifying or renewing such agreements, and also state that the agreement was called to the attention of the new Board of Commissioners at an early date.

We are of the opinion that the cooperative agreement entered into in 1945 by the Board of County Commissioners of Ormsby County, which boards has since gone out of office, is a basis for a valid claim against the county, under such agreement, at the present time, with an entirely new board in office.

Section 7, chapter 149, Statutes of 1945, provides as follows:

The state forester fire warden, fire districts, and the boards of county commissioners, either separately or collectively, are authorized to enter into agreements with the United States forest service, United States grazing service, and other fire protection agencies, to provide for placing any or all portions of the fire protection work under the direction of the agency concerned, under such terms as the contracting parties deem equitable, and are authorized to place any or all funds appropriated or otherwise secured for forest protection in the cooperative work fund of the respective agency for disbursement by that agency for the purposes stated in the agreements and otherwise in conformity with the terms thereof.

Section 8 reads as follows:

Any authority granted by this act for entering into cooperative agreements shall be deemed to include authority for canceling, modifying, and renewing such agreements.

The general law expressed in section 1973, N.C.L. 1929, provides as follows:

No member of any board of county commissioners within this state shall be allowed to vote on any contract which extends beyond his term of office.

The last quoted statute expresses the general rule that it is prejudicial to the public interest and against public policy to permit a Board of County Commissioners to execute contracts extending beyond the term of office and thus deprive the succeeding board of the power to perform its functions authorized by law.

The agreement entered into by a former Board of County Commissioners of Ormsby County with the Forest Service does not violate either the letter or spirit of this statute.

The agreement does not purport on its face to extend beyond the term of office of the County Commissioners when executed in 1945.

Paragraph 7 provides: "That this agreement may be terminated or amended by either party between December 1 of one year and April 1 of the following year by thirty days' notice in writing to the other party."

The agreement was made in behalf of the county and it was within the power of the new board to terminate it.

Chapter 149, Statutes of 1949, grants specific authority to the Boards of County Commissioners to enter into such agreements for the general welfare of the county, and includes a provision to except such agreements from contracts made under the general powers granted such boards.

The general principle that contracts executed by one Board of County Commissioners binding upon future Boards of County Commissioners is against public policy applies to contracts made under general powers granted to County Commissioners in management and control of county affairs, but has no application to a contract entered into under specific statutory authority.

*State ex rel. Schlarb, Pierce County Commissioners v. Smith et. al. King County*, 141 P(2) 651.

Another basis for holding that this claim against the county is a valid obligation is that the present Board of County Commissioners by passive acquiescence and receipt of benefits ratified the agreement of the previous board.

In *Quest v. Zerr et al.*, 120 P(2) 529, the Court held that appellants ratified a contract by accepting deliveries thereunder for a period of at least six months after the contract had come to the attention of one of the respondents.

"It is in substance that persons competent to contract may, by an act of will deliberately and voluntarily assenting to a contract made, or act done for them by another, adopt it as their own, and that when they have done so they will be bound by it just as though they had been parties to it from the beginning." This statement was made by the Court, declaring the doctrine of ratification, in *Williams v. Thrasher*, 62 F(2) 944.

The agreement was made under specific statutory authority and was not, according to its terms, in violation of the general law, and by action of the present Board of County Commissioners was ratified and continued.

It appears, therefore, that the claim against Ormsby County under the agreement is a valid obligation that may be paid by the present board.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-821 PUBLIC EMPLOYEES RETIREMENT—Status Matron County Hospital—Eureka County.**

Carson City, November 1, 1949

Hon. Ed Delaney, County Clerk, Eureka County, Eureka, Nevada

Dear Mr. Delaney:

Your former District Attorney, Jack Sexton, recently requested the opinion of this office as the status of Mrs. Mary J. Laird of Eureka, Nevada, for the purpose of retirement under the Public Employees Retirement System during the period that she served as matron of the Eureka County Hospital, which was from 1917 up to and including a part of 1947. His specific question was as follows:

Was Mrs. Mary J. Laird an employee of Eureka County or was she an independent contractor?

In view of the fact that Mr. Sexton has resigned as District Attorney of Eureka County and in view of the further fact that we are not certain as to whether your new District Attorney has been selected and assumed office, we are taking the liberty of addressing this letter to you. In the event your new District Attorney has assumed office, will you please be so kind as to give him this letter for his proper attention and action.

As you undoubtedly realize, since Mr. Sexton's request for this opinion this office has undertaken an extensive investigation of this problem. Among other things, we have written to you and received copies of the minutes of the Board of County Commissioners from 1917 to and including 1947.

It must be noted at the outset that the retirement Act itself does not differentiate between an employee and an independent contractor.

In Mr. Sexton's letter to this office he stated the following facts:

At the first meeting of the County Commissioners every year, there is selected from a list of applicants, the person whom they think is best qualified, at a salary set by this body, for the term of one year. The applicants do not submit bids based on the cost they would operate the institution, or feed the patients, and have the lowest and most responsible bidder accepted. A flat amount is offered by the county and this is the only figure used as a basis. This is similar to an oral interview or examination set by the Civil Service Commission or Merit Board for the selection of employees in the Federal or State Service.

He further stated:

It was the understanding of the matron of the hospital, whomever was to be selected, that they were to be under the direction and control of the County Commissioners and the County Physician.

Any matters of policy in the operation of the hospital, was for the consideration of the County Commissioners. The matron was under the supervision of the County Physician as to the care and treatment of the patients. The County Physician was hired on the same terms and conditions as the matron, and is considered to be an employee. The matron could feed the patients as she saw fit, subject to the dietary prescription of the County Physician. The matron could not make any physical changes in the building or grounds without the approval of the Commissioners. She could not hire any additional employees without their consent, nor make any purchases, other than food or minor items.

After assembling all of the available facts we have and combining them with the facts as stated in Mr. Sexton's letter regarding Mrs. Laird's service and applying these facts to the general law on this particular subject, we are of the opinion that Mrs. Mary J. Laird was an employee of Eureka County and not an independent contractor.

It is apparent from the examination of cases involving this problem that there is no absolute

rule for determining whether one is an independent contractor or an employee and each case must be determined on its own facts. With this in mind we will state several tests applicable for determining the status and apply these tests to Mrs. Laird.

First, it will be necessary to distinguish between an employee and an independent contractor. The definition of an independent contractor as found in American Jurisprudence, vol. 27, section 2, at page 481, is as follows:

An independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and *without being subject to the control of his employer*, except as to the product or result of his work. (Italics ours.)

In the case of *Fox Park Lumber Co. v. Baker*, 84 P(2) 736, the Court said:

The relation of one doing work to the one for whom the work is done is that of servant rather than independent contractor if the employer has retained the *right of control* over the person whose status is in question. (Italics ours.)

The Court further said at page 743:

Another test is whether either of the parties possesses the right to terminate the services at will without incurring liability to the other, this embracing, of course, the right of the employer to at any time to discharge the party performing the work, an affirmative answer establishing the status of master and servant.

In this particular case the person in question furnished his own truck, bought his own gas, oil and tires and by contract he was paid so much per every tie he hauled. The Court held him to be an employee of the lumber company.

Section 13, page 494, American Jurisprudence, vol. 27, reads as follows:

The measure of compensation for work to be done is an element to be considered in determining whether one is an independent contractor, but it is not controlling. Thus, the fact that the compensation of a contractor is by the day, in a lump sum, or on a commission basis is not a material factor. The modern cases look to the broader question whether the person is in fact independent or is subject to the control of him for whom the work is done \* \* \* .

The case of *L.B. Price Mercantile Co. v. Industrial Commission*, 30 P(2) 441, at page 494 says:

An in determining if the employer retains control the most important factor is whether either party may terminate the relation without liability. "Where such rights exists," to use the language of the court in *Industrial Comm. v. Hammond*, 236 P.1006, "the workman is usually a servant.

Where it does not exist, he is usually a contractor." The power of the employer to end the employment at any time he sees fit is incompatible with the full control of the work which an independent contractor enjoys.

Many other cases are cited following this same rule.

Mrs. Mary Laird, according to the minutes of the County Commissioners of Eureka County, was first employed on February 1, 1917, the minutes stating that the contract could be terminated by either party upon the giving of thirty days' notice. In 1918 and 1919 the minutes provide similar provisions. However, in 1921 the minutes contain the following statement:

Upon the same terms and conditions as she was heretofore employed. Until further order of this Board.

From 1921 up to and including a portion of 1947 there is no mention of any notice that was necessary in order for the county or Mrs. Laird to terminate the contract. It, therefore, necessarily follows that it was terminable at the will of either party. The only written contract that we have available was executed on the 5th of January 1934. The contract does not state as to how the contract should be terminated. The minutes of the meeting prior to the execution of the contract contain the following language:

Whereas, the Board of County Commissioners of said County of Eureka believe it to be for the best interest of Eureka County to *employ* the said Mrs. M.J. Laird \* \* \*. (Italics ours.)

It should be noted at this time that the word "employ" has some significance when used as it was here. In the case of *Stein v. Battenfield Oil & Grease Co.*, 39 S.W.(2) 344, at page 348, the Court said:

A person employed in or about an establishment and engaged in his ordinary duties is certainly something more than an independent contractor on a particular job. When associated with the idea of service, the word "employ" means to hire or make use of the services of, Websters New Interational Dictionary; and implies control by the employer over the means and manner of doing the work.

It is evident from the very nature of the employment, from the minutes of the County Commissionrs and from the contract entered into between Mrs. Laird and the County Commissioners that the County Commissioners did retain the power of control over Mrs. Laird. They had the power and the right to release her at any time after 1921 and the mere fact that this right was not exercised is immaterial.

Mrs. Laird was listed on the report to the Nevada Industrial Commission entitled "Names and Occupations of Employees" as an employee and her salary was stated to be \$90 per month.

Whether this would be considered as her salary for the purpose of retirement is not a matter contemplated by this opinion, but it does indicate the County Commissioners did consider her as an employee.

