

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1951

OPINION NO. 51-1. STATE BOARD OF AGRICULTURE, as the managing and control board of the state agricultural society, possesses no power to sell the property of such society. Legislative authority necessary.

Carson City, January 2, 1951.

State Board Of Agriculture, Fallon, Nevada.

Attention: Geo. D. Ernst, President.

Gentlemen: You request the opinion of this office as follows:

QUERY

The 1950 State Fair held at Fallon, Nevada, which said Fair is authorized by the laws of the State of Nevada, unfortunately created a deficit of some \$10,825, which deficit was incurred in the holding of said Fair and, at the present time, the majority portion of or all of this amount is owed in premiums won by exhibitors at the Fair.

The State Board of Agriculture is, as we believe, the owner of the State Fair grounds and buildings thereon at Fallon and the State Board of Agriculture feels it incumbent upon such board to sell and dispose of such property for the purpose of paying the aforesaid debt.

We therefore respectfully request the opinion of your office as to whether under the laws of the State of Nevada the State Board of Agriculture has the power to sell and dispose of its said real property and improvements thereon and thereafter use the money secured thereby for the payment of its debts aforesaid.

STATEMENT

The Nevada State Agricultural Society was created and incorporated a Society pursuant to an Act entitled, "An Act to incorporate a state agricultural society and provide for the management thereof," approved March 7, 1873, and which Act is now sections 310-314, N.C.L. 1929. In this Act the Society was given power to contract, to sue and be sued, to have and use a common seal and to make and put into execution such bylaws, ordinances, rules and regulations as deemed necessary, providing such rules, etc., shall not be contrary to provisions of the law in question. It

was further provided with the power to purchase, hold and lease any quantity of land not exceeding 640 acres with such buildings and improvements as may be erected thereon and empowered to sell, lease and dispose of the same at pleasure. The real estate was to be held for the purpose of erecting buildings and designed for the meeting of said Society for the purpose of promoting and encouraging the interests of agriculture, horticulture, mechanics, manufacturers, stock raising and general domestic industry. It was further provided in the Act for officers of the Society, including five directors, two of which directors were to be appointed by the Governor, all other directors and officers to be elected by the members of the Society. The Society was to provide, by bylaws, for membership and fix the price or dues of such membership and the terms thereof and such members were given the power to determine by vote the place where the annual meeting and exhibition of such Society should be held, such vote to be taken annually. Provision was made for debt limitation of not exceeding \$25,000.

In 1885 the Legislature enacted, "An Act to provide for the management and control of the state agricultural society by the state," approved March 7, 1885, and which Act is now sections 315-325, approved March 7, 1885, and which Act is now sections 315-325, N.C.L. 1929. Section 1 of this Act provides: "The state agricultural society is hereby declared to be a state institution." The entire Act materially changed the management and control of the Nevada State Agricultural Society as provided in the Act of 1873. The 1885 Act did away with membership in the Agricultural Society as such, and did entirely do away with the selection of its officers and board of directors. It is provided in the 1885 Act that within 10 days of the passage of the Act the Governor shall appoint 12 resident citizens of the State to constitute a State Board of Agriculture, who shall hold office for a term of four years and until their successors are appointed and qualified. This provision of the law was amended in 1907 by authorizing the Governor to appoint three additional members of the State Board of Agriculture. This State board was directed to organize by the election of a president and vice-president from its membership and a secretary and treasurer not of its membership. Thus the method of the election of the board of directors and officers under the 1873 Act was most substantially changed.

The 1885 Act, in section 5, provided: "The state board of agriculture shall be charged with the exclusive management and control of the state agricultural society as a state institution; shall have possession and care of its property, and be entrusted with the direction of its entire business and financial affairs." Nowhere in the 1885 Act is found any power vested in the State Board of Agriculture to sell and dispose of its property.

It further appears that for the last 20 years, and perhaps more, the State Agricultural Society has acted under the Act of 1885 and that so far as known there are no Society members other than those members appointed by the Governor to the State Board of Agriculture as provided in that Act. It appears factually that for 20 years and more the Nevada State Agricultural Society created by the Act of 1873 has not functioned as such, but that all of any duties that may have been performed by such society in past years have been taken over and performed by the State Board of Agriculture under the Act of 1885.

OPINION

The Act of 1873, in effect, created the Nevada State Agricultural Society a corporation with certain definite powers with respect to the ownership and control of its property and, pursuant to the powers in that Act granted the Society, it may be that such Society could have sold and disposed of its real property with the improvements thereon at such time as it deemed expedient. Had the Act of 1873 not been most materially changed by the Act of 1885, then, in our opinion, such Society could, if in existence today, sell its property.

However, the Act of 1885 first declared the State Agricultural Society to be a State institution. Second, the entire method of selecting the board of directors as provided in the 1873 Act was, in effect repealed and the State Board of Agriculture was directed to be appointed by the Governor and this board was vested with the power to transact all the business and affairs and control the property of the Nevada State Agricultural Society and in so doing to Act as a State institution.

The 1885 Act specifically directed the State Board of Agriculture not only to have exclusive management and control of the State Agricultural Society as a State institution, but also expressly directed in section 5 of the Act, section 319, N.C.L. 1929, that the annual fair or exhibition of the Society be held at the city of Fallon, Churchill County, Nevada, which direction has been continued in subsequent amendments in the Statutes of 1939, 1941, 1947, and 1949, wherein State aid by appropriations were incorporated. Further, the State Board of Agriculture is required to make a full report to the Governor, on or before the first day of February in each year, of its transactions, statistics and information gained, and also a full financial statement of all funds received and disbursed, which was not a requirement under the 1873 Act, thus indicating the intention of the Legislature that the business and affairs of the State Agricultural Society as a State institution was in fact to be deemed a State institution and within the control of the legislative power of the State.

We are of the opinion that from and after the enactment of the 1885 Act, containing the declaration that the State Agricultural Society was to be and become a State institution, that then the property theretofore owned and controlled by the Nevada State Agricultural Society under the Act of 1873 in fact became the property of the State of Nevada and as such became public property, subject, of course, to the control of the board of directors and officers provided in the 1885 Act.

It is an axiomatic rule of law that State-owned property cannot be sold and disposed of without the consent of the State expressed by its Legislature. There is no such consent provided in the Act of 1885. The rule in such a case is well stated in *Collett v. Vanderburg County* (Ind.), 21 N.E. 329, as follows: "Property held by the state, or by a corporation created by it for public purposes, and which is necessary to enable it to subserve the purposes for which the corporation was created, cannot be granted away or transferred by the act of those who hold it in trust without express authority to that end. *Railway Co. v. Boney*, 20 N.E. 432." There is a most serious doubt whether the State Board of Agriculture, as a State board and institution since 1885, has been empowered to sell its real property and the improvements thereon.

Therefore, it is the opinion of this office that while the State Board of Agriculture is vested with exclusive management and control of the State Agricultural Society as a State institution, it possesses no power to sell its property. An act of the Legislature undoubtedly will be necessary to authorize the sale of the property and to fix the terms and conditions thereof.

Very truly yours,

W.T. MATHEWS
Attorney General

OPINION NO. 51-2. Health—A member of the state board of health may not be an active health officer for a city and county.

Carson City, January 5, 1951.

Hon. Charles H. Russell, Governor of Nevada, Carson City, Nevada.

Dear Governor Russell:

This will acknowledge receipt of your inquiry of January 5, 1951, as follows:

QUERY

Could you please let this office know if it is lawful for a member of the State Board of Health to be the active Health Officer for a city and county.

OPINION

The pertinent provisions of section 5259, 1929 N.C.L., 1941 Supp., as set forth below specifically provides that the State Board of Health shall have "general supervision" over all local (district, county, and city) health departments, and to govern and define the powers and duties of local boards of health and health officers.

Sec. 5259. Powers of the State Board of Health—Rules and Regulations—Biennial Report—Hearings, Etc. § 25. The state board of health is hereby declared to be supreme in all health matters and it shall have general supervision over all

matters relating to the preservation of the health and life of citizens of the state and over the work of the state health officer and all local (district, county and city) health departments, boards of health, and health officers. The state board of health shall have the power by affirmative vote of a majority of its members to adopt, promulgate, amend and enforce reasonable rules and regulations consistent with law: (a) to define and control dangerous communicable diseases; (b) to prevent and control nuisances; (c) to regulate sanitation and sanitary practices in the interests of public health; (d) to provide for the sanitary protection of water and food supplies and the control of sewage disposal; (3) to govern and define the powers and duties of local boards of health and health officers; * * *.

A person as a member of the State Board of Health is empowered by the above-mentioned statute to govern, define the powers, and supervise all city and county health officers. One person holding both offices would in one capacity be governing and supervising himself in the other. We are of the opinion that such offices are incompatible.

The Court in *Attorney General v. Common Council of Detroit*, 112 Mich. 145, 169, 70 N.W. 450, 86 A.S.R. 574, 42 Am.Jur. 70 held as follows:

The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases, it has uniformly been held that the same person cannot hold both offices. The sole difficulty lies in the application of the rule, and in every case the question must be determined from an ascertainment of the duties imposed by law upon the two offices. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former.

Therefore, it is the opinion of this office that a member of the State Board of Health may not be an active health officer for a city and county.

Respectfully submitted,

W.T. MATHEWS
Attorney General.

By: THOMAS A. FOLEY
Deputy Attorney General

OPINION NO. 51-3. FISH AND GAME COMMISSION—may promulgate regulations pertaining to fishing in Lake Mead.

Carson City, January 8, 1951.

Mr. Frank W. Groves, Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada.

Dear Mr. Groves:

You request the opinion of this office as follows:

QUERY

Does the Fish and Game Commission or the County Game Management Board have authority to make it mandatory for an applicant for a commercial fishing camp license to comply with certain regulations prior to the issuance of said permit?

OPINION

The applicable portion of section 84, Chapter 146, 1949 Statutes of Nevada, provides 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 use of the word "may" in the last sentence of the above-quoted language indicates that whether or not the Fish and Game Commission grants a license to an applicant is to be discretionary with the Commission. However, it should be pointed out that the County Game Management Board has not been given the same discretionary power, and as it is not in the statute no such power exists.

Therefore, it is our opinion that the Fish and Game Commission may promulgate reasonable regulations that must be complied with before the applicant is granted a permit to operate a commercial fishing camp.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-4 MARRIAGES—Ordained minister of the gospel must be in charge of or in the employ of a religious society or congregation within the state in order to secure license to perform marriage ceremonies.

Carson City, January 10, 1951.

Hon. Jack Streeter, District Attorney, Washoe County, Reno, Nevada.

Attention: John C. Bartlett, Assistant.

Dear Sir:

You request the opinion of this office as follows:

STATEMENT

A minister of the gospel was in charge of or in the employ of a religious society or congregation in one county of the State and there secured from the district court of that county the statutory license to perform marriage ceremonies. Thereafter such minister removed from such county to another county in the State and entered into a secular employment, giving up or withdrawing as pastor of and/or the employment by such religious society or congregation. Upon removing to the latter county he presented his license to the County Clerk of such county for the entering of his name on record as qualified to perform marriages in such county.

QUERY

Can such minister secure the recording of his name in the aforesaid second county and thereupon perform marriages in such latter county?

OPINION

At threshold of this opinion we think a brief resume of the statutes authorizing persons to perform marriages in this State may well serve to show the trend of such legislation and the consequent material changes therein in the 1947 Act. Section 4 of "An Act relating to marriage and divorce," approved November 28, 1861, which section became section 4052, N.C.L. 1929, as amended, originally provided:

Marriages may be solemnized by any justice of the peace in the county in which he is elected, and they may be solemnized throughout the territory by any judge of a court of record, by ministers of the gospel, and by the governor of the territory. Laws of Nevada 1861, page 94.