We realize there are some facts that tend to establish her status as an independent contractor, but after considering all of the facts, it is our opinion that Mrs. Laird's status while matron of the Eureka County Hospital is that of an employee.

It should further be noted that this opinion is restricted to the facts as were present during the period Mrs. Laird was employed and are not necessarily determinative of any other county employee.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-822 FIRE PROTECTION**—Formation of districts—Procedure to be followed.

Carson City, November 3, 1949

Hon. Wayne McLeod, Surveyor General and State Forester-Firewarden, Carson City, Nevada

Dear Mr. McLeod:

This will acknowledge receipt of your letter of October 21, 1949, received in this office October 25, 1949, requesting our opinion as to the following question:

If four property owners in Gabbs, Nevada, sign an agreement to the effect that they desire to form themselves into a fire district, and present this agreement, or petition, to the Commissioners of Nye County, may the Commissioners declare the territory designated in the petition, "duly organized as a County Fire Protection District?"

The answer to this is in the negative.

Sections 1929.01, 1929.02, 1929.03, 1929.04, 1929.05, 1929.06, 1929 N.C.L., 1941 Supp., as amended by chapter 134, sections 1 and 2 of the 1947 legislative enactments provides the procedure for organizing a fire district and as there are no exceptions provided by the law, it is our opinion that the procedure as set out by the above sections must be followed.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-823 INSURANCE**—Sale or delivery of special stock debentures by life insurance companies violation of insurance act.

Carson City, November 4, 1949

Honorable Jerry Donovan, State Controller, Carson City, Nevada

Attention: Mr. G. C. Osburn, Insurance Deputy

Dear Sir:

This will acknowledge receipt of your recent letter relative to a request from the International Life Insurance of Austin, Texas, which is duly licensed and authorized to do business in this State, for permission to sell special stock debentures in Nevada.

The stock debentures are to be sold by the regular licensed agents of the company, and the question arises as to whether the offering for sale of these debentures by its agents would be prohibited as an illegal inducement under section 3656.82, 1929 N.C.L., 1931-1941 Supp.

You submit a copy of the minutes of the meeting of the stockholders that action was taken to increase the capital stock of the company and authorize the sale of the special stock debentures to



the public.

We are of the opinion that the sale, offering for sale, or delivery of the special stock debentures by the agents, officers or employees of the life insurance company, in this State, would be a violation of section 82 (Section 3656.82, 1929 N.C.L., 1931-1941 Supp.).

There is nothing in the Nevada Insurance Act relative to the sale of stock or increasing capital stock of a foreign insurance company, other than requesting the filing of the resolution authorizing the increase in capital conformable to the general provisions of article 3 of the Act respecting foreign corporations. However, the sale of such debentures by the licensed agents of the company appears to bring such a transaction within the provisions of section 3656.82, 1929 N.C.L., 1931-1941 Supp., the same being section 82 of article II of the Act, which reads as follows:

No life company authorized to do business in this state shall issue or deliver in this state or permit its agents, officers or employees to issue or deliver in this state as an inducement to insurance or in connection therewith any agency company shares or other capital shares, benefit certificates or shares in any common law corporation, securities of any special or advisory board, or other contracts of any kind promising returns and profits as an inducement to insurance; and no life company shall be authorized to do business in this state which issue in this state or in any other states agency company shares or other capital shares or benefit certificates or shares in any common law corporation or securities of any special advisory board or other contracts of any kind promising corporation acting as an agent of a life company, or any of its agents, officers or employees shall be permitted to sell, agree or offer to sell, or give or offer to give directly or indirectly, in any manner whatsoever, as an inducement to insurance or in connection therewith, any shares, securities, bonds or agreements of any form or nature promising returns and profits as an inducement to insurance or in connection therewith. It shall be the duty of the commissioner upon due proof after notice and hearing to revoke the license of any company or the license of any agent so offending if he finds that any such company or agent thereof has violated any of the provisions of this section.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-824 INSURANCE**—Licenses not required for banks collecting premiums.

Carson City, November 8, 1949

Honorable Jerry Donovan, Insurance Commissioner, Carson City, Nevada

Attention: Mr. G.C. Osburn, Deputy

Dear Sir:

This will acknowledge receipt of your letter dated October 27, received in this office October 28, 1949.

You present a question as to whether a life insurance company could pay a collection fee to banks or other financial institutions for collecting the premiums on a monthly basis on mortgage protection insurance policies without licensing the banks or other financial institutions. The company proposes to write mortgage protection insurance through their regular licensed local agents, and then arrange with the bank or other lending agency to collect the premiums on a monthly basis together with the payment on the loan, and for this collection service to pay the lending institution a fee of not to exceed five percent of the premium collected.

You submit a letter from the insurance company which states that in undertaking to collect such premiums the financial institution is performing a normal function of making collections which is a source of expense for which service the insurance company is willing to pay a fee.

We are of the opinion that the financial institution performing the normal functions of making collections when collecting premiums together with payments on loans receiving a fee would not require such institution to be licensed as an agent, broker, or solicitor under the Nevada Insurance Act.

The compensation or fee paid for the collections mentioned, when not paid for or on account of the solicitation or negotiation of contracts of insurance, is not in violation of the Act.

Section 141 of the Nevada Insurance Act, being section 3656.141, 1929 N.C.L., 1931-1941 Supp., as amended by chapter 240, Statutes of Nevada 1949, reads as follows:

Definitions. The term "agent" as used in this article means any person, partnership, association or corporation who or which solicits, negotiates or effects in this state, on behalf of any company, contracts for insurance of any of the classifications listed in Section 5 of Article 1. The term "solicitor," as used in this article, means any person engaged in the solicitation of contracts of the kind or kinds hereinabove enumerated for any broker or nonresident broker. The term "broker" as used in this article, means a person who, for compensation and on behalf of another person, transacts insurance with, but not on behalf of, an insurer.

The term "nonresident broker," as used in this article, means any person, partnership, association or corporation, not a resident of or a domiciled company in this state, who or which for money, commission, brokerage or anything of value acts or aids in any manner any solicitation or negotiation, on behalf of the assured, of any contracts of any of the kind or kinds enumerated in Section 5.

The arrangement made by the insurance company with a bank or other lending agency for collecting the premiums on mortgage protection insurance policies is not such a transaction that would come within the provisions of the section quoted. The function performed is not within the meaning of the terms, soliciting, negotiating or effecting contracts of insurance.

Section 144 as amended by chapter 240, Statutes of 1949, quoting the language deemed relevant, reads:

Payment of Commissions. (1) A company may pay money or commission for or on account of the solicitation or negotiation in this state or elsewhere, of contracts of the kind or kinds enumerated in Section 5 of Article 1 of this act on property or risks in this state only to its agent, broker, or nonresident broker, duly licensed under this act, \* \* \*.

The bank or other lending agency making collection of premiums on mortgage protection insurance do not receive a collection fee for or on account of the solicitation or negotiation of contracts of insurance, and it would not be in violation of this section for an insurance company to pay a bank or other lending agency for such service.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-825 STATE OFFICERS—Per diem—Maximum allowance.**

Carson City, November 9, 1949

Mr. Forrest M. Bibb, Director of the Budget, Office of the Governor, Carson City, Nevada

Dear Mr. Bibb:

This will acknowledge receipt of your recent letter requesting an interpretation of chapter 247, Statutes of Nevada 1949, which amends the Act fixing the amount of expense money for traveling and subsistence charges per day of District Judges, State officers, commissioners, representatives, and other employees of the State in the transaction of public business within the State.

You request an opinion as to the maximum daily travel reimbursement allowable, including per diem subsistence and lodging, under the amendment.

We are of the opinion that the maximum allowance is eight dollars for any one calendar day, which amounts embraces the total per diem allowance for subsistence and lodging when such officer is entitled to receive his necessary expenses in the transaction of public business within this State.

Section 2 of chapter 247, Statutes of 1949, reads in part as follows: "When any district judge, state officer, commissioner, or representative of the state, or other state employee, shall be entitled to receive his necessary traveling expenses in the transaction of public business within the state, such person shall be paid a per diem allowance not exceeding eight dollars (\$8) for any one calendar day and for any period of less than a full calendar day such person shall receive a subsistence allowance of one dollar and twenty-five cents (\$1.25) for each full six-hour period of such person is on travel status, and in addition shall receive a lodging allowance of three dollars (\$3) for each night his duties require him to remain in travel status, and also an allowance for transportation \* \* \*."

The construction of a statute, when the language is not plain the meaning liable to be mistaken, is to determine the intention of the Legislature which must be gathered from the mischiefs intended to be suppressed or benefits to be attained.

The history of the legislation on this subject is an important aid in the construction of the latest amendment.

Chapter 247, Statutes of 1949, amends section 6943, N.C.L. 1929, as amended. Section 6943, N.C.L. 1929, provided for necessary traveling expenses which included actual living expenses, not to exceed six dollars per day.

The act was amended in 1931, the amount per day remained the same, but the mileage allowance was changed. In 1933 the Act was amended reducing the expense allowance not to exceed four dollars per day. Again the Act was amended in 1939 fixing the expense allowance not to exceed five dollars per day. Throughout these amendments no mention was made regarding any period of less than one day. Under the provisions of these statutes no regard was taken of the fraction of a day as there was no specific basis upon which to determine the period or the allowance to be made for such time on travel status.

Chapter 116, Statutes of 1945, amended the Act and fixed an allowance for a period of less than a calendar day in the following language: “\* \* \* such person shall be paid a per diem allowance of six (\$6) dollars for any one calendar day and for any period of less than a full calendar day such person shall receive an allowance of one dollar and fifty (\$1.50) cents for each six-hour period such person is on travel status \* \* \*.”

From the enactment of the statute in 1929 and throughout the amendments a maximum per diem allowance was declared.

The history of the statute is an important aid in the construction of its latest amendment. Chapter 247, Statutes of 1949, the latest amendment to the Act, like other amendments, fixes the maximum allowance for any one calendar day at eight dollars. This was an increase of two dollars per day for any period less than a full day was reduced from one dollar and fifty cents for each six-hour period to one dollar and twenty-five cents. This was defined as a subsistence allowance and in addition there was provided a lodging allowance of three dollars for each night his duties required him to remain in travel status. A calendar day is from midnight to midnight which comprises twenty-four hours. This may be divided into four full six-hour periods. At the rate of one dollar and twenty-five cents for each full six-hour period the allowance would be the total sum of five dollars. In addition to this subsistence allowance there is provided a lodging allowance of three dollars when the officer’s duties require him to remain overnight. This applies in the event that any of the six-hour period which required him to remain in travel status overnight would include an additional allowance of three dollars for lodging.

As we read the statute, it provides for a total per diem allowance of \$8, which per diem allowance may be composed of a subsistence allowance and a lodging allowance. This construction is warranted by the constantly recurring language of the statute and its amendments which fixed a maximum allowance in definite terms. This is the leading idea or purpose of the Act.

Sutherland Statutory Construction, 3d Edition, Vol. 2, section 4703, page 336: “The principal inquiry in litigation is usually to determine what a particular provision, clause, or word means. To answer it one must proceed as he would with any other one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”

The statute reveals the intent of the Legislature to harmonize the specific provisions of the six-hour periods with the maximum per diem allowance, as four full six-hour periods receive an allowance of five dollars and the additional three dollar allowance for lodging does not exceed the eight dollars for any calendar day, as provided in the general language.

If the intent of the Legislature was that the three dollars be in addition to the eight dollars there would be an apparent inconsistency, as one part of the section allowed only eight dollars for each twenty-four hours and the other part allowed eleven dollars. It would not only be inconsistent, but the general words “not exceeding” would be meaningless.

“If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the Act must be construed accordingly and ought to be so construed as to make it a consistent whole. If after all it turns out that this cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.” Sutherland Statutory Construction, Vol. 2, pages 337-338.

It appears, therefore, that it was the intent of the Legislature, as indicated in the numerous amendments, and reading the section as a whole, that an allowance for subsistence and lodging cannot exceed eight dollars for any one calendar day.

We are returning herewith the papers submitted with your letter.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-826 PUBLIC EMPLOYEES RETIREMENT—Teacher defined—**  
Supervisor of school lunch program is teacher.

Carson City, November 9, 1949

Hon. Kerwin L. Foley, Executive Secretary, Public Employees Retirement Board, Carson City,  
Nevada

Dear Mr. Foley:

This will acknowledge receipt of your recent letter in which you request an opinion on the following question:

Will a certified teacher employed in the public schools in a supervisory capacity in a position not directly concerned with instruction to pupils or the supervision of such instruction, be regarded as a teacher within the meaning of Section 9(2) of the Public Employees Retirement Act?

You submit this as a general question, and also present a specific case.

In the specific case a certified teacher was advanced to the administrative position of a supervisor of a school lunch program under a contract as other teachers are employed. This teacher rejected membership in the teachers' retirement system and as a consequence was not included in the Public Employees Retirement Act at the time of integration of the teachers' system with the public system.

In such a case is the employer's contribution paid by the school district or by the State?

Our opinion in answer to your general question is that the definition of a teacher as found in section 361, chapter 39 of the 1947 School Code should be the guide in determining this question.

The answer to your specific case, in our opinion, is that the holder of a valid teacher's certificate who is legally employed as a supervisor of a school lunch program in the public schools is a teacher as contemplated in the teachers' retirement system and the Public Employees Retirement Act, and the employer's contribution is paid by the State.

The Public Employees Retirement Act as amended by chapter 124, Statutes of 1949, provides for the integration of the previously existing teachers' retirement system.

The amendment does not define the term "teacher." It provides that the members of the previously existing system and all public school teachers legally employed as such in the State shall become members upon the execution of the contract effecting the integration. To find the definition of a teacher it is necessary to refer to the chapter of the School Code in which the term is defined.

Chapter 39, section 361 of the 1947 School Code defines the term "teacher" as follows:

(b) The term “teacher” as used in this school code shall mean every person who has served or is serving: (1) As a legally qualified teacher in, or a principal or superintendent of, the public schools of the State of Nevada; (2) as an instructor in the Nevada state orphans’ home, teaching under a valid Nevada teacher’s certificate; (3) as an instructor in the Nevada school of industry, teaching under a valid instructor in county normal schools of the State of Nevada; (4) as a legally qualified instructor serving as a local supervisor for industrial training in the vocational education department of this state; (5) as a legally qualified supervising executive or educational administrator of the public schools of this state; (6) as a state superintendent of public instruction of the State of Nevada, a deputy superintendent of public instruction of the State of Nevada, or a state vocational supervisor of the vocational education department of the State of Nevada; (7) as an employee of the public school teachers’ retirement salary fund board of the State of Nevada who holds a valid teaching certificate.

This section defines a teacher and those who are classed as such when not directly concerned with the instruction to pupils.

Applying this definition to the teacher referred to in the specific case, the teacher would come within the sixth case, the teacher would come within the sixth subdivision of the above-quoted section.

She is a legally qualified teacher during the time she holds a valid teacher’s certificate. She is employed as a supervising executive in a school lunch program for the public schools.

Section 9(2) of chapter 124, Statutes of 1949, which provides for the integration of the two retirement systems, contains the following language in the second paragraph under subsection (b):

All teachers legally employed in the public schools of this state or by the state department of education, whether members of a previously integrated system or not, shall upon integration of the two systems become members of the retirement system created by this act, and shall be entitled to all the benefits accruing under this act.

The next paragraph provides for the payment of the State’s contribution through an appropriation by the Legislature.

She is therefore regarded as a teacher within the provisions of section 9(2) of chapter 124, Statutes of 1949.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-827 SURVEYOR GENERAL**—Not authorized to grant easements over state land for power line purposes.

Carson City, November 10, 1949

Hon. Wayne McLeod, Surveyor General, Carson City, Nevada

Dear Mr. McLeod:

Receipt is hereby acknowledged of your letter of November 8, 1949, together with the letter of Fred H. Johnston of the Corps of Engineers, U.S. Army, relative to the execution of a lease on the part of the State of Nevada to the United States concerning a proposed easement for the construction of a power line and access road over certain land belonging to the State of Nevada in Section 23, Township 20 South, Range 62 East, M.D.B. & M., in Clark County. You inquire as to your authority to execute such lease. You state that you have found no statutory authority empowering you to so act.

### OPINION

This office has examined the law with respect to your inquiry and we find that there is no statutory authority empowering you or, in fact, any other State officer to execute the lease in question. Consequently, we hold that you do not possess the legal authority to execute the lease.

In an examination of the law, however, we find that section 5509, N.C.L. 1929, provides as follows:

There is hereby granted, over all the lands now or hereafter belonging to the state, a right of way for ditches, tunnels, and telephone and transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way.

We think it clear, by reason of the foregoing statute, that the State has in fact granted a right of way to the United States to construct the power line in question over the land mentioned in the proposed lease and that, insofar as the power line itself is concerned, the United States, by reason of such statute, does have the right to construct such line and that upon construction of the line it will have acquired an easement over the land which would remain in effect so long as the power line is maintained.

The statute is silent as to the reservation of rights of way for access roads, but we think a reasonable construction of the statute would permit of the necessary road, closely following the proposed line, for the purposes of construction of the line and reasonable use thereafter for purposes of repair and maintenance.

We think the proper procedure on the part of the United States in this particular instance would be for the Government to furnish you with an accurate description and location of the power line and a plat thereof. We are of the opinion that section 5509 is ample authority for you to indicate the reservation on your official plat, if and when the power line is actually constructed, following the proper description thereof lodged in your office.

Very truly yours,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-828 PUBLIC SCHOOLS**—Trustees in districts of more than 500 children may purchase land adjacent without vote of electors.

Carson City, November 21, 1949

Miss Mildred Bray, State Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will acknowledge receipt of your letter dated November 16, 1949, received in this office November 17, 1949.

You request an opinion as to the authority under the statute of the trustees of a school district having an enrollment of more than 500 school children to purchase for \$3,000 land immediately adjacent to one of the schools, which land may later be used for the construction of additions to the school building, without a special election to secure authorization therefore. The district is hampered for adequate school ground space.

We are of the opinion, under the facts stated, the trustees of the district have authority under section 285 of the 1947 School Code to purchase the land, as a school site, without vote of the electors of the school district to authorize such expenditure of school funds.

Section 285 of the 1947 School Code contains the provisions that no school site shall be purchased nor any school house erected at a greater expense than \$5,000 unless the same is first authorized by a majority vote of the school district cast at a school election. One of the exceptions expressed in the section is as follows: "provided, that in any school district having five hundred (500) or more school children enrolled, as shown in the last preceding annual report of such school district, the school trustees thereof, without vote of the electors of the school district: (1) May purchase any school site that they may deem advantageous to the future use of the school district \* \* \*." Provision is made for the levy of a certain amount of tax, or they may pay the cost of such expenditures, either wholly or in part, from any funds to the credit of the school district not required for other purposes.

The section authorizes the trustees of such qualified district, without an election, to purchase any school site which in the opinion of the trustees may be advantageous to the future use of the school district.

The section uses the terms "school site" and "schoolhouse." The term "school site" is not subject to the strained construction that would limit it to only sufficient land upon which to erect a schoolhouse. As held by the Court in *Board of Education v. Woodworth*, 214, P. 1077: "School sites in this country embrace, not only the grounds upon which the schoolhouse is located, but the grounds surrounding the building used as playgrounds, and in referring 'school sites' the ordinary acceptance of the term means, not only the ground upon which the building is located, but the ground surrounding the building which is dedicated and used as a place of recreation for the children while attending school. It is within the knowledge of all that, in conducting a school and especially the smaller grades, the school recesses every day to permit the children to have some out-door recreation which is considered necessary, but for his proper education."

The circumstances in the question submitted for an opinion from this office reveal the fact that the land proposed to be purchased is immediately adjacent to a schoolhouse, that it is needed at present for school ground space, and is advantageous to the future use of the district for the purpose of erecting a schoolhouse.

The district has an enrollment of more than 500 school children and comes within the exception provided in section 285 of the School Code, authorizing the purchase without vote of the electors of the school district.