Said section 4 was amended at 1867 Statutes, page 88, to read as follows:

It shall be lawful for any ordained minister of any religious society or congregation within this State who has or hereafter may obtain a license for that purpose as hereinafter provided, or for any Judge of a District Court in his district, or justice of the peace in his county, to join together as husband and wife all persons not prohibited by this Act. Any minister of the gospel, upon producing to the District Court of any county or district within this State, credentials of his being a regularly ordained minister of any religious society or congregation, shall be entitled to receive from said Court a license authorizing him to solemnize marriages within this State so long as he shall continue a regular minister in such society or congregation. It shall be the duty of any minister licensed to solemnize marriages as aforesaid, to produce to the County Clerk in every county in which he shall solemnize any marriage, his license so obtained; and the said clerk shall thereupon enter the name of such minister upon record as a minister of the gospel duly authorized to solemnize marriages within this State, and shall not the Court from which such license issued, for which service no charge shall be made by such Clerk. The record so made, or the certificate thereof by the said Clerk under the seal of his office, shall be good evidence that said minister was duly authorized to solemnize marriages.

This section was amended several times, i.e., 1899 Stats. 47; 1901 Stats. 19; 1911 Stats. 317, being section 2340, Rev. Laws 1912; 1925 Stats. 239, being section 4052, N.C.L. 1929.

In each of these amendatory Acts the language of the 1867 amendment beginning with the words, "Any minister of the gospel, upon producing to the District Court of any county or district within this State, credentials of his being a regularly ordained minister," etc., was retained in toto.

The language of the 1967 amendment above quoted was incorporated in an amendment to such section 4 at 1933 Statutes, page 43. This amendatory Act was repealed at 1937 Statutes, page 72. In 1943 the section as it then appeared as section 4052, N.C.L. 1929, was reenacted containing the same identical language.

In an opinion of the then Attorney General, dated February 7, 1920, it appears that a duly ordained minister of the gospel, who had been duly licensed by a district court of this State to perform marriages and had ceased to be pastor in charge of a congregation, requested an opinion as to whether he was still a regularly ordained minister and entitled to act as such in performing the marriage ceremony. Opinion No. 111, Attorney General's Report 1919-1920. This office is in agreement with such opinion under the law as it then stood.

It is said at 45 Am.Jur. 743, section 30:

A pastor is not an officer of a religious corporation, but, in the administration of the marriage ceremony, is a public civil officer, and in relation to this subject is not at all to be distinguished from a judge of the superior or circuit court, or a justice of the peace in performance of the same duty.

We think that the Legislature has the power, absent any constitutional provisions to the contrary, to provide by statute the persons, qualifications and licensing requirements of all persons it deems necessary for the legal performance of the marriage ceremony.

The aforesaid amendatory Act of 1943 was materially amended at 1947 Statutes, page 380, and the following language inserted therein:

Any ordained or licensed minister of the gospel in charge of or in the employ of a religious society or congregation upon producing to the district court of any county or district within this state in which said society or congregation is located, credentials of his being a regularly ordained or licensed minister of said religious society or congregation, shall be entitled to receive from said court a license authorizing him to solemnize marriages within said county so long as he shall continue a regular minister in charge of such society or congregation. It shall be the duty of any minister licensed to solemnize marriages as aforesaid to produce to the county clerk in the county in which he shall solemnize any marriage, his license so obtained, and the said clerk shall thereupon enter the name of such minister upon record as a minister of the gospel duly authorized to solemnize marriages within said county, and shall not the court from which such license issued, for which service no charge shall be made by such clerk. The record so made, or the certificate thereof by the clerk under the seal of his office, shall be good evidence that said minister was duly authorized to solemnize marriages. All outstanding certificates as do not now conform to this act are hereby declared null and void.

It is to be noted that prior to 1947 there was no express provision in the law that the religious society or congregation of which the ordained minister purported to be a minister was necessarily located within the State of Nevada, nor were the requirements that such religious society or congregation should exist in the county or district wherein the minister obtained his original license as being necessary for the proper licensing of the minister to perform marriage ceremonies. The 1947 amendment materially changed the requirements, and one of the requirements is that upon being originally licensed to perform marriages within the State he must be in charge of or in the employ of a religious society or congregation within the county or district of the State in which the minister is seeking to be licensed. Such minister is thereupon licensed to perform marriages in said county so long as he shall continue a regularly ordained minister in charge of such society or congregation.

The second requirement is, we think, based upon the language, "It shall be the duty of any minister *licensed* to solemnize marriages *as aforesaid* to produce to the county clerk in the county in which he shall solemnize any marriage, [marriage,] his license so obtained, and said

clerk shall thereupon enter the name of such ministers upon record as a minister of the gospel duly authorized to solemnize marriages within said county, *and shall note the court* from which such license issued * * *.” (Italics ours.) We think such language implies, if it does not expressly provide, that a minister in charge of or in the employ of a religious society or congregation within one county may obtain a license in some other county in the State, provided, if and when he shall have presented to the County Clerk of the latter county his license originally obtained in the first county, that he shall then and there be a pastor in charge of a congregation or in the employ thereof.

It is, therefore, the opinion of this office that the power to perform marriage ceremonies in some other county exists so long as the minister is in charge of the religious society or congregation within the county in which he originally obtained his license, and that if he ceases to be in charge of such congregation or society in that county, then he would not be entitled to perform marriage ceremonies in some other county unless prior to obtaining a license in such other county he shall then and there be in charge of a religious society or congregation therein.

Respectfully submitted,

W.T. MATHEWS,
Attorney General

OPINION NO. 51-5. CONSTRUCTION OF SECTION 4(C) OF THE EMPLOYMENT COMPENSATION LAW as to eligibility of unemployed to receive weekly benefits after referral of suitable work, and refusal of claimant to accept due to illness disability.

Carson City, January 11, 1951.

Employment Security Department, Board of Review, Room 8, Armanko Building, Reno, Nevada.

Attention: Mr. C.C. Smith, Chairman of the Board.

Gentlemen:

You request an opinion as to the decision rendered by your board of review respecting the interpretation of section 4 (c) and section 5 (c) (1) of the Employment Security Laws.

STATEMENT

The applicant in the present case established wage credits working as an employee in the State. On May 8, 1950, a claim was filed for unemployment compensation, and the first check was received June 14. On June 20 the employee was injured in an automobile accident, but continued to receive the weekly benefit amounts until found ineligible on July 23, 1950. The occasion for stoppage of payments was a work referral offered on July 24 and refused because of physical disability. From the disqualification determination, an appeal was filed and a hearing conducted on August 16. A decision rendered by the Appeals Referee, on August 25, 1950, found the claimant physically unable to work and hence ineligible for benefits until such time as the disability was less restrictive. A review was conducted by the Board of Review on October 5, 1950.

The finding of the board was that appellant had not recovered from injuries received in the automobile accident at the time the job referral was made; the job was not suitable, and by the

terms of section 4 (c) of the Employment Security Act, an error was made in denying benefits. If otherwise eligible, benefits should be allowed.

The Employment Security Department forwarded to this office its interpretation of the sections involved, which sets forth that claimants are not ineligible if unavailable because of illness or disability occurring after filing a claim and registering for work; providing no offer of work that would have been suitable at the time of registration is refused.

This holding is stated to be in conformity with the regulations of the Federal Bureau of Employment Security in its comparison of the various State laws.

OPINION

Section 4 of the Unemployment Compensation Law, quoting that part deemed relevant, reads as follows:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the executive director finds that * * * (c) He is able to work, and is available for work; provided no claimant shall be considered ineligible in any week of unemployment for failure to comply with the provisions of this subdivision, if such failure is due to an illness or disability which occurs after he has filed an initial claim for unemployment benefits, and no suitable work has been offered after the beginning of such illness or disability.

It is evident from the different interpretations presented that the language of the particular part of the section is not plain and unmistakable, and is therefore subject to construction to determine the intention of the Legislature.

In construing to any statute the language of which is not clear, it is well to consider the law as it existed prior to the enactment. *National Mines Co. v. District Court*, [34 Nev. 67](#).

Subdivision (c) of this section, before amendment by Chapter 187, Statutes of 1945, contained the following language, only: "(c) He is able to work, and is available for work."

The operation of this section, as presented by the Employment Security Department, worked an unintended hardship in some cases. For example, two individuals were separated from employment and both filed claims for benefits at the same time, and were paid benefits. During the time these benefits were being paid, one of the claimants became unable to work. It was determined in his case that according to the statute he was at that time not able to work and not available for work and his payment was discontinued.

The other claimant was not ill or disabled and was available for work. He would therefore continue to receive benefits until a work reference was made.

It is evident that the intention of the Legislature in adding the proviso in the 1945 amendment was to correct the hardship in such cases rather than to broaden the Act to provide compensation during all the time the person was ill or disabled, notwithstanding there was no lack of work.

The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended for some other matter. It is to be construed in connection with the section of which it forms a part, and is substantially an exception. If it is a proviso to the particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. *C.V.L. Co. v. District Court*, [58 Nev. 456](#).

The proviso therefore does not relate to the language contained in section 5 (c) of the Act. Section 5 is entitled disqualifications for benefits, suitable work defined—labor disputes—outside benefits—when benefits barred. Subsection (c) provides in determining whether or not any work is suitable for an individual, the executive director shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation.

The purpose of the section is that the unemployed individual is able to, available for, and seeking work when he files an initial claim. If during any week subsequent to such filing he was found to be unable to work due to illness or disability, the compensation for that week should not automatically cease by reason of language in the statute before amendment. The exception is but a temporary waiver of the provision in the first part of subsection (c), section 4. The last part of the section uses the language, “and no suitable work has been offered after the beginning of such illness or disability.” Suitable work applies to the antecedent, able to work and available for work, and not to illness or disability.

To hold otherwise would be to change the policy and purpose of the Act, which is to compensate the unemployed who are seeking work and are unemployed due to a lack of work which they are able to perform in line with their industrial experience, to payment of compensation to the unemployed who are physically incapable of doing any work.

The temporary waiver of disqualification is at an end when the unemployed person is offered work for which registered, or work of a similar nature that would have been suitable at the time of registration, and such offer is refused.

Registration for work is the first requirement, and ordinarily it will be presumed that a claimant who registers is able and available for work. By registering the claimant makes out a prima facie case of availability, which is of course rebuttable by countervailing evidence, e.g. refusal of referred work, illness, inability to superannuation, and other conditions. *Bliley Electric Co. v. Unemployment Comp. Board of Review*, 45 A(2) 898, page 905.

Inability to do any work would destroy the effect of a prima-facie case of availability.

Even in the broadest and most liberal interpretation of the law, we cannot hold that one whose availability is so limited is available to work and is available for suitable work. * * * To do so would in effect, change unemployment compensation to health insurance. *D’Yantone v. Unemployment Compensation Board of Review*, 46 A(2) 525.

The State laws respecting unemployment compensation service must meet the requirements and receive the approval of the Federal Security Administrator.

Title 26, section 1603 U.S.C.A. Subsection (a) (4) provides in part that all moneys withdrawn from the Unemployment Fund of the State shall be used solely in the payment of unemployment compensation.

Subsection (c) provides as follows: “On December 31 of each taxable year the Federal Security Administrator shall certify to the Secretary of each State whose law he has previously approved, except that he shall not certify any State which after reasonable notice and opportunity for hearing to the State agency, the Federal Security Administrator finds that the State has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.”

Section 1602, subsection (4) (a) contains, among other conditions, this language: “* * * to all individuals who are in his (or their) employ in, and who continue to be available for suitable work in, one or more district establishments, * * *.”

The term “suitable work” has been defined in numerous decisions by the courts.