Very truly yours,

ALAN BIBLE  
Attorney General



By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-829 FISH AND GAME**—Fishing hours, may not be reduced—Confiscated game may not be given to sportsmen's organizations.

Carson City, November 23, 1949

Mr. S. S. Wheeler, Director, Fish and Game Commission Post Office Box 678, Reno, Nevada

Dear Mr. Wheeler:

This will acknowledge receipt of your letter of November 8, 1949, in which you request the opinion of this office as to the following questions:

1. Does the State Fish and Game Commission or the County Game Management Board have the power to reduce those fishing hours as prescribed in section 38 of the Fish and Game Act by regulation to one hour before sunrise to one hour after sunset?

2. Does the County Game Management Board have the authority to give to a sportsman's organization game which has been taken illegally and confiscated or the meat from game animals accidentally killed by automobiles?

The answer to both of these inquiries as stated above is in the negative.

Section 38, chapter 101 of the 1947 legislative enactments, prescribes as follows:

It shall be unlawful for any person to fish in or from any of the waters of the State of Nevada except during the open season, or on any calendar day before one hour before sunrise or later than two hours after sunset; provided, that it shall be lawful to fish for any species of catfish during the open season at any hour of the day or night.

Section 46, chapter 146 of the 1949 legislative enactments, reads as follows:

The state fish and game commission is hereby authorized to extend the closed season for fishing in any streams or parts of streams, lakes, or waters within this state, which are now or hereafter shall have been stocked with food fish by the state or its commission, when, in its opinions, such action is necessary for the protection of the fish in said streams and waters, to the end that the supply of fish for food may be permanently increased; provided, however, that before any such action shall be effective, notice thereof shall have been published by order of the commission for at least once each week for two consecutive weeks in a newspaper published and of parts of streams, lakes, or waters in or from which the open season for taking or catching fish is to be restricted, and shall state the period over which the closed season is to extend, giving the names of the streams, parts of streams, ales or waters; and copies of said order shall have been posted in such locations as are deemed by the commissioner most likely to give public notice along the mainstream or body of water or the particular tributary or tributaries affected. The payment for the notice herein provided for shall be paid out of the county fish and game fund of the county affected.

You will note that section 46 gives to the Fish and Game Commission the authority to extend the closed season for fishing in any streams or parts of streams, lakes, or waters within the State, which are now or hereafter shall have been stocked with food fish by the State or its

Commission, when, in its opinion, such action is necessary for the protection of the fish in said streams and waters. From this it is evident that the Commission does have the authority to extend the closed season as prescribed above, but it does not follow that it or the County Game Management Boards have the authority to set hours other than those prescribed in section 38. Therefore, it is our opinion that it would be a violation of the law for the Fish and Game Commission to set hours for fishing other than those prescribed in section 38 of the 1947 legislative enactments.

As to your second inquiry, the pertinent portion of section 90 of chapter 101 of the 1947 legislative enactments reads as follows:

In addition to such fine or imprisonment, the court, upon conviction, may cause to be confiscated all wild animals, wild birds, or fish taken or possessed by the violator, and may in its discretion confiscate any fishing or hunting equipment used in any unlawful taking of fish and game. All confiscated fish and game shall be placed in the hands of the county game management board of the county in which the conviction is had, for disposal to the needy, or destruction.

You will note that this section is very explicit in providing that game taken illegally is to be disposed of to the needy or to be destroyed. As there are no other provisions allowing the disposal of such game must be disposed as this section provides. It is also our opinion that this section is broad enough to include those deer accidentally killed by automobiles as, although they are accidentally killed, they are not legally killed.

Very truly yours,

ALAN BIBLE'  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-830 PUBLIC SERVICE COMMISSION**—Motor carrier vehicles—  
Courtesy cars operated by strikers are motor carrier vehicles within motor carrier licensing act.

Carson City, November 28, 1949

Public Service Commission, Carson City, Nevada

Attention: Mr. Lee S. Scott, Secretary

Gentlemen:

This will acknowledge receipt of your letter dated November 9, received in this office November 10, 1949.

You call attention to the taxicab strike that exists in Reno and Las Vegas. You write that it is the Commission's understanding that the drivers for these taxicab companies who are on strike, in certain instances, own their own cars and are operating them within the confines of the two cities. These cars are operated under the term "courtesy cars." The cars do not make any specific charge for the services rendered, but somewhere inside the car is placed a box where a rider may

voluntarily give a tip. You also write that you have been informed in some instances these cars have driven between points inside the city limits and points outside the city limits, and request an opinion if in the latter case the operators are in violation of chapter 165, Statutes of 1933, especially the amendment covered by section 72, chapter 244, Statutes of 1949.

As to taxicabs operated wholly within the corporate limits of any city, such operation comes within the exemption contained in section 3 of the Act of 1933, as amended by chapter 219, Statutes of 1945, which provides that none of the provisions of the Act shall apply to any motor vehicle operated wholly within the corporate limits of any city or town in the State. Attorney General's Opinion No. 303, 1944-1946 Biennial Report.

The opinion as to taxicabs transporting passengers from points within the city limits to points outside, is based upon the assumption that the so-called courtesy cars are operated as taxicab motor carriers in the transportation of passengers from points within the city to places outside the limits of the city.

If the facts assumed are correct, we are of the opinion that the courtesy cars come within the provisions of section 7 2, added in the amendment by chapter 244, Statutes of 1949, which requires the certificate of public convenience and necessity if a taxicab motor carrier transports passengers, either with or without compensation, between any place within the limits of any city to any other point within the State outside such city limits.

Chapter 244, Statutes of 1949, amended the Motor Vehicle Carriers Act, and added section 7 2 to follow immediately after section 7 of the Act. The new section provides: "It shall be unlawful for a taxicab motor carrier to transport passengers, either with or without compensation, between any point or place within the limits of any city or town in the State of Nevada to any other point or place in said state without having first applied for and received the certificate of public convenience and necessity provided for in said above-entitled act."

Section 7 of the Act, section 4437.06, 1929 N.C.L., 1949 Supp., makes it unlawful for any common motor carrier of passengers to operate as a carrier of intrastate commerce within this State without first having obtained from the Public Service Commission a certificate of convenience and necessity.

One class of common motor carriers of passengers operating as a carrier of intrastate commerce is defined in section 2 of the Act, section 4437.01, 1929 N.C.L., 1941 Supp., under subsection (1) quoting that part deemed relevant reads as follows: "The term 'taxicab motor carrier' when used in this act shall be construed to mean any person operating a motor vehicle or vehicles designated and/or constructed to accommodate and transport not more than five passengers in number, including the driver, and fitted with taximeters or having some other device, method, or system to indicate and determine the passenger fare charged for distance traveled; \* \* \*."

The following section exempts from the supervision and licensing by the Public Service Commission, motor vehicles operated wholly within the corporate limits of any city or town in the State.

A taxicab motor carrier under the Act before the amendment in chapter 244, Statutes of 1949, within the authority of the public service to regulate and license, was a person operating as a carrier of passengers in intrastate commerce between any place within the limits of any city to any other place in the State, by means of a motor vehicle or vehicles constructed to accommodate and transport not more than five passengers over the highways in a gainful operation.

Section 7 2 added by the amendment in chapter 244 makes it unlawful for any taxicab motor carrier, either with or without compensation, to transport passengers between any place within the limits of any city to any other place in the State without having the certificate of public convenience and necessity.

Intrastate commerce as applied to a taxicab motor carrier, as appears from the statute, is to engage in the transportation of persons from place to place in a motor vehicle or vehicles constructed to accommodate and transport not more than five passengers.

If the operation of the so-called "courtesy cars" is the principal business of the operators, and such transportation is for public convenience and necessity, this brings such operation within the provisions of section 7 2, chapter 244, Statutes of 1949, and requires a certificate provided in the Motor Vehicles Carriers Act.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-831 UNIVERSITY OF NEVADA**—Salaries or pensions of faculty members retired to emeritus positions may be increased if funds available.

Carson City, November 29, 1949

Hon G. E. Parker, Acting President, University of Nevada, Reno, Nevada

Dear President Parker:

Reference is hereby made to your letter of November 19, 1949, received in this office November 23, 1949, wherein you request the opinion of this office as to whether the Board of Regents of the University may legally increase the pensions of members of the faculty who have been retired to emeritus positions pursuant to an Act of the Legislature entitled, "An Act to empower the board of regents of the University of Nevada to establish emeritus positions, establishing conditions and qualifications of those who shall benefit thereunder," approved March 24, 1915.

Your inquiry is directed to the point as to whether the Board of Regents may legally increase the pensions or payments made pursuant to the above-entitled Act to those members of the faculty retired thereunder from 25 percent to 33 a of the actual average salary received by such faculty members for a period of five years previous to the date of their retirement.

Reference is also made to the data submitted with your letter of inquiry concerning the minutes of the Board of Regents relative to the Retirement Act of 1943.

### **OPINION**

It is clear from a reading of the 1943 Retirement Act providing for the retirement of all employees of the University, which Act is found at chapter 99, Statutes of 1943, and as amended in matters not material here at 1945 Statutes, 341, and 19494 Statutes, 556, that the Retirement Act of 1943 has no effect and no bearing whatsoever upon those individuals retired to emeritus positions under the aforesaid Act of 1915 and your inquiry relates solely to those individuals who have, prior to July 1, 1943, retired from actual service pursuant to the provisions of the 1915 Act. In fact, section 7 of the 1943 Act expressly provides that nothing in the 1943 Act shall effect the status of those individuals who retired or acquired a pay roll status under the 1915 Act.

We have examined your inquiry and the law relating thereto very carefully. It is the considered opinion of this office that if the Board of Regents has at its command, and available, funds from which the salaries or pensions granted the individuals assuming emeritus positions pursuant to the 1915 Act can be paid, then such Board may legally increase the retirement payments from 25 percent to 33 a percent of the average salaries received by such persons for a period of five years

previous to the date of their each and several retirements.