In the case of *Garcia v. California Employment Stabilization Comm.*, 161 P.2d 972, the Court defined suitable work "as work in the individual's usual occupation or for which he is reasonably fitted." The Court stressed the necessity of adequate investigation in each case, and held that the board should have more exhaustively inquired into the situation for the purpose of determining whether or not suitable employment of a like or suitable kind as claimant had heretofore performed had been offered, and should not have denied his claim solely on the ground that the referral job offered had not been accepted.

In the case presented for an opinion from this office, it appears that the claimant was offered the same kind of work in which wage credits had been established, and this work was refused because of physical inability to perform such work.

In the opinion of this office the unemployment compensation should not be construed to provide a health and accident insurance. However, according to the provisions in section 6, subsection (h), a decision of the Review Board in the absence of an appeal therefrom, shall become final 10 days after the date of notification. We are therefore bound by its findings, and the question is moot.

A claimant's physical fitness is one of the tests of suitable employment. Pusey Unemployment Comp. Case, 49 A(2) 259.

But consideration of this and of other factors is for the board; and determination of suitability of work is largely a question of fact and ordinarily our review is limited to ascertaining whether the board's findings are sustained by the evidence. Fuller Unemployment Compensation Case, 46 A(2) 510, cited in *Hassey v. Unemployment Compensation Board of Review*, 56 A(2) 400.

We respectfully suggest that section 4 (c) of the Employment Security Law should be amended. The statutes of Vermont contain a provision which may be used as a guide in such amendment. The section of the Vermont Act provides that he is able to work and is available for work; provided further, that no claimant shall be ineligible in any week of unemployment for failure to comply with the provisions of this paragraph if such failure is due to illness or disability which occurs after he has registered for work and no work which would have been considered suitable but for the illness or disability has been offered after the beginning of such illness or disability.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-6. TAXATION—Motor fuel excise tax levied for and in behalf of counties is to be used solely for the construction, maintenance and repair of highways and cannot legally be used for the purchase of automobiles used by traffic law enforcement officers.

Carson City, January 15, 1951.

Hon. Jon R. Collins, District Attorney, White Pine County, Ely, Nevada.

Dear Mr. Collins:

You request the opinion of this office under date of January 11, 1951, as follows:

QUERY

A question has arisen concerning the interpretation of the Act to provide an excise tax on the distribution of motor vehicle fuel, secs. 6570.01 to 6570.16, 1929 N.C.L., 1941 Supp., as amended by Statutes of Nevada, 1947, 850, and Statutes of Nevada, 1949, 647. The question is this: Can the County Commissioner expend funds allocated to the county, under the above-mentioned Act and its amendments, for the lawful purchase of an automobile to be used exclusively by the county traffic control officer?

The vehicle used by the county traffic control officer, in the performance of his official duties, is used exclusively to enforce the traffic laws upon the public highways and roads of this county.

OPINION

Pursuant to the statute cited by you, particularly the amendment thereof at 1949 Statutes, pages 647 and 648, we beg to advise that the excise tax levied thereby is to be used solely for the construction, maintenance and repair of the public highways within the county and incorporated cities therein.

Section 5, Article IX, Constitution of Nevada, as amended by the vote of the people in the general election of 1940 provides as follows:

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

An examination of the traffic laws of this State fails to disclose any authorization therein whereby the patrolling of the highways for the purpose of enforcement of traffic laws can be construed or deemed to mean construction, maintenance and repair of such highways. While enforcement of the traffic laws may occur, and probably in all cases does occur on the public highways, still, in our opinion, that is a much different question from construction, maintenance and repair of such highways.

It is, therefore, the opinion of this office, in view of the constitutional amendment above-quoted, that the Boards of County Commissioners cannot legally expend funds allocated to the county pursuant to the excise tax laws on motor vehicle fuel in the purchase of an automobile which is used for the purpose of traffic control officers in the enforcement of the traffic laws of this State.

Very truly yours,

W.T. MATHEWS
Attorney General

OPINION NO. 51-7. MOTOR VEHICLES—Use of official automobiles in licensing of persons operating motor vehicle.

Carson City, January 18, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Dear Sir:

This will acknowledge receipt of your letter of inquiry dated January 10, 1951, as follows:

QUERY

Is an employee of the State, working in the capacity of a Drivers License Examiner, authorized to give permission to a nonemployee of the State taking the Drivers License test, to take the test driving a State-owned car?

Further, is any employee of the State authorized to give permission to anyone other than another employee of the State to operate a State-owned vehicle?

OPINION

Section 4442.16, 1929 N.C.L., 1949 Supp., being 1943 Stats. 268, provides only that applicants for operator's or chauffeur's license be examined, among other things, on an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle.

The statutes are silent as to the use of State-owned automobiles by operator's license examiners; however, section 6941.01, 1929 N.C.L., 1949 Supp., being 1949 Stats. 360, relative to purchase of State automobiles provides, "* * * and shall such automobiles shall be used for official purposes only and shall be labeled on both sides thereof by painting the words 'For Official use Only' * * *."

It is therefore the opinion of this office that since drivers license examiners are not specifically authorized to use an official State vehicle to test applicants on their ability to operate an automobile, they are not empowered so to do. Further, a perusal of the pertinent statutes fails to disclose any specific authorization for a State employee to give permission to anyone other than a State employee to operate a State-owned vehicle.

The Legislature now being in session, the moment is opportune to submit this matter for clarification.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-8. VETERANS' SERVICE COMMISSIONER—De facto officer entitled to compensation for services performed after term of commissioner expired according to law.

Carson City, January 8, 1951.

Hon. Charles H. Russell, Governor of Nevada, Carson City, Nevada.

Dear Governor Russell:

Under date of January 17, 1951, you requested the opinion of this office based upon the following facts.

Section 8 of the Act creating the office of Veterans' Service Commissioner of 1943, as amended at page 781, Statutes of 1947, provides:

The term of office of the veterans' service commissioner and the deputy veterans' service commissioner each shall be for a period of two years, terminating regardless of date of appointment on December 31 of each even-numbered year; provided, however, that each said commissioner may be removed from office at any time on failure to perform the duties herein required of him; and provided further, that such office shall not be permitted to be vacant at any time for a period of more than thirty days.

No appointment subsequent to December 31, 1950, was made to the office of Veterans' Service Commissioner and/or the Deputy Veterans' Service Commissioner office. Subsequent to January 1, 1951, warrants covering the payment of salaries of the officers for the first 15 day period in 1951 were issued by the State Controller.

QUERY

Was the issuance of such warrants by the State Controller legal in view of the provisions of section 8 above-quoted?

OPINION

There is no question but that the provisions of section 8 of the Act in question specifically terminates the term of office as provided in the Act and that termination in the instant case was on December 31 of the year 1950. Section 11, Article XV of the Constitution of Nevada, provides that the tenure of any office not created by the Constitution may be declared by law, with the further provision that the Legislature shall not create any office, the tenure of which shall be longer than four years, except as otherwise provided in the Constitution. This provision of the Constitution, as construed in *State ex rel. Williamson v. Morton*, [50 Nev. 145](#), means that an office becomes vacant at the expiration of the term as specifically stated in the law.

The office of Veterans' Service Commissioner is a statutory office and the Legislature possessed full legislative power to absolutely fix the termination date of the term of office, so that as a matter of law the office became vacant at midnight on December 31, 1950, insofar as a de jure incumbent was or is concerned.

However, the law is well settled that a de facto officer may exercise the duties of a de jure officer even after the expiration of the term of office of the de jure officer and that his occupancy would be good as a de facto officer against third persons and the public and, in fact, against everyone except the State itself.

Walcott v. Wells, [21 Nev. 47](#).

The doctrine of de facto officers is well stated in 43 Am.Jur. 224, sec. 470:

The de facto doctrine officer was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public

to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.

In the instant case we assume the Veterans' Service Commissioners continued to serve in good faith as de facto commissioners from and after December 31, 1950. If so, the general rule of law sustained by the weight of authority is that where a de facto officer is performing the duties of a de jure officer, even after the term of the de jure officer has expired, he would be entitled to compensation therefor until such time as such de facto officer is replaced by a de jure officer.

43 Am.Jur. 238, sec. 488.

Section 8 of the Act in question contains a provision that such office shall not be permitted to be vacant at any time for a period of more than 30 days, thus giving the appointing power a period of 30 days within which to fill any vacancy in the office.

For the foregoing reasons, it is the opinion of this office that the warrants in question issued by the State Controller were legally issued, particularly for the period mentioned in the inquiry.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-9. ALIEN CORPORATIONS—Filing fees of secretary of state are to be computed upon the present rate of exchange between the foreign money and the American dollar.

Carson City, January 19, 1951.

Hon. John Koontz, Secretary of State, Carson City, Nevada.

Dear Mr. Koontz:

Under date of January 17, 1951, you requested the opinion of this office concerning the fee to be charged for the filing of corporation papers of an Australian corporation seeking to qualify to do business in the State of Nevada. Your query is as follows:

QUERY

We understand that the amount of capital stock which said corporation is authorized to issue is specified in the pound sterling. By reason of this fact, the question has been raised as to whether this office in computing the filing fee should so upon the dollar or exchange value of the pound as of the date of the original articles, or of the last amendment affecting the amount of authorized capital stock,

or whether such fee should be computed upon the dollar or exchange value of the pound on the date when said articles are filed here.

OPINION

An exhaustive examination of the law concerning the computation of filing fees to be charged by the Secretary of State for the filing of articles of incorporation, and amendments thereto, of alien corporations fails to disclose any case directly in point with the question propounded by you.

We have given the matter serious consideration and study and, while the question is not so free from doubt, this office is of the opinion that the fee to be charged for the filing of the articles of incorporation of the Australian corporation, which provides that the authorized capital stock of such corporation is specified in the English pound sterling, is to be computed upon the present rate of exchange between the pound sterling and the American dollar. We are impelled to this conclusion upon the proposition that insofar as the citizens of the United States and Nevada are concerned with respect to the capitalization of the Australian corporation, its present value based upon the ratio between the pound sterling and the American dollar would in most cases be the proper estimate and scale of value.

We, therefore, conclude that your fees are to be computed upon the presently fixed rate of exchange between the pound sterling and the American dollar.

Respectfully submitted,

W.T. MATHEWS,
Attorney General

OPINION NO. 51-10. PUBLIC EMPLOYEES RETIREMENT—Member of system upon being elected to public office has right to withdraw his contributions.

Carson City, January 23, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your letter of January 15, 1951, in which you request the opinion of this office as to the following questions:

1. May persons previously members of the Retirement System reject such membership upon assuming elective or appointive office and receive refund of their contributions thereto when there has been no lapse in employment entitling them to such membership?
2. Must elective or appointive officials, previously members of the Retirement System, reaffirm their desire to continue in the system upon beginning a new term or appointment?

OPINION

Your questions will be answered in the same order that you have set them out in your letter to this office.

Section 16(2) of the Public Employees Retirement Act provides as follows:

In the event that an employee who is a member of the system, who has contributed to the fund and who has not attained his earliest service retirement age, is separated, for any reason other than death or disability, from all service entitling him to membership in the system, he may withdraw from the fund the amount credited to him in his account.

It is apparent from the above-quoted section that if a person is separated from all service entitling him to membership in the system, for reasons other than death or disability, he may withdraw the amount credited to him in the Retirement Fund.

It follows, therefore, that the remaining question is whether or not one who was initially compelled to be a member of the system and while a member is elected to a public office is then entitled to membership in the system.

Section 8(6) provides as follows:

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

It is apparent from this section that if a person is in the position outlined above, i.e., was originally compelled to be a member of the system, before being entitled again to a membership in the system, he must comply with the condition precedent set forth in the statute. In other words, he must give written notice of his desire to become a member before he is entitled to be a member. Therefore, in our opinion, one who does not give written notice of his desire to become a member in the system may withdraw the contributions he has previously made.

In view of section 8(6) above quoted, it is our opinion that an elective or appointive official, who was previously a member of the system, need not reaffirm his desire to continue in the system on beginning a new term or appointment. He has already made his choice.