The pertinent provision of the 1915 Act, the same being section 7739, N.C.L. 1929, provides as follows:

\* \* \* upon recommendation of the president of the university and the approval of the governor of the state, place such individual or his widow upon the payroll of the university at a salary which shall not be more than one-half of the average salary received by the employee for the period of five years previous to the date of retirement.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-832 PHARMACY**—Grocer store operating within city or town not qualified to receive permit provided for dealers in rural districts to sell certain drugs—Full time registered pharmacist.

Carson City, November 30, 1949

Mr. William Ramos, Member, State Board of Pharmacy, Second and Virginia Streets, Reno, Nevada

Dear Mr. Ramos:

Reference is hereby made to your letter of November 15, 1949, received in this office November 29, 1949, wherein you request the opinion of this office as follows:

As a member of the State Board of Pharmacy and on behalf of the Board, I write this letter to secure your opinion relative to the duties and powers of the Board under the State Pharmacy Act, as amended statutes of 1949, pages 554 and 555.

Specifically we ask:

1. Does a grocery store in Reno operating without a pharmacist violate the Act if it sells those certain drugs enumerated in the second unnumbered paragraph of Section 18 of the Act? No rural district is involved.
2. If a drug store operates in a city, other than a rural district, and employs a part-time registered pharmacists, is it unlawful for that drug store to make sales of drugs, medicines, chemicals, poison, or fill prescriptions during the absence of said pharmacist.

### **OPINION**

Answering Query No. 1—Section 18 of the Pharmacy Act, as amended at 1949 Statutes, page 555, provides:

The board of pharmacy shall issue a permit to general dealers in rural districts in

which the conditions, in their judgment, do not justify the employment of a registered pharmacist, which said permit shall authorize the person or firm named therein to sell in such locality, but not elsewhere, and under such restrictions and regulations as said board may from time to time adopt, the following simple household remedies and drugs \* \* \*.

Then follows in the next paragraph of the section an express and itemized statement and list of the household remedies and drugs that may be sold pursuant to the permit mentioned above.

Section 1 of the Act as amended in 1949 provides, briefly, that it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medicine, or chemical, or to dispense or compound any prescription of a medical practitioner unless such person be a registered pharmacist or a registered assistant pharmacist within the meaning of the Act. The section then goes on to provide that every store, dispensary, etc., dispensing or compounding drugs, medicines or chemicals, or for the dispensing of prescriptions of medical practitioners, shall be in charge of a registered pharmacist excepting as provided in the Act for the absence of the pharmacist where a registered assistant pharmacist is left in charge, the absence of the registered pharmacist, however, to be only temporary as the occasion may occur during the day's work. It is further provided in section 1 that every store or shop where drugs, medicines or chemicals are sold at retail, or displayed for sale at retail, or where prescriptions are compounded, shall be deemed a pharmacy. Thus, section 1 of the Act provides a most stringent regulation with respect to the sale and disposal of drugs and chemicals, which regulation is carried throughout the entire Act, save and except as to the exception contained in section 18 hereinabove quoted.

It is the opinion of this office that the Legislature used the term "rural districts" in section 18 in its commonly known meaning, the same being as found in Webster's Dictionary, "Of or pertaining to the country, as distinguished from a city or town," and that the Legislature intended that only dealers in rural districts, as distinguished from dealers in cities and towns could be permitted to sell the expressly mentioned drugs and chemicals set forth in the second paragraph of section 18. We conclude that a grocery store operating within a city or town is not qualified to receive the permit provided in section 18 for dealers in rural districts and if such store sells the drugs enumerated in the second paragraph of section 18, it is violating the Pharmacy Act.

Answering Query No. 2—Section 1 of the Act as amended in 1949, in our opinion, is clear and express in its provisions and prohibits the sale of drugs, medicines, chemicals, poisons, or the filling of prescriptions during the absence of a registered pharmacist. Such section provides that every store, dispensary, pharmacy, laboratory, or office for the sale, dispensing or compounding of drugs, medicines or chemicals, or for the dispensing of prescriptions of medical practitioners, shall be in charge of a registered pharmacist. The section further provides a registered assistant pharmacist may be left in charge of any such store, etc., only during the temporary absence of the registered pharmacist. The temporary absence, as defined in the section, means only those absences which may occur during the day's work and when the registered pharmacist in charge shall be within the immediate call, ready and able to assume the direct supervision of the pharmacy.

Respectfully submitted,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-833 PUBLIC SCHOOLS**—Transfer of pupils from one school district to another district in same county—State and county apportionment.

Carson City, December 6, 1949

Honorable Mildred Bray, Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will acknowledge receipt of your letter dated November 25, received in this office November 27, 1949.

You request an opinion as to the operation of section 87 of chapter 63, Statutes of Nevada 1947, which provides for the transfer of pupils from one school district to another district in the same county, and submit the following questions:

1. In addition to the per capita pupil apportionment provided in section 180, paragraph (b), and the per capita pupil apportionment of the county school fund provided for in section 181, paragraphs (b) and (c), does the pro rata of State and county moneys apportioned to each child in the county include a pro rata of the State and county school funds apportioned on a teacher basis as provided in section 180, paragraph 2(a), and section 181, paragraph 1(a) respectively?

We are of the opinion that the transfer referred to in section 87 is on a pupil basis, under section 180, subsection (2) paragraph (b) for State Distributive School funds, and section 181, paragraph (b) of subsection 1, for county school fund apportionment.

The apportionment on teacher basis in paragraph 2(a) of section 180 and paragraph 1(a), section 181, is not included in such transfer.

Second question: For purposes of receiving State and county apportionment for the school year next succeeding, is the district in which a transfer pupil is attending, entitled to count the attendance of such transfer pupil?

We are of the opinion that the attendance of the transferred pupil is credited to its resident district. The attendance in receiving district is reported to secure the transfer of the fund for such pupil received.

Third question: In the event a pupil continues attendance at a school to which he has been regularly transferred and still retains his original residence, is a new authorization of transfer required for each successive year?

We are of the opinion that a new authorization for transfer between the districts is not required for each successive year.

Fourth question: Under the circumstances described in query three, shall the State Superintendent of Public Instruction continue to transfer funds from the district in which the child resides to the district to which he has transferred?

We are of the opinion that the report from the resident district and that from the receiving district must be received by the Superintendent in time to make the transfer once each year at the close of the year of attendance.

Section 87 of the 1947 School code, chapter 63, Statutes of 1947, provides for the transfer of pupils between school districts in the same county. The section empowers Boards of School Trustees to make arrangements with trustees of another district in the county for the attendance of children in either school district that may be most convenient for such children. The transfer is initiated upon the written request of the parents or guardians of the children to the trustees of the district where the children reside. Such request must be accompanied by a written permit from the trustees of the district to which the children are to be transferred.

The latter part of this section provides as follows:

“Whenever the two (2) boards of trustees in interest shall agree upon the transfer of said children, and notice thereof shall be given the superintendent of public instruction by either of said school

boards, said superintendent shall direct the county auditor and county treasurer of the county in which such districts are situated to transfer from the funds of the district in which such children live to the credit of the funds of the district in which they are attending, the pro rata of state and county money apportioned to each child in the county for each of such children as shown by the last preceding semi-annual state apportionment, provided, that such moneys shall be transferred once each year at the close of the year of attendance, and such transfer shall cover only those in attendance during the period for which the transfer of money is made.”

It appears therefore that the transferred apportionment is for each child, and is on a pupil basis and not on a teacher basis from such apportionment.

The apportionment on the child or pupil basis is found under subsection 2, paragraph (b) of section 180, providing for the apportionment from the State distributive School fund, which reads as follows:

He shall apportion on a per capita basis from the state distributive school fund not more than eight (\$8) dollars for each pupil in average daily attendance, as shown by the last preceding annual school report.

Section 180 was amended by chapter 264, Statutes of 1949, but this paragraph was not changed.

Apportionment of the county school fund on a pupil basis is found under section 181, in paragraph (b) of the first part of the section, which reads as follows:

He shall further apportion to each district one (\$1) dollar for each pupil in average daily attendance as shown by the attendance report for the last preceding year.

Paragraph (c) provides how the balance of the County School Fund is apportioned on a per capita pupil basis.

The second question must be answered in the negative for the reason that the resident district receives its regular apportionment for resident children which apportionment is transferred to the district to which the transferred pupils attend. If the transferred pupils were counted to arrive at the apportionment of the receiving district there would be no occasion for the transfer. It appears that the section excuses the actual attendance in the resident district but credits the district with such attendance, and then transfers the pupil apportionment for each child attending in the district to which they are transferred.

Answering your third question, it appears from section 87 that the arrangement when made by the trustees interested is not limited to any specified period of time, and it does not require a new arrangement for each successive year.

Your fourth question, as to the duty of the Superintendent continuing to transfer the funds, is answered by the provision of section 87 which provides such transfer shall cover only those in attendance for the period for which the transfer of money is made, and shall only be transferred once each year at the close of the year of attendance for the period for which the transfer of money is made, and shall only be transferred once each year at the close of the year of attendance. To effect this transaction, the report from the resident district should show the pupils in actual attendance, and the number of pupils transferred. The receiving district should show attendance of its regular pupils and the attendance of the pupils attending on transfer. Without such report once each year, the Superintendent would be unable to make the annual directory notice to the County Auditor and Treasurer at the close of the year attendance.

Very truly yours,



ALAN BIBLE  
Attorney General

By: GEORGE P. ANNAND  
Deputy Attorney General

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**OPINION NO. 49-834 PUBLIC EMPLOYEES RETIREMENT**—Members of previously established system, which has been integrated, entitled to participate to extent of compensation received.

Carson City, December 15, 1949

Mr. Kerwin L. Foley, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada

Dear Mr. Foley:

This will acknowledge receipt of your letter of November 25, 1949, received in this office November 27, 1949, requesting our opinion as to the following question:

May Miss Della B. Boyd, who is Washoe County Auditor and also ex officio auditor of the city of Reno, and Mr. Jack B. Cunningham, who is the city of Reno, and Mr. Jack B. Cunningham, who is Washoe County Treasurer and also ex officio treasurer of the city of Reno, participate in the Public Employees Retirement System to the extent of the compensation received for their services to the city of Reno?

The answer to this inquiry is in the affirmative.

Section 8 of the 1949 Public Employees Retirement Act reads in part as follows:

No person may become a member of the system unless he is in the service of a public employer. All public employers shall participate in, and their employees shall be members 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. \* \* \*

The intent of the Legislature in enacting this particular provision was obviously to prevent those employed by a public employer, who although eligible to participate in the State System had not integrated with it, from becoming members of the State System. In other words, the public employers must be a member of the System before one of its employees may be a member.

In applying the above interpretation to our present facts, we find that those persons referred to are not among those intended to be excluded from membership in the State System.

Both Miss Della B. Boyd and Mr. Jack B. Cunningham are employed not only by Washoe County, a nonparticipant, but also by the city of Reno, which is a member of the State System, being integrated with the State System in September of this year. Therefore, since they are members of a previously established system which has been integrated, they are entitled to participate to the extent of the compensation received from the city of Reno.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-835 CIGARETTES**—Wholesaler dealer must have license.

Carson City, December 22, 1949

Mr. H. S. Coleman, Supervisor, Cigarette Tax Division, Nevada Tax Commission, Carson City,  
Nevada

Dear Mr. Coleman:

Reference is hereby made to your letter of December 20, 1949, requesting the opinion of this office as to whether it is necessary for a grocery company to act as a wholesaler of cigarettes in this State if such company sells no cigarettes in Nevada but disposes of them at wholesale for resale or consumption without the State of Nevada.

**OPINION**

The answer to the inquiry is found in section 2 of the Cigarette License Tax Law. Such section provides:

No person shall engage in business as a wholesale dealer of cigarettes in the State of Nevada unless he first secures a wholesale cigarette dealer's license from the State of Nevada as hereinafter provided.

In our opinion this language means exactly what it says, that no person can engage in the business as a wholesale dealer of cigarettes in the State of Nevada unless he obtains a license and that such person shall obtain such license irrespective of whether he sells any of the cigarettes in this State. Such person is undoubtedly engaged in the wholesale business of disposing of cigarettes even though he ships the cigarettes out of the State. To hold otherwise would be to open the door to illegal practices.

If the Legislature had intended to exempt wholesale dealers in this State, who engage wholly in the business of sales of cigarettes to be exported from the State, from the licensing provision, it could well have said so. Apparently the only express provision in the Act exempting persons from obtaining such licenses is found in section 17, which relates to common carriers while engaged in interstate commerce. The other exemptions in the Act relate to the cigarette tax itself and have no bearing upon the instant question.

Very truly yours,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-836 PUBLIC SCHOOLS**—Budgets—Unencumbered balances—Amounts may be rebudgeted.

Carson City, December 22, 1949

Miss Mildred Bray, State Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will acknowledge receipt of your letter dated December 12, 1949, received in this office the same date.

You present three questions relative to a county high school wherein the sum of \$4,000 was allowed in its budget for 1949 as a “capital outlay” for certain improvements of the county high school athletic field. The questions involve the necessity of the board to expend this money before December 31 of this year; the authority to carry it over as a balance, and if it has legal authority to set it aside in a fund to be used only for the specified purpose of improvement of the athletic field.

We are of the opinion that the board is not required to expend the money before the end of this year.

There is no provision in the school budget law to carry over an unencumbered balance at the beginning of the current year. The balance at the end of the year is reflected in the required tax rate. The amount could be rebudgeted for the current year and specially set aside for the purpose designated.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-837 PLANNING BOARD, STATE**—State office building—No authority to purchase additional site deemed advantageous to future use.

Carson City, December 22, 1949

Hon. W. T. Holcomb, Chairman, State Planning Board, Carson City, Nevada

Dear Mr. Holcomb:

We submit the following in answer to your oral inquiry as to the authority of the State Planning Board, at this time, to purchase additional property for use as a parking area in conjunction with the State Office Building authorized by chapter 325, Statutes of Nevada 1949, which said building is now under construction.

From the facts submitted we are unable to find authority in the statute for the purchase of this additional property.

The Planning Board, in cooperation with the Highway Department and the Board of Control, after due consideration selected a site for the State Building which consisted of the plot of ground

for the building and such additional land as the Board deemed reasonably required as needed for the convenient use of the State Building.

The determination of the term "site" as used in the statute is now a moot question as the selection of a site is no longer an undecided point. The Planning Board has fulfilled its function in the selection and purchase of the present site.

There is no provision in this statute which empowers the Board to purchase an additional site that they now deem advantageous to the future use of the State.

It appears to us that the best and safest rule to be adopted in the construction of this statute is the rule expressed in *Arnold et al. v. Stevenson*, 2 Nevada 234, that is, where the law is doubtful, we think it is a duty to adopt that construction which will least likely to produce mischief, and which will afford the most complete protection to all parties. The purchase of the additional land is a matter which should be submitted to the Legislature for its direction and action.

Very truly yours,

ALAN BIBLE  
Attorney General

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**OPINION NO. 49-838 COUNTIES**—Tax roll—Property escaping taxation—Additional valuation—Procedure for correcting errors.

Carson City, December 22, 1949

Hon. Harold O. Taber, District Attorney, Washoe County, Reno, Nevada

Attention: Grant L. Bowen, Assistant

Dear Sir:

This will acknowledge receipt of your letter dated December 7, 1949, received in this office December 8, 1949.

The questions are presented are summarized as follows:

1. A certain lot in a city of your county, together with two houses thereon was properly assessed for the year 1946. during the years 1947 and 1948 the lot and only one of the houses was assessed for each of said years. The Assessor has, of his own volition, placed the valuation of the other house for the years 1947 and 1948 and the 1949 assessment roll. The taxpayer has protested the additional taxes for the years 1947 and 1948, claiming that the Assessor was not justified in adding the additional valuation to the 1949 assessment roll. Your inquiry is whether the Assessor has authority under the statutes for his action. You cite from chapter 52, Statutes of Nevada 1945, and inquire if the Tax Commission has authority to add the omitted property to the tax roll, must any notice be given to the taxpayer of the Commission's intention to place such property on the tax roll for the next ensuing year.

2. Certain property was assessed in 1948 for \$1,600. Without submitting the error to the County Commissioners, the Assessor in 1949 assessed the same property correctly in the sum of \$16,000 for 1949 and in addition assessed the property in the sum of \$14,400, which presumably represented the difference between the assessed value of the property as it appeared on the assessment roll in 1948 and the actual property as it appeared on the assessment roll in 1948 and the actual assessed value for the same year. The Tax payer has tendered payment on the \$16,000 valuation for 1949. Your inquiry is whether the tax collector now should refuse to accept or reject the tendered amount. Our attention is called to chapter 70, Statutes of 1949, which defines

the procedure to correct clerical or typographical errors appearing on the tax roll.

In answer to your first question, we are of the opinion that there is no authority given in the statute for the action of the Assessor under the circumstances recited. Chapter 52, Statutes of Nevada 1945, provides the method of placing on the assessment roll by the State Tax Commission any property found to be escaping taxation.

As to the question of notice to the taxpayer, in the event the Tax Commission exercises the power granted to place on the tax roll property found to be escaping taxation coming to its knowledge, either prior to the delivery of the roll to the tax receiver or for the next ensuing year, the statute is silent.

The answer to your second question, in our opinion, is that the Assessor had no authority under the statute to add the additional valuation to the 1949 tax roll.

In the event the Treasurer refused to accept the payment of the taxes on the assessment for the current year, the collection of such taxes would depend upon whether the provisions of the statutes had been complied with pertaining to the assessment of property for tax purposes and subsequent provisions pertaining to the collection of taxes.

Chapter 179, Statutes of Nevada, 1939, section 6548, 1929 N.C.L., 1941 Supp., amended the Act creating the Nevada Tax Commission. Section 7 of the amendment contained the following provision: "The said commission shall have power to be caused to be placed on the assessment roll of any county, property found to be escaping taxation coming to its knowledge after the adjournment of the state board of equalization; provided, such property is placed upon such assessment roll prior to the delivery thereof to the ex-officio tax receiver. In the event such property cannot be placed upon the assessment roll of the proper county within the proper time it shall thereafter be placed upon the tax roll for the next ensuing year, and taxes thereon collected for the prior year in the same amount as though collected upon the said prior year's assessment roll; provided further, said commission shall not raise or lower any valuation established at the session of the state board of equalization unless, by the addition to any assessment roll property found to be escaping taxation, it shall be found necessary so to do \* \* \*."

The above provision is present in the amendment to the Act under chapter 52, Statutes of 1945.

In the first question presented it appears that the property was properly assessed in 1946.

Section 6421, N.C.L. 1929, provides the method of assessing property for taxation. For the purpose of enabling the Assessor to make such assessments he shall demand from each person a statement under oath of all real estate and personal property within the county owned or claimed by such person.

Section 6431, N.C.L. 1929, provides for the completion of the assessment roll by the Assessor and his affidavit to the effect that he has made diligent inquiry and examination to ascertain all the property subject to taxation within the county, and that he has assessed it on the assessment roll equally and uniformly, according to his best judgment, information and belief.

Section 6434, 1929 N.C.L., 1941 Supp., authorizes the County Board of Equalization to change the valuation and if found necessary to add to the assessed valuation, to give notice to the person interested.

If the under valuation of the property in question was not discovered in 1947 during the session of the County Board of Equalization and the State Board of Equalization and could not be placed on the tax roll by the State Tax Commission, if called to its attention, before the roll was delivered to the tax collector, then the Commission had authority to place the added assessment on the tax roll for 1948.

The answer to your second question comes within the range of the law applicable to the first question. The error occurred on the 1948 tax roll before the passage of chapter 70, Statutes of 1949. The manner prescribed by law at that time is found in section 6548, 1929 N.C.L., 1941 Supp., as amended by chapter 52, Statutes of 1945, which authorized the Tax Commission to place on the tax roll any property found to be escaping taxation.