In further answer to your second question, it is also our opinion that the failure to follow the procedure outlined in section 8(6) will not constitute an automatic cancellation of membership.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-11. NEVADA STATE WELFARE DEPARTMENT—The meaning of travel status as used in Chapter 247, Statutes of 1949, is a journey in the transaction of public business away from the usual place of employment.

Carson City, January 24, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

You request the opinion of this office under date of January 19, 1951, as follows:

QUERY

Has the State Welfare Board, under the provisions of the State Welfare Act, the authority to reimburse workers within city limit travel as proposed in the following regulation:

Public Assistance and Child Welfare workers of the Nevada State Welfare Department are required to furnish privately owned cars to carry out the official duties of their positions. The State Welfare Board hereby authorizes reimbursement of such workers, at the rate of 7-1/2¢ per mile, for all travel necessary for the transaction of official business both within city limits and other travel outside city limits as assigned.

OPINION

Chapter 327, Statutes of Nevada 1949, is the Act creating the State Welfare Department and defining its powers and duties.

Chapter 295, Statutes of 1949, provides the appropriation for the support of the Welfare Department. The Act contains the following language, quoting only that part deemed relevant, reads: “* * * and to pay the compensation of the necessary personnel of said state welfare department as provided for in the ‘state welfare act’ and their necessary traveling expenses, and their subsistence, * * * and disbursements for the purposes of this act shall be made upon claims duly filed, audited and allowed in the same manner as other moneys in the state treasury are disbursed.”

Chapter 247, Statutes of 1949 amends the Act which authorizes the State Board of Examiners to fix the expense money for traveling and subsistence charges.

Section 2 reads 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 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, but the amount allowed for traveling by a private conveyance shall not exceed the amount charged by public conveyance; provided, however, that where it appears to the satisfaction of the board of examiners that travel by private conveyance is more economical or where it appears that, owing to train or stage schedule or for other reasons, travel by public conveyance is impractical, or in case where a part of the route traveled is not covered by public conveyance, the board of examiners, in its discretion, is authorized to allow for traveling by private conveyance an amount not to exceed seven and one-half cents per mile so traveled.

The allowance is made for a full day, or a part of a day with an additional allowance for lodging when necessary, and also for transportation.

The section uses the terms “on travel status,” “in travel status.”

The interpretation of the terms used, in order to bring them in harmony with the statute, means the existence of a journey, and not that status which generally engages or occupies the time in the ordinary transaction of public business.

If a State employee is required to furnish a car, or furnishes a car as an attending convenience to his work, the use of such car is in an employment status and not in travel status.

The term "traveling" when used in its ordinary sense, does not have reference to moving about from street to street or house to house in the city or its suburbs. *Kochman v. Baumeister*, 63 N.Y.S. 503.

The term "traveling expenses" contained in 6064-5 General Code, in relation to members of the Board of Liquor Control, does not embrace expenditures for subsistence, lodging, telephone calls and local transportation made by a member of such board after arriving at his destination for the transaction of the business in which he is regularly and customarily engaged at the "central office" maintained for such purpose. *State v. Ferguson*, 80 N.E.(2) 118.

It is true that fees, expenses and compensation of public officers must be authorized by statute and that the provisions thereof should be strictly construed. *Madden v. Riley*, 128 P.2d 602.

We are therefore of the opinion that the Welfare Department has no authority to reimburse workers for travel within city limits, if such payment is made out of the appropriation provided by the Legislature.

If it be determined that it is fair that the workers be so reimbursed, the remedy is with the Legislature.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-12. STATE HIGHWAY CONTRACT—Contractor bidding on construction of state highway over land belonging to United States Government and within a recreational area set apart by such government not required to obtain the state contractor's license as provided in Nevada law.

Carson City, January 29, 1951.

State Department of Highways, Carson City, Nevada.

Attention: W.T. Holcomb, State Highway Engineer.

Gentlemen:

The State Department of Highways has requested the opinion of this office relative to the validity of the bid of the Kolob Construction Company for construction of a certain sector of highway extending approximately one mile south of Davis Dam, to and across said dam in Clark County, Nevada, the cost of the construction to be borne by State Highway funds without Federal reimbursement in Nevada, but which cost was and is to be borne by State Highway funds and

Federal aid secondary funds for work in Arizona. The Nevada department has an agreement with the Arizona Highway Department whereby Nevada will be reimbursed for costs of work in Arizona. The Kolob Construction Company submitted the low bid for the construction of such sector of highway on January 23, 1951. It appears that such construction company was and is financially qualified to comply with the terms of the contract for which a bid was submitted. However, it appears that such construction company had not obtained the State contractor's license required by the laws of this State. Objections to the awarding of the bid to such Kolob Construction Company have been interposed by the Associated General Contractors of Nevada based on the fact that since no Federal moneys were involved for the work in this State, the contractor should have been required to procure a Nevada license prior to bidding.

The Department has submitted the question of whether, under the Nevada Contractors' Licensing Law, such contractor was required to be properly licensed under the laws of Nevada prior to the opening of such bids.

OPINION

This office has carefully considered the question with respect to the requirements of the Nevada Act requiring the licensing of contractors by the State, both with respect to the submission of bids upon proposed contracts for the construction of highways and the awarding of bids thereunder.

Pursuant to the request for this opinion, this office has carefully examined into the matter and it is advised that the particular sector of highway proposed to be constructed is to be constructed upon land the title of which vests in the United States of America and, in addition thereto, is to be constructed in an area that has been and is now set aside as a recreational area known as the Lake Mead Recreational Area, created and set aside pursuant to Federal statutes relating thereto, and that it was necessary for the State Highway Department to have the acquiescence of the United States Government, through its proper representatives, to acquire a right of way for the proposed new highway and that, as we understand it, an easement was granted therefor by permit issued on behalf of the United States Government.

We are inclined to the view, and so hold, that with respect to the instant matter the contractor in question, who bid on the proposed construction and submitted the lowest and best bid therefor, in so doing brought himself within the exemption contained in section 7, Article III, of the State Contractors' Board Act, the same being found at 1941 Statutes, page 442, and being section 1474.19, 1929 N.C.L., 1941 Supp., reading as follows: "This act does not apply to any construction, alteration, improvement or repair carried on within the limits and boundaries of any site or reservation, the title of which rests in the Federal Government."

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-13. CONSTITUTIONAL LAW—Validity of appointments to fill vacancies in appointive offices by the Governor as governed by Section 7393, N.C.L. 1929, and as applied to appointments to Colorado River Commission.

Carson City, January 30, 1951.

Hon. Charles H. Russell, Governor of Nevada, Carson City, Nevada.

Dear Governor Russell:

Reference is hereby made to the correspondence between our offices of January 22 and 24, 1951, relating to certain appointments made by former Governor Pittman to the Colorado River Commission under date of December 12, 1950. From such correspondence the facts appear as follows:

STATEMENT

The Colorado River Commission was created by the Colorado River Commission Act of 1935, being Chapter 71, Statutes of 1935, and being found at sections 1443.01-1443.17, 1929 N.C.L., 1941 Supp. Section 1 of the Act provides for a commission of five members, i.e., the Governor and four members appointed by him. Two members to be appointed for a term of four years and two members appointed for a term of two years. The appointive members, so we are advised, were appointed pursuant to the statute soon after its enactment and approval, and, as the terms of such members so appointed expired, new appointments or reappointments were made from time to time until December 12, 1950, when it appears that some three appointments were made by the then Governor to fill what were then assumed to be vacancies on the commission, the Governor being empowered by the statute to fill vacancies occurring on the commission. It further appears that one of the appointments made on said day was for a four-year member to the four-year term which had expired on July 24, 1949, without any appointment or reappointment being made thereto from such date until December 12, 1950, when the appointment was made for a four-year term beginning on that date.

The other two appointments being made to positions on the commission were for the terms of the incumbents serving for two years, each of which terms had expired on July 7, 1950. One incumbent was reappointed and new appointee appointed for the other position. However, it appears as to these two appointments they likewise were made for four-year terms beginning on December 12, 1950. We are advised that one other appointed member of the commission is presently filling an unexpired four-year term.

You request the opinion of this office as follows:

I would like to ask a ruling from your office as to whether or not under existing statutory law, these appointments were legally made, or if they are void on account of the statutes governing the powers of the Governor.

In connection with your request you direct attention to section 7393, N.C.L. 1929, reading:

Whenever any vacancy shall hereafter occur in any appointive office or position in this state required by law to be filled by the governor, such vacancy remaining unfilled for a period of ninety days, the governor shall not, within sixty days preceding the expiration of his term in office, fill said vacancy to be effective beyond the termination of his own term in office.

OPINION

At the threshold of this opinion we desire to point out that the records of this office fail to disclose any prior request for an opinion upon the question presented by the instant inquiry. It is a case of the first impression in this State arising by reason of the provisions of section 7393, N.C.L. 1929, and its relation to the powers of the Governor in the making of appointments to fill vacancies in appointive offices.

Section 1 of the Colorado River Commission Act provides, inter alia, "Within thirty days after the passage and approval of this act the governor shall appoint the said commissioners, and two of said commissioners shall hold office for a term of two years and two for a term of four years, and until their successors are appointed and qualified. Any vacancies shall be filled by the

governor for the unexpired term.” It is to be noted that the appointive members, while appointed to definite terms, still they may serve until their successors are appointed and qualified.

The provision that the members hold office until their successors are appointed and qualified is substantially a general rule of law universally accepted by the weight of authority, the purpose being to “prevent a hiatus in government pending the time when a successor may be chosen and inducted into office.” 43 Am.Jur. 21 sec. 164. It is also the general rule, supported by a long line of authorities, that where an officer is legally elected or appointed to an office and the constitution or the statute creating the office provides that such officer shall hold the office until his successor is elected or appointed and qualified, that such officer may legally hold over beyond his term of office until such time as his successor is elected or appointed and qualifies for the office. 43 Am.Jur. 19-20, secs. 161, 163; 67 C.J.S. 203, sec. 48b. And there is respectable authority that even in the absence of constitutional or statutory authority, still an officer is entitled to hold over beyond his term of office until his successor is appointed and qualifies. 43 Am.Jur. 20, sec. 162; 67 C.J.S. 202, sec. 48a.

It is also well settled that a term of office cannot be extended by provisions for holding over, where the term is fixed by the Constitution. 67 C.J.S. 202, sec. 47c. With these generalities in mind let us consider the application thereof, and also with relation to specific law, to the questions involved herein.

First, with respect to the appointment for a successor in office for the four-year term as a member of the Colorado River Commission that expired on July 24, 1949. The question at once presents itself—was there such a vacancy in the commission on December 12, 1950, that brought the appointment on that date within the purview of section 7393, N.C.L. 1929?

Apparently the prior appointment was for the term beginning on or about July 24, 1945, and the then appointee was in fact a de jure officer during the ensuing four years and according to some of the cases so holding could have, unless prohibited by some constitutional provision, continued to hold over beyond the term of office for which appointed until his successor was appointed and qualified, particularly where a statute so provides, and in such event the expiration of the term would not in itself create a vacancy.

However, Nevada is not in that category with respect to the office here considered. The office of a member of the Colorado River Commission is not a constitutional office. It is purely a statutory office created by and the tenure thereof fixed by the Legislature. Section 11, Article XV, of the Nevada Constitution, provides:

The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, *but the legislature shall not create any office the tenure of which shall be longer than four years*, except has herein otherwise provided in this constitution. (Italics ours.)

This provision was construed by the Supreme Court in *Ex rel. Williamson v. Morton*, [50 Nev. 145](#), a case relating to whether there was a vacancy in the office of County Assessor, a statutory office, under the following facts, quoting from the Court’s opinion:

The defendant was elected assessor of Churchill County in November, 1922, for a term of four years. At the general election in November, 1926, when, according to the general statute, all county officers holding for a period of four years should have been elected, there was no candidate for the office of county assessor of Churchill County. On January 3, 1927, the board of county commissioners of that county, being of the opinion that the office of county assessor was vacant, appointed the relator to the office, whereupon he duly qualified and demanded the office of the defendant, who refused the demand upon the ground that he holds over until his successor is elected and duly qualified. There is no provision in our constitution authorizing a county assessor to hold over.

Several contentions are urged by relator in this matter, but we deem it necessary to discuss but one. It is contended by relator that respondent is incapable of holding over because of the provision in section 11, art. 15, of our constitution, which reads:

“* * * The legislature shall not create any office the tenure of which shall be longer than four years except as herein otherwise provided in this constitution.”

There is no exception in the constitution as to the office in question.

The Court exhaustively examined the question presented, quoting with approval from 23 Am. & Eng. Ency. Law (2d ed.) 415 the following:

It is entirely competent for the legislature of a state to authorize public officers to hold over in the absence of any constitutional provision to the contrary. But it is the better opinion, and the one supported by the greater weight of authority, that when the constitution fixes the term of an office or limits it to a prescribed period of time, the legislature cannot, by authorizing the incumbent to hold over until his successor is elected or appointed and qualified, extend his authority over a longer period than that prescribed.

And then held:

There being no constitutional provision authorizing county assessors to hold over until their successors are elected and qualified, under [Const. art. 15, sec. 11](#), providing that the legislature shall not create office, tenure of which shall be longer four years, office of county assessor becomes vacant at expiration of four years, even though no successor is elected and qualified.

Thus the Supreme Court has definitely laid down the rule that the Legislature cannot create any office the tenure of which shall be longer than four years, and that at the expiration of a four-year term of office so created the tenure thereof cannot well be extended by holding over until a successor is appointed and qualifies for the office.

Applying the rule of law enunciated in the Morton case to the facts with respect to the office now in question here, such office became vacant as to a de jure officer from and after July 24, 1949, and any incumbency from that date until December 12, 1950, was, in any event, that of a de facto officer only.

A de facto officer is one whose title is not good in point of law, but who is in fact in the unobstructed possession of an office and is discharging its duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. 43 Am.Jur. 225, sec. 471, citing *Waite v. Santa Cruz*, 184 U.S. 302.

To like effect—67 C.J.S. 438, sec. 135.

In *Walcott v. Wells*, [21 Nev. 47](#), the Supreme Court held that a de facto officer is “(1) One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. (2) One who actually performs the duties of an office, with apparent right, and under claim and color of appointment or election. (3) One who has the color of right or title to the office he exercises. (4) One who has the apparent title of an officer de jure.” The Court further quoted from *State v. Carroll*, 38 Conn. 471, a leading case on the question, as follows:

An officer de facto is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interest of the public and third persons, where the duties of the office were exercised: First. Without a known appointment or election, but under such

circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

While an officer de facto can be ousted from office in a direct proceeding brought for that purpose, 43 Am.Jur. 226, sec. 472; *Walcott v. Wells*, [21 Nev. 47](#), still the lawful acts of such officer pertaining to the office cannot be collaterally attacked by the public or third persons, 43 Am.Jur. 241, sec. 495; *Walcott v. Wells*, supra; *Mallet v. Uncle Sam Min. Co.*, [1 Nev. 188](#), for the reason that, "The practical effect of the rule is there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent the failure of public justice." 43 Am.Jur., sec. 495.

Adverting now to the incumbency of the office in question here from and after July 24, 1949, to December 12, 1950, without any showing having been made to the contrary, we think such incumbency without reappointment was premised upon the assumption that the prior appointee was legally authorized to hold over after the expiration of the term for which appointed by reason of the language "and until successors are appointed and qualified" contained in section 1 of the Colorado River Commission Act. We know of no question or objection being raised or offered collaterally or otherwise during such period of time by any person to such incumbency. It is, therefore, our considered opinion that the prior appointee was de facto officer from and after July 24, 1949, to December 12, 1950, and that as such his acts as a de facto member of the Colorado River Commission within the purview of the powers of such commission were legal acts and not subject to collateral attack. There being no collateral attack or objection to the incumbency of the de facto officer, was there such a vacancy in the office as to bring it within the purview of section 7393, N.C.L. 1929, in view of the decision of the Supreme Court in the *Ex Rel. Williamson v. Morton* case, so as to preclude the appointment made on December 12, 1950, in its entirety?

This office is not unmindful of the fact that its opinion and/or decision on this question can have a far-reaching effect. The Colorado River Commission ever since its creation has been engaged in the administration of a major project for and in behalf of this State. It has entered into and executed many valuable contracts and thereby bound not only the State but also interested parties to carrying out such contracts, which will require many years in the future for the entire fulfillment thereof. We must most carefully consider the importance of the question in order that the best interest of the State may be preserved and due consideration and respect given the law of the State involved here.

The law is well settled that the term "vacancy" has no technical meaning; an office is vacant whenever it is unoccupied by a legally qualified incumbent who has a *lawful* right to continue therein until the happening of some future event. 67 C.J.S. 206, sec. 50a; 43 Am.Jur. 976, sec. 131, and cases cited in notes.

In *State ex rel. Hodges v. Amos*, 133 So. 623, the Court held that after the expiration of four-year term, incumbent held over and eight months later was appointed for four-year term from latter date, the office, nevertheless, became vacant for the purpose of executive appointment when the statutory term had expired. That such is the law of this State on the instant question is settled beyond question by the *Ex rel. Williamson v. Morton* case, for the reason that it now develops that while the appointee to the four-year term expiring July 24, 1949, continued to hold over, he did so upon the assumption that the provision contained in the Colorado River Commission Act "and until their successors are appointed and qualified" was a constitutional act as applied to him. We are bound by the decision of the Supreme Court in the *Williamson v. Morton* case.

Therefore, in deference to the law as construed by our highest court, it is the considered opinion of this office that from and after July 24, 1949, there was such a vacancy in that particular office as to bring it within the purview of section 7393, N.C.L. 1929, in that and for the reason, while such hold over incumbent was a de facto officer and his acts as such officer were valid and binding upon the public and third persons, still the office was not filled by an incumbent legally qualified and endowed by law with a lawful right to continue therein, in brief, such incumbent was not a de jure officer.

Was the appointment to the office in question here so made on December 12, 1950, void or invalid by reason of the prohibitive provisions of said section 7393?

We are not advised of the reasons for the delay in the appointment to fill the vacancy in office in question here. It is here that the best interest and welfare of the State must be weighed and considered in the application of the foregoing statute. We must assume that on, or a short time before, December 12, 1950, the Governor determined there was a vacancy in the office and exercising the prerogative of his office made the appointment in question, erroneous though such appointment may have been, nevertheless the appointment was made and the fact is such appointee sat in a meeting of the commission prior to December 31, 1950, and assisted in the transacting of the business thereof, which business no doubt pertained to important matters submitted to the commission. Had not such appointment been made effective beyond the term of the then Governor, no legal question could well have arisen, as he had the right under section 7393 to have made the appointment to fill such vacancy for the remainder of his term of office since the statutory provision is prohibitory only of appointments made to fill vacancies that are effective beyond the Governor's term of office. In view of all the circumstances of the case, involving as they do serious questions pertaining to a major project of great value and interest to the State and also the effect of the statute in question, we are impelled to the following conclusions:

1. That there was a vacancy in law within the meaning of the provisions of section 7393 from and after the 24th day of July, 1949.
2. That section 1 of the Colorado River Commission Act empowered the Governor to appoint to fill vacancies in the appointive positions on such commission for the unexpired term of any such commissioner.
3. That as to any vacancy unfilled for a period of 90 days, the Governor could not within 60 days of the expiration of his term of office make an appointment to fill such vacancy *effective beyond his term of office*.
4. That within such 60-day period the Governor could appoint to fill a vacancy in office, provided such appointment was not to be effective beyond his term of office.
5. That the appointment made on December 12, 1950, with respect to the office in question here was erroneous in the following particulars:
 - (a) That the appointment was for a four-year term beginning December 12, 1950, whereas the unexpired term began from and after July 24, 1949, and the power of appointment to fill vacancies is limited to appointments for the residue of the unexpired term.
 - (b) That the appointment in question contravenes section 7393 insofar that it was made effective for the major portion of the remaining term beyond the term of the appointing power.
 - (c) That the interest and welfare of the State is and will be best served by holding that that part of the unexpired term of the office in question was legally filled by the appointment made on December 12, 1950, and extending to and expiring on the date of the expiration of the term of office of the then Governor.

It is, therefore, the considered opinion of this office that the appointment made on December 12, 1950, to fill the vacancy in the office in question that expired on July 24, 1949, was invalid and within the purview of section 7393, N.C.L. 1929, save and except as to the part of such expired term between December 12, 1950, and the expiration of the term of the then Governor.

We come now the appointments of the two members purportedly appointed for terms of four years from and after December 12, 1950, to replace or fill vacancies in the two year terms in positions as members of the Colorado River Commission that expired on July 7, 1950. An exhaustive examination has been made of many cases from many jurisdictions that tended to have a bearing upon the questions considered in this opinion. It can be said that there is a line of authorities sustaining the position that as to the appointments here under consideration, that incumbents holding over after the expiration of their terms of office (two-year terms), where the constitution or statute provided for the holding over until the election or appointment of their

successors, would be deemed to be de jure officers and that such incumbency would not be construed as a vacancy caused by the expiration of the term of office. However, none of such cases dealt with the problem as limited by statute of like tenor as section 7393, N.C.L. 1929.

It has long been the canon of statutory construction as declared by our Supreme Court that the intentions of the Legislature in enacting statutes must control and is to govern in the construction of statutes; that words in a statute shall be given their plain meaning, and that the unambiguous language cannot be construed contrary to its clear meaning; where the meaning of a statute is clear and there is no occasion for construction; statutes are to be construed so far as possible to give effect to all of the language therein so as to give effect to the entire statute and not nullify it.

The intent of the Legislature in enacting section 7393 is, we think, clearly expressed in the language therein used, and that intent is that the Governor shall not make any appointments extending beyond his term of office in any case relating to a vacancy in an appointive office or position to which he has the appointing power, which vacancy remained unfilled for 90 days and the appointment thereto is made within 60 days preceding the expiration of his term of office, and which appointment was to be effective beyond his term of office.

We think it clear that the Legislature intended the statute to relate to and to mean that the term "vacancy" would include a vacancy occasioned by the expiration of the term of office as well as a vacancy brought about by any other cause, and that in any event the Governor should not within 60 days of the expiration of his term of office make an appointment to fill a vacancy which would be effective beyond his term of office.

Entertaining the foregoing views, it is the opinion of this office that the appointments to fill vacancies in the offices of the two members of the commission that expired on July 7, 1950, were invalid, save and except as to that part of the appointments covering the period of time extending from December 12, 1950, to expiration of the term of the then Governor.

Note—In the consideration of the request for this opinion it is noted that the appointments made on December 12, 1950, in each case were for a period of four years from that date. Section 1 of the Colorado River Commission Act, as hereinabove pointed out, provides for two four-year terms and two two-year terms. These terms are to be consecutive with no interim between them. All appointments should be made accordingly, and when made to fill vacancies, the appointments should always be made for the portion of the then unexpired term.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-14. NUISANCE—County commissioners required by statute to abate houses of prostitution within the county.

Carson City, January 31, 1951.

Hon. Roscoe H. Wilkes, District Attorney of Lincoln County, Pioche, Nevada.

Dear Mr. Wilkes:

This will acknowledge receipt of your letter of inquiry of January 26, 1951, requesting the opinion of this office as follows:

QUERY

(1) Whether or not 1929 N.C.L. 6678 can be interpreted to properly include a house of prostitution for licensing purposes or in other words, have the words “Hurdy Gurdy” through common usage become synonymous with house of prostitution for the purposes of the statute?