Chapter 70, Statutes of 1949, as shown by the preamble, was enacted because there is no method provided in the revenue laws of the State whereby errors may be corrected after the tax rolls have received their final check by the respective boards. It is evident from the preamble and the statute that the clerical or typographical errors which have escaped the attention of the officers and boards refer to the tax roll for the current year while such roll is in possession of the Treasurer for the collection of taxes.

The method of correcting such errors is defined in the following language:

\* \* \* the county assessor of the county in which such errors appear shall make report thereof to the board of county commissioners of such county, which said board shall thereupon examine the error or errors so reported together with such evidence as may be presented in connection therewith and, if satisfied that such error or errors or any of them are purely clerical or typographical, shall by order entered in the minutes of such board authorize and direct the county treasurer to correct the error or errors so reported so as to conform to the true assessment and serve a copy of such order on the treasurer who shall thereupon make the correction and change the tax roll or rolls in conformity therewith.

Failure to discover the error in time resulted in the omission from the 1948 tax roll the true assessed valuation of the property in question. It was, therefore, escaping taxation and the procedure for placing it on the tax roll for the next ensuing year is defined in chapter 52, Statutes of 1945.

The authority of the Treasurer to refuse to accept the tendered amount of taxes would be contingent upon the power to collect the entire amount.

As stated by the Court in *Lander County v. Nye County*, 59 Nevada, on page 119, "to enable Nye County to subject the Potts property to payment of taxes, it was necessary that the provisions of the statutes pertaining to the assessment of property for tax purposes, and all subsequent provisions pertaining to the collection of taxes be complied with." No such thing was possible as taking a short cut to collect from Lander County. The county officials of Nye County were charged with a knowledge of the law, and it was necessary that they follow the method outlined.

The rule stated in *Goldfield Con. Mines Co. v. State*, 60 Nevada 241, is that belief that property may escape taxation does not warrant taxing it in a manner not authorized by law.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-839 NEVADA HOSPITAL FOR MENTAL DISEASES**—Board may remunerate psychology instructor of university for services rendered hospital on free time.

Carson City, December 22, 1949

S. J. Tillim, M.D., Superintendent, Nevada Hospital For Mental Diseases, Post Office Box 2460, Reno, Nevada

Dear Dr. Tillim:

This will acknowledge receipt of your letter dated December 16, received in this office December 19, 1949.

You inquire if the hospital is empowered to remunerate Dr. Paul Brewer, psychology instructor at the University of Nevada, for services rendered the Hospital on his own free time from the University. The arrangement is with consent of the Board of Commissioners for the hospital.

This office rendered an opinion to the Superintendent of Public Instruction, Opinion No. 52, 1943-1944 Biennial Report, wherein we held that school trustees have no authority to control remunerative work of teachers after school hours.

This would apply in answer to your first question.

The employment appears to be within the general powers granted the Board of Commissioners under section 3509, Nevada Compiled Laws 1929.

As you know, section 6 of chapter 277, Statutes of 1947 requires that the resident physician and the resident assistant physician devote full time to the respective positions.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-840 PROFESSIONAL ENGINEERS ACT**—Applicants for classification of land survey—Section 5 does not apply.

Carson City, December 23, 1949

Hon. Alfred Merritt Smith, Chairman, Board Registered Professional Engineers, Carson City, Nevada

Dear Mr. Smith:

This will acknowledge receipt of your letter dated December 14, 1949, received in this office December 16, 1949.

You submit a letter from Dr. Stanley G. Palmer, Secretary of the Nevada Board of Registered Professional Engineers, making inquiry as to whether the provision in the Engineer's Registration Law requiring eight years of active practice in engineering applies to applicants for classification as land surveyor.

We are of the opinion that the conclusion of Dr. Palmer as to the interpretation of sections 11 2 and 14 of chapter 254, Statutes of 1947, is correct in that section 5 of the Act does not apply to applicants for classification of land surveyor.

Sections 11 2 and 14 of the Act were not amended by chapter 315, Statutes of 1949. Section 11 2 provides: "This section of the act creating the state board of registered professional engineers may be cited as the land surveyors act." This provision distinguishes land surveying from the definition of professional engineer under section 2 of the Act as amended. Land surveyor is defined in section 11 2 and section 12 empowers the Board of Registered Engineers to administer the provisions and requirements listed therein.

Section 13(a) defines the sphere of action of a land surveyor and provides in subdivision (4):  
“Surveys authorized under this act do not include the design, either in whole or in part, of any structure or fixed works embraced in the practice of professional engineering, as defined in Section 2 of the engineers registration law.”

Section 14 defines the qualifications required, the grade to be attained on his examination, and the elements of the written examination.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-841 FIRE PROTECTION**—Rural—Real property of public utilities within organized district subject to taxation.

Carson City, December 19, 1949

Hon. Wayne Mcleod, Surveyor General and State Forester-Firewarden, Carson City, Nevada

Dear Mr. Mcleod:

This will acknowledge receipt of your letter dated December 20, 1949, received in this office December 21, 1949.

You request an opinion as to whether public utilities such as power and telephone companies, public carriers such as railroads, express and Pullman companies, can be assessed to support rural fire protection districts through which such companies operate.

We are of the opinion that only the real property owned by such companies, together with the improvements thereon, as shown by the assessment roll of the county or counties to be within an organized fire control district, is subject to the tax provided in the Act for the organization of fire control districts.

Section 10 of the Act providing for the organization of fire protection districts, the same being section 1929.10, 1929 N.C.L., 1941 Supp., defines the method of raising the necessary tax to defray the cost of maintenance and other expenditures authorized in the Act. The board of directors of a district shall annually estimate the amount of money needed to defray such expenses “and shall also ascertain from the assessor or assessors the assessed value of the assessable property within the district. Said board shall then determine the amount of the tax sufficient to raise the sum estimated to be necessary \* \* \*. When county commissioners of the counties in which any portion of said district is located, and such boards of commissioners shall, at the time of making the levy of county taxes for that year, levy the tax certified upon all real property, together with the improvements thereon in the district.”

The section also contains a provision limiting the tax to a certain percentage of the assessable property in the district.

The language in the section is not clear as to the class of property to be assessed. In one instance the directors are required to ascertain the assessed value of the assessable property in the district and then determine the amount of the tax sufficient to raise the sum estimated to be necessary. The last part of the section directs the County Commissioners to levy the tax so



certified upon all the real property together with the improvements thereon in the district. The limitation placed on the tax is a certain percentage of the assessable property within the district.

To remove or explain any ambiguity in a section the whole Act should be considered. A rule of construction approved in *National Mines Co. v. District Court*, 34 Nevada 67, is:

Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses.

Section 2 of the Act, section 1929.02, 1929 N.C.L., 1941 Supp., defines the procedure to organize a fire protection district. Quoting only the language deemed relevant to the question, this section reads:

When twenty-five percent or more of the holders of title or evidence of title to lands lying in one body and whose names appear as such upon the last county assessment roll shall present to the board of county commissioners of the county in which said land or the greater portion lies, setting forth the exterior boundaries of said proposed district, and asking that the district so described be formed into a county fire protection district under the provisions of this act, the said board of county commissioners shall pass a resolution declaring their intention to form or organize said territory into a county fire protection district, naming said district and describing its exterior boundaries \* \* \*.

Holders of land whose names appear on the assessment roll as such are the only persons qualified to file a petition to organize a district.

The following section makes provision at the hearing of the petition whereby the Commissioners may exclude therefrom any land that will not be benefited by the formulation of such a district.

Section 5 of the Act, section 1929.05, 1929 N.C.L., 1941 Supp., which provides for an election to determine if a district shall be organized declares: "Holders of title or evidence of title to lands within the district, and no others, shall be qualified and entitled to vote either in person or by proxy at an election held by such district."

Landowners who appear on the assessment roll as such, their real property and improvements thereon appears to be the property in the district.

Land is real property and real property and improvements is real estate. Words and Phrases, Vol. 36.

Section 6 of the Act to provide revenue for the support of the government, section 6419, 1929 N.C.L., 1941 Supp., defines real estate to mean and include all houses, buildings, fences, ditches, structures, erections, railroads, toll roads and bridges, or other improvements, built or erected upon land.

It appears, therefore, that only the real estate of the class mentioned in your letter, as shown on the assessment roll of the county or counties in your letter, as shown on the assessment roll of the county or counties within the fire protection district, is subject to the tax mentioned in the Act providing for the organization of fire protection districts.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand

Deputy Attorney General

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**OPINION NO. 49-842 ARCHITECTURE**—Bond not required for secretary-treasurer, but board may regulate—Legislative Auditor not required to audit books.

Carson City, December 30, 1949

Mr. Walter Zick, Secretary-Treasurer, State Board of Architecture of Nevada, Post Office Box 2107, Las Vegas, Nevada

Dear Mr. Zick:

This will acknowledge receipt of your letter dated December 20, received in this office December 22, 1949.

You request advice as to the necessity of the secretary-treasurer of the State Board of Architecture to furnish a bond, and also if the books of the Board should be audited annually by the Legislative Auditor. Although chapter 220, Statutes of Nevada 1949, being an Act to regulate the practice of architecture, and creating a State Board of Architecture.

Section 8 of chapter 220, Statutes of 1949, provides for the appointment of one of the members of the State Board of Architecture as secretary and treasurer at a limited salary.

Section 12 provides for the organization of the Board, and for the formulation and adoption of a code of rules and regulations for its government in the examination of applicants for certificates to practice architecture in this State; “and such other rules and regulations as may be necessary and proper not inconsistent with this act.”

Section 14 provides that all fees shall be paid to the Secretary of the Board, and shall be paid by him monthly into the State Treasury to the credit of a separate fund to be known as the Architecture Fund.

The general powers given the Board would by implication of law include the authority to require a bond of the officer receiving the funds of the Board.

It does not appear from the provisions of chapter 205, Statutes of 1949, which provides for the appointment of a Legislative Auditor, that his duties include the auditing of the books of the State Board of Architecture.

Section 6, subsection (1) provides for a post-audit of all accounts, books, and other financial records of all State departments that are charged with the collection, custody, or expenditure of public funds.