(2) Whether or not 1929 N.C.L. 10193 when considered along with 203 P(2d) 611 makes it *mandatory* upon the County Commissioners under 1929 N.C.L. 2043 to abate a house of prostitution as being a nuisance assuming there has been no complaint against the operation of a house of prostitution whatsoever by anyone to the County Commissioners, or in other words do the County Commissioners have any discretion on the question of allowing a house of prostitution to operate within the county?

(3) Whether or not under the laws of the State of Nevada the county sheriff has a mandatory duty to prevent a house of prostitution from operating within the county?

OPINION

(1) The words “hurdy-gurdy” as such, is a lute-like stringed musical instrument, played by turning a handle.

From the days of the early West came the phrases “hurdy-gurdy girls” and “hurdy-gurdy houses.” Such phrases evolved from establishments likened to public dance halls and saloons which comprised generally of a bar, cafe, and dancing.

This office finds no place in the law for an interpretation that “hurdy-gurdy” is synonymous with prostitution. To the contrary, hurdy-gurdy by common usage has become a descriptive term for a class of entertainment which as other classes of entertainment is sought to be licensed under 1929 N.C.L. 6678.

Bouvier’s Law Dictionary.
Encyclopaedia Britannica.
Roget’s International Thesaurus.
Webster’s Unabridged Dictionary.

(2) The Supreme Court of the State of Nevada in *Cunningham v. Washoe County*, 203 P.2d 611, answered in the *negative* these questions: “Do such enactments of the Nevada legislature (referring to 10193 N.C.L. 1929) stand as a repudiation of the common law determination which declared such an activity unlawful and therefore a public nuisance? * * * .”

“Do the various statutory enactments of the Nevada legislature concerning prostitution and its conduct, constitute it a lawful activity when practiced in an area not prohibited by statute, or conducted in a manner not forbidden by a statute? * * * .”

The Court in the above-mentioned case continued, in reference to *Kelley v. Clark County*, 61 Nevada 293, as follows:

“The penal statutes mentioned in this opinion clearly negative any implication that the legislature, by making it a penal offense to operate a house of prostitution within 400 yards of school or church, intended so to modify existing law as to declare it lawful when operated elsewhere. * * * .”

The law as stated by our Supreme Court is convincingly clear that a house of prostitution irrespective of its location is a public nuisance, and therefore the following is applicable, 2043 N.C.L. 1929, “Whenever, in any county of this state, the county commissioners of said county shall have knowledge, either by personal observation, complaint in writing, or other satisfactory evidence, that a nuisance exists * * * it shall be the duty of said board of county commissioners to take immediate action * * *. Failure on the part of either county commissioners or district attorney to enforce the provisions of this act shall work forfeiture of office.” (Emphasis supplied.)

It is therefore the opinion of this office that when the County Commissioners have knowledge of the existence of a house of prostitution within said county, such knowledge obtained or procured as provided above, it is then mandatory that said commissioners take the necessary action to abate said nuisance, hence if the County Commissioners have knowledge of the

existence of a nuisance they have no discretionary power, but must comply with the mandate of the statute.

(3) The duties of the sheriffs of the respective counties are clearly stated in 2148 N.C.L. 1929.

The law has by statute placed the duty to abate nuisances upon the Boards of County Commissioners. It is therefore the opinion of this office, that without statutory enactment, the County Sheriffs do not have a mandatory duty to prevent a house of prostitution from operating within the county.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-15. THE MENTALLY ILL—Notwithstanding commitment to the state mental hospital for the minimum period of six months, the superintendent has authority to release the patient before the expiration of such period if in his opinion confinement and treatment is no longer required.

Carson City, February 7, 1951.

Hon. Jack Streeter, District Attorney, Washoe County, Reno, Nevada.

Dear Mr. Streeter:

This will acknowledge receipt of your letter dated January 31, 1951, received in this office February 1, 1951.

You request an interpretation of the Act concerning the mentally ill of the State concerning the commitment of inebriates.

STATEMENT

The superintendent of the Nevada State Hospital claims that it is within his discretion as to when persons committed as inebriates under the Act concerning the mentally ill should be released, although such persons are committed by a District Judge for a period of not less than six months nor more than one year from the date of the order.

OPINION

Admission of inebriates, dipsomaniacs and drug addicts is provided for in sections 23 to 28, inclusive, of Chapter 201, Statutes of 1947, being an Act concerning the mentally ill of the State. Section 26 reads as follows:

If after a hearing and examination, the judge believes the person charged is an inebriate or dipsomaniac, 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; but no such order shall be made in respect to any person who has theretofore been committed to and has received treatment at said hospital unless there has been first

filed with the court a written report of the superintendent of the hospital stating that the person is a suitable case for treatment at said hospital and if such report is not filed the person so charged shall forthwith be discharged by the court.

Section 1 of the Act provides that it shall be liberally construed so that persons who are mentally disordered, but not dangerously mentally ill may, without being committed as an insane person, be admitted to the hospital to receive care and be restored to normal condition if possible.

Section 17 provides:

Whenever the superintendent of the state hospital to which a person has been admitted pursuant to this act is of the opinion that the person is no longer in need of supervision, care, or treatment in the hospital, he may release the person on leave of absence or discharge him.

The hearing provided for in the sections makes no provision for a jury, and the charge cannot, when considered with the entire Act, be regarded as penal. It is evident that the sections of the Act were designed for the benefit and good of such unfortunate person as might be liable to such charge, and the purpose of the entire Act is to restore such persons to normal condition if possible. The minimum confinement is not punishment, it is a definite period within which the person is subject to treatment for restoration to normal condition.

When such normal condition is restored there is no longer reason for constraint.

It must be presumed that the superintendent will act under the guidance of professional skill when such a person is released before the six-month period has expired.

Considering the nature of the hearing; the sentence of the judge for a definite period with no possibility for restoration to normal condition within the time fixed, it appears that the restraint of such person after restored to normal condition would be in violation of his constitutional rights.

A statute of Wisconsin similar to the Nevada statute was the subject of the case of *State ex rel. v. Ryan Court Commissioners*, 36 N.W. 823. The statute provided for a hearing without a jury on a complaint that a person was an inebriate, and if convicted the sentence should be for a period not exceeding two years, nor less than three months. The defendant was sentenced to two years' confinement in an insane asylum. The Court reviewed the question as to whether the Act was paternal or penal and concluded that the Act was not penal, and if such in fact, it must to that extent be regarded as inoperative. The Court said: "The purpose of such guardianship is humane, beneficent, and paternal, but the lawful right to its continuance is limited to the period of such disability or want of self control." The Court mentioned the confinement thus arbitrarily fixed without the possibility of reformation within the period, and decided the person was entitled to discharge.

We are therefore of the opinion that the Act should be construed as a remedial measure, and when, in the opinion of the superintendent, supervision and treatment is no longer required, the superintendent has the authority to release the patient.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-16. A JUSTICE OF THE PEACE has no authority under the statute to accord a person charged as a fugitive from justice of another state a preliminary hearing to determine if such person charged is a fugitive from justice.

Carson City, February 15, 1951.

Hon. Jack Streeter, District Attorney, Washoe County, Reno, Nevada.

Attention: A.D. Jensen, Assistant District Attorney.

Dear Mr. Streeter:

This will acknowledge receipt of your letter in this office February 9, 1951, requesting an opinion upon the following question.

STATEMENT

A Justice of the Peace issued a warrant for the arrest of a person charged to be a fugitive from justice from another State. An exemplified copy of a complaint supported the warrant issued. The defendant, through his counsel, insisted that under section 11235, N.C.L. 1929, the Justice of the Peace must accord a preliminary hearing to the defendant and that at such hearing the alleged fugitive had the right to offer testimony to prove his absence from the demanding State on the date of the alleged crime as appeared in the exemplified copy of the complaint issued from the demanding State.

The question, is a defendant arrested under section 11235, N.C.L. 1929, entitled under the statutes to a preliminary hearing in the Justice Court in such cases?

OPINION

Article IV, section 2, of the Constitution of the United States, reads as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Section 662, Title 18, Federal Code Annotated, provides that whenever the executive of any State demands any person as a fugitive from justice of the executive authority of another State to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor of the State from whence the person so charged has fled, it shall be the duty of the executive authority of the State to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, and to cause the fugitive to be delivered to the agent of such authority when he appears.

Section 11230, N.C.L. 1929, follows substantially the provision of Article IV, section 2, of the Constitution of the United States.

Section 11235, N.C.L. 1929, provides the procedure to secure a person charged with a crime in another State who is found in this State, and to restrain such person for a reasonable time to enable the arrest of the fugitive under the executive warrant of the Governor of this State. This section provides that the arrest and commitment shall be in all respects similar to those provided in the Criminal Law and Procedure Act for the arrest and commitment of a person charged with a public offense committed within this State. The exception to this procedure is that an exemplified copy of judicial proceedings had against him in the State or Territory in which he is charged is to be received as evidence before the magistrate.

The Criminal Practice Act provides for the examination of the complainant or any witness he may produce, and if it sufficiently appears therefrom that an offense has been committed, a

warrant may issue. Provision is made in following sections for the preliminary examination and the holding of defendant to answer to the charge.

Commitment under Chapter 48 of Criminal Law and Procedure relating to fugitives from justice, section 11236, N.C.L. 1929, is defined as follows:

If, from the examination, it appears that the person charged has committed treason, felony, or other crime charged, the magistrate, by warrant reciting the accusation, shall commit him to the proper custody within his county, for a time to be specified in the warrant, which the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he give bail as provided in the next section or until he be legally discharged.

The examination applies to the evidence supplied by the exemplified copy of the judicial proceedings had against the person charged with a crime against the demanding State, upon which the warrant is issued by the magistrate in this State.

The jurisdiction to inquire into the cause of the arrest and detention of the person so charged is vested in the District Court under section 11241, N.C.L. 1929.

It is apparent from the reading of the entire chapter relating to the fugitives from justice that the intent of the Legislature was to comply with the Constitution of the United States and the Federal statute.

It was said in *Cook v. Hart*, 146 U.S. 183, "We have no doubt that the Governor upon whom the demand is made must determine for himself, in the first instance, at least, whether the party charged is in fact a fugitive from justice."

As held by the Court in *Munsey v. Clough*, 196 U.S. 364, at page 372, the questions before the Governor, under revised statutes relating to arrest of persons as fugitives from justice under clause 2, section 2 of Article IV of the Constitution of the United States, are whether the person demanded has been substantially charged with a crime, and whether he is a fugitive from justice.

The first is a question of law and the latter a question of fact, which the Governor, upon whom demand is made, must decide upon such evidence as is satisfactory to him. "The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides none. To hold otherwise would in many cases render the constitutional provision as well as the statute passed to carry it out, wholly useless."

The same reasoning is applicable to a hearing on the law and facts before a Justice of the Peace in fugitives from justice proceedings. To hold otherwise would, in many cases, result in a disregard of the constitutional provision as well as the Federal statutes and statutes of this State.

Therefore, we are of the opinion that section 1235, N.C.L. 1929, does not authorize a Justice of the Peace or magistrate to conduct a hearing on the complaint of a demanding State to determine whether the person charged with a crime in such State is a fugitive from justice. If it appears from the exemplified copy of a judicial proceedings had against the person demanded that he is charged with a crime against the demanding State, it is the duty of the magistrate to commit such person for a reasonable time to await the warrant from the Governor of this State.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-17. ORPHANS' HOME—Appointments to fill vacancies caused by resignation of present superintendent and matron should be made by Governor.

Carson City, February 16, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

This will acknowledge receipt of your letter received in this office February 14, 1950, requesting an opinion of the following statement.

STATEMENT

The positions of superintendent and matron of the State Orphans' Home, due to the resignation of the persons now holding those positions, will become vacant March 1, 1951, and the question presented is as to the power of the State Welfare Department to appoint a superintendent and matron under its present authority.

OPINION

The State Orphans' Home, under the Act of 1869, was established as a State institution. The power to appoint a superintendent and matron was vested in a board of directors. Section 1 of this Act, section 7582, N.C.L. 1929, which designated a board of directors, was amended by Chapter 79, Statutes of 1943, making the State Board of Relief, Work Planning and Pension Control directors of the State Orphans' Home.

Chapter 327, Statutes of 1949, created the State Welfare Department and repealed the Act creating the State Board of Relief, Work Planning and Pension Control Act, and the former Act creating the State Welfare Department.

Section 10, paragraph 9, of the Act of 1949, reads as follows: "Administer and manage the affairs of the Nevada state orphans' home."

Section 8, paragraph 4, gives the State Welfare Director power to appoint the heads of the divisions of the department in accordance with the provisions of a merit system. The divisions of the Welfare Department are such divisions as contemplated under the Social Security Act and subject to the conditions imposed by that Act. The Orphans' Home is a State institution that does not receive aid under the Social Security Act and is not subject to the conditions imposed by that Act.

The amendment to the Orphans' Home Act in 1943 made the State Board of Relief, Work Planning and Pension Control the directors of the State Orphans' Home, and, under the provisions of the Act for the government and maintenance of the Orphans' Home, this board had the authority to appoint a superintendent and matron whose salaries were fixed by statute. The Act providing for the creation and appointment by the Governor of the Board of Relief, Work Planning and Pension Control was specifically repealed by the State Welfare Act of 1949.

It appears, therefore, that there is no specific authority named in the statutes which may appoint a superintendent and matron for the Orphans' Home.

Article XV, section 10, of the Constitution of Nevada, provides that all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law. The power of appointment to office is, in its nature, an executive function and unless such appointment is prescribed by law, the appointment to fill a vacancy in a State office vests in the Governor under Article V, section 8, of the Constitution, which provides that when any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission, which shall expire at the next election and qualification of the person elected to

such office. The latter part of the section is not a limitation of the general powers of the Governor as expressed in the first part of the section, but a limitation as to elective officers for a period certain.

The Legislature has supplemented such constitutional provision by the general Act relating to officers. Section 46 of the Act, section 4810, N.C.L. 1929, provides that vacancies that may occur in office, the appointment of which is vested in the Governor and Senate, or in the Legislature, shall be filled by the Governor during the recess of the Legislature, by granting commissions which shall expire whenever the Governor and Senate, or the Legislature, shall appoint a person or persons to fill said offices.

Therefore, we are of the opinion that neither the State Welfare Department, nor the director of the department, has the statutory authority to appoint a superintendent or matron for the State Orphans' Home. When the vacancies occur as a result of the resignation of the present superintendent and matron, it appears from a consideration of the constitution and the statutes that the appointment to fill such vacancies rest in the Governor.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-18. CONSTITUTIONAL LAW—INITIATIVE PETITIONS—NOT MANDATORY THAT LEGISLATIVE BODY BY ITS ACTION REJECT SUCH PETITION—Such petition will go upon the ballot irrespective of any action of legislative body, save that of approval of the petition.

CARSON CITY, February 19, 1951.

HON. J.M. HIGGINS, *Speaker of the Assembly, Assembly Chamber, Carson City, Nevada.*

STATEMENT

Dear Mr. Speaker:

We are advised that during the year 1950 an initiative petition, purporting to be denominated the "right to work" petition, was circulated throughout the State for the purpose of securing the required number of signatures to enable it to be filed with the Secretary of State and by him submitted to the present Legislature in accordance with the constitutional provisions relating to initiative petitions. The petition was filed with the Secretary of State and thereafter submitted to the Assembly upon the convening of the Legislature on January 15, and thereafter referred to the committee on labor. Such committee, we understand, has not as yet reported thereon. You request the opinion of this office as follows:

QUERY

Is it mandatory that the Assembly act upon the initiative petition within the 40-day period provided in the constitutional provision governing the legislative procedure on such measures, i.e., is it mandatory that the Assembly shall by its action approve or reject such petition?

OPINION

Section 3, Article XIX, of the Nevada Constitution provides, inter alia:

The first power reserved by the people is the initiative, and not more than ten per cent (10%) of the qualified electors shall be required to propose any measure by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions, for all but municipal legislation, shall be filed with the secretary of state not less than thirty (30) days before any regular session of the legislature; the secretary of state shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all measures of the legislature except appropriation bills, and shall be enacted or rejected by the legislature, without change or amendment, within forty (40) days. If any such initiative measure so proposed by petition as aforesaid, shall be enacted by the legislature and approved by the governor in the same manner as other laws are enacted, same shall become a law, but shall be subject to referendum petition as provided in sections one and two of this article. If said initiative measure be rejected by the legislature, or if no action be taken thereon within said forty (40) days, the secretary of state shall submit same to the qualified electors for approval or rejection at the next ensuing general election; and if a majority of the qualified electors voting thereon shall approve of such measure it shall become a law and take effect from the date of official declaration of the vote; an initiative measure so approved by the qualified electors shall not be annulled, set aside or repealed by the legislature within three (3) years from the date said act takes effect. In case the legislature shall reject such initiative measure, said body may, with the approval of the governor, propose a different measure on the same subject, in which event both measures shall be submitted by the secretary of state to the qualified electors for approval or rejection at the next ensuing general election. * * * The provisions of this section shall be self-executing, but legislation may be especially enacted to facilitate its operation.

Thus, the legislative procedure is clearly set forth with respect to an initiative petition in a constitutional provision that contains within its provisions a statement that such provision is self-executing. Further, the initiative petition portion of the constitutional provision was held self-executing in *State v. Brodigan*, [37 Nev. 37](#). The constitutional provision being self-executing, there was no necessity for further legislation on the subject, and while the Legislature did in 1921 enact sections 2570-2580, N.C.L. 1929, still, such sections did not change in any respect, and could not well have so changed, the constitutional provision in question. The Constitution then must govern the procedure in the legislative body.

The legislative process within the Legislature is:

1. Submission of the petition to the legislative body by the Secretary of State upon the convening thereof.
2. There being no restrictive provision in the constitutional provision directing the legislative body with respect to the machinery it may use in processing the measure through that body, we must assume that the people intended that upon the submission of the measure to the legislative body that the same legislative rules would apply thereto as in the case of bills introduced therein, and thereafter be referred to committee, which committee would thereafter report thereon according to the will of the members of the body.
3. The legislative body may approve the measure without change or amendment, or it may reject it. In any event such approval or rejection must be had within 40 days of its submission. The language is "shall be enacted or rejected by the legislature, without change or amendment, within forty (40) days." This language seemingly is mandatory and is susceptible to the

construction that a rejective vote of the body is necessary to constitute a rejection. However, the people also wrote into the constitutional provision the following language:

If the initiative measure be rejected by the legislation, *or if no action be taken thereon within said forty (40) days*, the secretary of state shall submit the same to the qualified electors for approval or rejection at the next ensuing general election * * *. (Italics ours.)

This language, we think, modifies the mandatory language preceding it that the measure “shall be enacted or rejected by the legislature without change or amendment, within forty (40) days.”

We think that the intent of the people in writing into the Constitution the provisions providing for the initiative measures was, (1) to provide the Legislature with the power to approve such measures and thus obviate the necessity of placing the same on the ballot; (2) to enable the Legislature to reject the measure, and in its discretion to propose a different measure and thus cause both measures to be submitted to the people at the next election, who would then express their choice; (3) by writing into the constitutional provision a third alternative that “if no action be taken” then “the secretary of state shall submit the initiative measure to the qualified electors at the next election,” the people have sanctioned nonaction by the legislative body, but in so doing have preserved to the electorate the right to enact the measure into a law.

We are impelled to the foregoing conclusions for the following reasons:

1. Section 1, Article II of our Constitution provides:

The powers of the government of the State of Nevada shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Section 1, Article IV of the Constitution provides:

The legislative authority of this state shall be vested in the senate and assembly, which shall be designated “The Legislature of the State of Nevada,” and the sessions of such legislature shall be held at the seat of government.

Section 6 of Article IV provides:

Each house shall judge of the qualifications, elections, and returns of its own members (except the president of the senate), *determine the rules of its proceedings*, and may punish its members for disorderly conduct, and, with the concurrence of two-thirds of all its members, expel a member. (Italics ours.)

Pursuant to the foregoing constitutional provisions, the Supreme Court of this State held long ago that the Legislature possesses legislative power unlimited except by Federal and express State constitutional provisions to the contrary. *Gibson v. Mason*, [5 Nev. 283](#); *see also, State v. Williams*, [46 Nev. 263](#); *Moore v. Humboldt County*, [48 Nev. 397](#).

The people, in the enactment of the referendum and initiative amendment to the Constitution, reserved to themselves the power to propose laws and to enact or reject the same at the polls, independent of the Legislature and no doubt could have provided for the enactment of initiative measures wholly independent of the Legislature. However, as pointed out hereinbefore, the people did not restrict the legislative power to examine such measures and in its discretion to approve, reject, or take no action thereon. By so doing, we thin, the people, being presumed to know the effect of the Constitution in prescribing and setting apart the three departments of State Government, intended that the Legislature should exercise its discretion in passing upon an initiative petition submitted to it, and in so doing to exercise its legislative powers in accordance

with its own rules of procedure as adopted by each house thereof, particularly so as by no action, save that of approval, can the people be denied the right to vote upon an initiative petition.

There is no provision in the Constitution of this State whereby power is vested in one of the coordinate departments of the State Government, as delineated in the Constitution, to encroach upon and coerce the one of the other departments with respect to the powers and duties vested in each thereof by the Constitution. It is axiomatic that the very principle of the separation of powers of government is fundamental to the very existence of constitutional government as established in this country. 11 Am.Jur. 880, sec. 182. It is well established that courts cannot interfere with legislative action in any case which will cause an interference by the judicial department with the legislative powers of the Legislature. 11. Am.Jur. 902, sec. 200. It is well settled that the courts have no power to enforce the mandates of the Constitution which are at the legislative branch of the government or to coerce the Legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function. *Greenwood Cemetery Land Co. v. Routt*, 28 Pac. 1125; *Adams v. Howe*, 7 Am.Dec. 216; *Russell v. Ayer*, 27 S.E. 133; *Cottsetin v. Lister*, 153 Pac. 595; Anno. 153 A.L.R. 522 et seq. And, of course, the executive department has no control over legislative procedure save by the exercise of the veto power.

We come then to the question of whether the Assembly, or for that matter either house of the Legislature, is, by reason of the constitutional provision, mandatorily required to, by vote of its membership, reject an initiative petition, in the absence of constitutional coercive power exercised by any other entity save the legislative body in the absence of constitutional coercive power exercised by any other entity save the legislative body in the State. We think not. Each house under the Constitution without restriction determines the rules of its legislative proceedings. We are aware of no constitutional rule, nor joint rules, of this Legislature that provide coercive measures of one house over the other. The people of the State have seen fit to provide no coercive or penal provision in the Constitution whereby a vote of either house is necessary for the rejection of an initiative measure. In brief the question is left to the will of each branch of the Legislature to act or not act in the matter, with the admonition that such action as is taken must be within 40 days of the submission to the Legislature, and in the event of a rejection of the measure, or nonaction thereon, it will go to the people at the next election.

The Assembly, or the Senate, as the case may be, wherever the measure is first submitted, has the power to force action therein on the measure. Neither house, save by persuasion, can enforce action in the other. If such action is not forthcoming, we are of the opinion that the remedy therefor is in the submission of the question by the Secretary of State to the qualified electors at the next ensuing election. We are further of the opinion that the 40-day period set forth in the constitutional provision is jurisdictional.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-19. PERFORMANCE OF PROFESSIONAL SERVICES BY THE SUPERINTENDENT OF THE NEVADA HOSPITAL FOR MENTAL DISEASES, outside of the duties prescribed by statute, and charging a fee for such services, is to engage in private practice, which is forbidden by law.