The secretary of the State Board of Architecture is not charged with the collection, custody or expenditure of public funds. His financial records would not require an audit by the Legislative Auditor.

When the money is deposited with the State Treasurer it becomes State money to the credit of a separate fund. The State Treasurer is the custodian of the fund, which, as provided in section 15, shall be paid on claims signed by the chairman and secretary, and paid as other claims against the State are paid, out of the special fund provided.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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**OPINION NO. 49-843 CORPORATIONS**—Corporations sole—Articles of incorporation—  
methods to be followed.

Carson City, December 30, 1949

Hon. John Koontz, Secretary of State, Carson City, Nevada

Dear Mr. Koontz:

Reference is hereby made to your letter of November 28, 1949, requesting the opinion of this office upon the question of whether the proposed articles of incorporation creating corporations sole with respect to the "Reno Corporation of the Church of Jesus Christ of Latter-Day Saints" and "The First Assembly of God" conform to the Act of the Legislature of this State providing for the creation of corporations sole, the same being sections 3223-3230, N.C.L. 1929, as amended at 1941 Statutes, page 91, and at 1949 Statutes, page 283. You state the inquiry arises by reason of the amendment of paragraph 1 of section 3 (Section 3225, N.C.L. 1929) by the 1949 Legislature as found in chapter 137, Statutes of 1949. This office has been delayed in answering your inquiry, due to other pressing public business, until this date.

**OPINION**

Paragraph 1 of said section 3 of the Act originally provided as follows: "The articles of incorporation shall specify: 1. The name of the corporation by which it shall be known." Such paragraph was amended in 1949 to read as follows: "The articles of incorporation shall specify: 1. The name of the corporation by which it shall be known; which such name shall be the name of the person making and subscribing the articles and/or the title of his office in such church or religious society naming it, if desired; and followed by the words 'and his successors, a corporation sole.'"

An examination of the proposed articles of incorporation of the Reno Corporation of the Church of Jesus Christ of Latter-Day Saints submitted by you discloses that Article First thereof reads as follows: "The name of the corporation shall be the RENO CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS." The name of the person making and subscribing the articles is not included in Article First and neither is the title of the person to be found therein nor the words "and his successors, a corporation sole." In fact, the only place that the name of the person making the proposed articles does appear is at the end thereof where his name is subscribed to such articles. Nowhere in such articles do the quoted words "and his successors, a corporation sole" appear.

In Article Fourth it is stated: "The title of the person making these Articles of Incorporation is, Bishop of the Reno Ward of the Church of Jesus Christ of Latter-Day Saints, in the County of Washoe, State of Nevada. When, by death, resignation, or removal, such Bishop ceases to hold office, his successor shall succeed to all the rights and powers of his predecessor by filing a certified copy of appointment, which is issued by the First Presidency of the Church of Jesus Christ of Latter-Day Saints, with the County Recorder of the county in which the property is located."

We are of the opinion that the proposed articles would have complied with the Corporation Sole Act prior to the 1949 amendment. However, the 1949 amendment in question here has, in

our opinion, most materially changed and amended the Act with respect to articles of incorporation purporting to create corporations sole and by reason thereof have placed additional elements and conditions in the making of such articles that must be complied with.

In our opinion the person making such articles must do one of three things with respect to the name of the corporation:

(1) The articles must specify the name of the corporation by which it shall be known, which such name shall be the name of the person making and subscribing the articles or

(2) In lieu of using the name of the person making such articles as the name of the corporation the maker may use the title of his office in such church or religious society without expressly naming the person, or

(3) Such person may combine the name of the person making the articles and title of his office in such church or religious society as the name of the corporation.

In any event, one of the foregoing methods must be used. In addition thereto, it is absolutely incumbent upon the maker of the articles, in setting forth the name of the corporation, that such name must be followed by the words "and his successors, a corporation sole." It is the opinion of this office that proposed articles of incorporation for corporations sole which do not literally follow the language contained in paragraph 1 of section 3 of the act as amended in 1949 do not conform to the law.

An examination of the proposed articles of incorporation for The First Assembly of God discloses there is a total failure to comply with the 1949 amendment.

For the reasons above-stated, it is the opinion of this office that neither of the proposed articles of incorporation mentioned hereinabove comply with the 1949 amendment to the Act in question so as to warrant their filing in your office.

Very truly yours,

ALAN BIBLE  
Attorney General

By: W. T. Mathews  
Special Assistant Attorney General

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**OPINION NO. 49-844 VETERANS**—May attend school and work part-time in another state—May claim exemption in Nevada even though receiving exemption in another state.

Carson City, December 30, 1949

R. E. Cahill, Secretary, Nevada Tax Commission, Carson City, Nevada

Dear Mr. Cahill:

This will acknowledge receipt of your letter of December 20, 1949, received in this office December 21, 1949, in which you request our opinion as to the following two questions:

1. Can a veteran who owns property in Nevada but is going to school and working part time in another State claim an exemption in Nevada?
2. Can a veteran who resides in Nevada claim an exemption in Nevada when he

receives an exemption in another State?

The answer to your first inquiry is in the affirmative, assuming the claimant is a bona fide resident of the State of Nevada.

The applicable part of chapter 22 of the 1949 legislative enactments provides as follows:

Section 5. All property of every kind and nature whatsoever within this state shall be subject to taxation except:

\* \* \* The property of any person who has served in the armed forces of the United States in time of war, and upon severance of such service has received an honorable discharge or certificate of service from such armed forces, or who having so served is still serving in such armed forces, shall be exempt from taxation to the extent of one thousand (\$1,000) dollars assessed valuation of such property; provided, however, that for the purposes of this section the first one thousand (\$1,000) dollars assessed valuation of property in which such person has any interest shall be deemed the property of such person. Such exemptions shall be allowed only to claimants who shall make an affidavit annually, on or before the third Money in August, before the county assessor to the effect that they are actual bona fide residents of the State of Nevada, that such exemption is claimed in no other county within this state \* \* \*.

It is to be noted that there is nothing in this statute that precludes a veteran, who is a property owner in the State of Nevada and is a bona fide resident of the State of Nevada, from claiming an exemption merely because he is going to school and working part-time in another State. As the statute is silent in this regard, it is our opinion that a veteran in the position you outline above can claim exemption in Nevada.

The answer to your second inquiry is also in the affirmative.

You will note that again the statute is silent as to a veteran who claims an exemption in another State. Although we are not familiar with the second State's law, if the particular veteran is a bona fide resident of Nevada, he has a right by statute to this exemption. The mere fact that another State allows an exemption. The mere fact that another State allows an exemption to a resident of the state of Nevada is immaterial.

Very truly yours,

ALAN BIBLE  
Attorney General

By: Robert L. McDonald  
Deputy Attorney General

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**OPINION NO. 49-845 NEVADA SCHOOL OF INDUSTRY**—Not a penal institution.

Carson City, December 30, 1949

Miss Mildred Bray, State Superintendent of Public Instruction, Carson City, Nevada

Dear Miss Bray:

This will acknowledge receipt of your letter dated December 20, 1949, received in this office December 21, 1949.

You request an opinion as to whether the Nevada School of Industry is classified as a penal or

nonpenal institution under the laws of this State.

We are of the opinion that the Nevada School of Industry is not classified as a penal institution, but under our statutes it is regarded as a nonpenal institution.

Section 6830, N.C.L. 1929, provides:

There shall be established in the manner hereinafter provided a state institution to be known as  
“The Nevada School of Industry.”

Section 6831, N.C.L. 1929, provides:

Said school shall be designed and calculated to provide a suitable home for boys committed thereto under the laws of Nevada relating to the care of children who have been adjudged delinquent, and for the moral, industrial and general education of such boys; provided, that the permanent board of government hereinafter created shall be authorized to provide for the care of delinquent children of either sex properly committed thereto, either at this school, or by sending female delinquents to other institutions of a like kind for females, and are authorized to pay the expense of transportation and maintenance of children sent to such other institution out of the fund hereinafter created by this act.

Section 6837, N.C.L. 1929, provides:

The board shall cause to be organized and maintained a department of instruction for the inmates of said school, with a course of study corresponding, so far as practicable, with the course of study in the state public schools and not higher than the high-school courses. They shall adopt a system of government embracing such rules and regulations as are necessary for the guidance of teachers, officers and employees, for the regulation of the hours of labor and study, for the preservation of order, for the enforcement of discipline, and for the industrial training of the inmates. The ultimate purpose of all such instruction, training, discipline and industries shall be to qualify inmates for profitable and honorable release from the institution rather than to make said institution self-supporting.

Section 6839, N.C.L. 1929, defines the construction of the Act to be in conformity with the intent as well as the expressed provisions thereof, to promote the prosperity of the school, the well-being and education of its inmates, including the organization of trade schools.

Chapter 63, Statutes of Nevada 1949, the new Act regulating procedure in juvenile cases, empowers the Court to commit a child that comes within the provisions of the Act to the custody of a public or private institution authorized to care for children. Section 18 of the Act provides that proceedings under the act against any child shall not be deemed to be criminal or criminal in nature.

Therefore, it appears from the statutes of this State that the Nevada School of Industry is a nonpenal institution. The definition of an industrial school as given in *Leiby v. State*, 113 N.W. 125, and repeated in *Roberts v. State*, 118 N.W. 574, under statute similar to Nevada statutes, supports this conclusion in the following language:

Our industrial school is not a place of punishment, nor is it in any sense a prison, no more so than our public schools upon which the law requires and enforces an attendance. It is a place of education, reformation, refinement and culture. It is a beneficent provision for the uplift of boys who by reason of their surroundings and conditions are deprived an education and moral training which are so essential to their well-being and good citizenship. This is conceded by all courts and writers upon the subject. The action of the court in sending them to the school is to avoid a

“conviction” and change the prospective punishment into a blessing. Any other conclusion does violence to the vowed purpose of the law.

We enclose a copy of this opinion as requested.

Very truly yours,

ALAN BIBLE  
Attorney General

By: George P. Annand  
Deputy Attorney General

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