Carson City, February 19, 1951.

Hon. Jack Streeter, District Attorney, Washoe County, Reno, Nevada.

Dear Mr. Streeter:

This will acknowledge receipt in this office on February 14, 1951, of your letter containing the following request for an opinion.

STATEMENT

At the request of a judge of the District Court the superintendent of the Nevada Hospital for Mental Diseases made an examination before trial of a prisoner being held on a State charge.

You request an opinion as to the obligation of the county to pay the superintendent a fee for such examination.

OPINION

Where the law prescribing the remuneration of a particular office confines it to a fixed salary such officer is not generally entitled to fees or compensation received by him for the performance of services connected with his office. The duties of the office may be increased, but the only resort to determine such increase is the written law. 43 Am.Jur., page 149.

Chapter 277 of the Statutes of Nevada, 1947, section 6, as amended, provides as follows:

The board of commissioners shall elect a physician, who shall hold a degree of doctor of medicine from an accredited medical school, if a qualified psychiatrist is available, who shall be the resident physician of a hospital, and who shall serve at the pleasure of the board and under its direction. 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.

The section forbids private practice by the superintendent, and requires that he devote his full practice time to his position.

Subsection (b) of the above section requires the superintendent to perform neurological and psychiatric examinations at the State Prison, State Orphans' Home, and State Industrial School when requested by the superintendents of these institutions. These are the only duties, in addition to his general duties at the hospital, which are imposed by law.

We are of the opinion that the law does not require the superintendent of the Nevada Hospital for Mental Diseases to make examinations of prisoners held on criminal charges. The making of such examinations for which a fee is charged is to engage in private practice which is forbidden by statute.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-20. CLARK COUNTY EDUCATIONAL DISTRICT NO. 12 AND ELEMENTARY SCHOOL DISTRICT NO. 2, comprising a union district, are separate entities under the statutes of this state, and each has a separate debt-incurring power in the issuance of bonds.

Carson City, February 21, 1951.

Hon. Rodger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter requesting an opinion as to the total bonded indebtedness that may be incurred by educational district No. 2 and by school district No. 12 of Clark County.

STATEMENT

Clark County Union School District contemplates two bond issues for the construction of new school buildings within the educational district No. 2, the high school district, and district No. 12, the grammar school district, which districts are included in the union district.

QUERY

For the purpose of computing the 10 percent limitation upon bonded indebtedness, is the high school district and the grammar school district considered a separate entity, and under the statute does each district have a separate debt-incurring power?

OPINION

Clark County, by action of the Legislature in 1919, was divided into educational districts. The Act was amended in 1921, 1927, 1929, 1945, and was subsequently included in Chapter 63, Statutes of 1947, the School Code, under Chapter 18, sections of the Code 109-119, inclusive.

The last paragraph of section 109 reads as follows:

Educational district No. 2 shall include all that portion of Clark County not embraced in educational districts No. 1 and No. 3 as herein described, and shall constitute a high school district for the government and maintenance of all high schools in said district.

Educational district No. 2, as shown by the map of Clark County submitted with the inquiry, includes within its boundaries educational district No. 12. District No. 12 comprises Las Vegas and North Las Vegas. This district, according to information furnished, was organized prior to the Act of 1919 dividing Clark County into educational districts.

Section 32 of the School Code provides that every village, town or incorporated city of the State, unless otherwise provided in the Code, shall constitute but one elementary district.

Section 110 of the School Code places the government and control of all high schools in educational district No. 2 in a board of education, defining some of the powers in the following language: “* * * which shall have all the powers and duties of any board of trustees of a school district and of the board of education of a union school district in the State of Nevada, or either of them * * *.”

Section 75 of the School Code provides that the control and management of all high and elementary schools in a union district shall be vested in a board of education.

Section 78 of this Code provides that such board of education shall have the power to issue bonds on behalf of any school district included in the union.

Section 31 of this Code defines a union school district as a combination of two or more districts, either high or elementary of any type wherein one board controls all the schools in the union, but each of the component districts retains its own identity.

Section 128 of this Code provides for the establishment of district high schools in counties which do not have a duly established county high school.

Section 119, subchapter 18 of the School Code, as amended by Chapter 155, Statutes of 1949, designated all high schools within the boundaries of the educational district established in the chapter as district high schools.

Section 129 of the School Code as amended by chapter 287, Statutes of 1949, defines the procedure to establish a high school in an elementary school district calling for a district high school.

The district high schools in educational district No. 2, Clark County, were not established under the provisions of the general School Code, but were established under the Act dividing Clark County into educational districts. The Act superimposed educational district No. 2 over the elementary district No. 12, but under the Act and within the provisions of the school it retained its entity within the boundaries provided in the Act.

It appears, therefore, that educational district No. 2, a union district, is composed of a high school district and an elementary school district, each of which districts retains its own identity.

The powers granted a board of education of a union district include the authority to proceed according to statute and issue bonds for the high school district, educational district No. 2. The taxes for the payment of such bonds would be levied against the taxable property within the entire boundaries of that district. The same board could provide for the issuance of bonds for the elementary district included in the union, and the taxes for the payment of such bonds would be levied against the taxable property within the boundaries of district No. 12.

Section 206 of the School Code provides that the total bonded indebtedness of a school district shall at no time exceed 10 percent of the total of the last-assessed valuation for county purposes of the taxable property situate within that school district.

The decisions on the question of the aggregate indebtedness of school districts with identical boundaries and overlapping boundaries are very much in opposition. Each decision is based upon the particular statutes involved.

See Board of Education v. Upham, 119 N.E. 876; *State ex rel. Zylstra v. Clusen*, 119 P. 797; *Mistler et al. v. Eye et al.*, 231 P. 1045; *Hoase v. School District No. 4 Park County*, 184 P.2d 285; *Erickson v. School District No. 2 Natroma County*, 217 P.2d 887; *Morgan v. Board of Supervisors*, 192 P.2d 236; 94 A.L.R. 818.

Therefore, we are of the opinion, based upon the existing statutes of this State, that Chapter 18 of Chapter 63, Statutes of 1947, defines educational district No. 2 as an entity separate from the elementary district No. 12, which last-mentioned district retains its own identity, and each have a separate debt-incurring power.

The question of the assessed valuation in each district and the outstanding bonds of each district is one of fact to be determined by the authority contemplating the bond issue.

Very truly yours,

W.T. MATHEWS
Attorney General

By: george p. Annand
Deputy Attorney General

OPINION NO. 51-21. BLINDNESS to entitle a person to the benefit of education at institutions outside the state is a question of fact to be determined in each particular case.

Carson City, February 22, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office on February 20, 1950, requesting advice as to your authority under the Act to provide for the education of the deaf and dumb and blind of this State, in the case of a person afflicted with a sight condition known as nystagmus.

STATEMENT

The boy in question is about 18 years of age, and since birth has had a sight condition known as nystagmus, which is a rapid and involuntary oscillation of the eyeballs, resulting in a visual handicap which prevents him from obtaining an education in the public schools of this State. According to your letter a qualified physician reports that the best correction for sight gives a 20/200 in each eye, and that the boy would do better in a school for visually handicapped. The mother of the boy is his sole support and she is unable to pay for his education.

QUERY

Does the Superintendent of Public Instruction have the authority under the statute for the education of the blind to pay the expenses of room and board at the Y.M.C.A. or some other accredited agency at Los Angeles, to enable the boy to attend a sight-saving class at the Hollywood High School where the tuition will be without cost?

OPINION

The Act to provide for the education of the deaf and dumb and blind, as amended by Chapter 33, Statutes of 1943, provides that the Superintendent of Public Instruction is authorized to make arrangements with the directors of any institutions for the deaf and dumb and the blind in any State of the United States possessing any institution, for the admission, support, education, and care of the deaf and dumb and the blind of this State, and for that purpose is empowered to make all needful contracts and agreements to carry out the provisions of the Act.

Under the provisions of section 4 of the Act, when the parent, relative, guardian, or nearest friend is unable to pay for the support and education of such person at such an institution, the cost and expenses of maintenance are paid by the State out of the appropriation for such purpose.

The purpose of the Act is to provide education at institutions equipped to educate persons who are deaf, dumb, or blind and who are capable of receiving an education, but who are themselves or by relatives unable to pay for the admission, support, education and care at such schools. The Act is a remedial statute, and as such should be liberally construed in favor of the parties obviously entitled to its protection. *Tobin v. Gartiez*, 44 Nevada, 179.

Blindness does not necessarily mean sightless. A person may be able to see, but his eyesight may be so impaired that the usual method of education is not available to him. Blindness is a term that has been the subject of court decisions in cases involving disabilities under the insurance policies and industrial insurance.

In the case of *Ravelin Mining Co. v. Viers*, 200 P.2d 433, the Court held: "It is conceded by the medical experts that a vision of 20/200 in both eyes constitutes industrial blindness." See, also, *Words and Phrases*, Permanent Edition.

The question as to the blindness of the person who is the subject of this inquiry is one of fact to be determined by competent medical authority. If it is determined that the boy is incapable of receiving an education in the public schools in this State due to his handicap, the Superintendent

of Public Instruction is authorized, if there is sufficient money in the appropriation, to make the needful contracts and agreements for his support while attending a school outside the State equipped to teach persons with such a handicap.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-22. WATERMASTER appointed by the U.S. District Court not considered an employee of the State of Nevada.

Carson City, February 23, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your letter of February 9, 1951, requesting the opinion of this office as follows:

QUERY

Can a person who has been appointed as watermaster for the Truckee and Carson Rivers be considered an employee of a political subdivision of the State of Nevada for the purpose of retirement?

OPINION

Section 2, subsection 2, Chapter 124, Statutes of 1949, provides as follows:

The term "public employer" means the state, one of its agencies or one of its political subdivisions and irrigation districts created under the State of Nevada.

Section 2, subsection 3, of the above Act provides as follows:

The term "employee" includes in addition to employees of the State of Nevada and its political subdivisions, public officers, but not persons employed as independent contractors.

Section 8 of the same Act provides in part as follows:

No person may become a member of the system unless he is in the service of a public employer. * * *

For one to become a member of the Public Employees Retirement System he must first fall within the definition of "employee" as set forth above. He must also be employed by a "public employer" as defined above. The watermaster of the Truckee and Carson Rivers is appointed by

the United States District Court for Nevada for the purpose of administering certain decrees of that Court. He is not paid by the State of Nevada, nor any of its political subdivisions, and only a portion of his pay is received from the Truckee-Carson Irrigation District. He is in way subject to the control of the Truckee-Carson Irrigation District, but is under the supervision of the Federal District Court and may be removed from office only by this Court.

Therefore, it is our opinion that a person in the above position is an officer of the Federal District Court and not an employee of the State of Nevada, or any of its political subdivisions, or irrigation districts, and, consequently, cannot become a member of the retirement system.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-23. INSURANCE—Examination of agent with respect to the kind of insurance business for which license is sought.

Carson City, March 1, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Attention: Paul A. Hammel, Insurance Director.

Dear Sir:

This will acknowledge receipt of your letter of February 21, 1951, in which you request the opinion of this office substantially as follows:

QUERY

Is it necessary that an agent of an insurance company, desiring to be licensed to sell accident and health insurance only, be examined by the Commissioner upon life, accident and health insurance under the statutory classification set forth in section 5, article 1, Nevada Insurance Act?

STATEMENT

Attention is directed to section 5, Article I, Nevada Insurance Act, being section 3656.04, 1929 N.C.L., 1941 Supp., as amended, 1949 Stats. 59, wherein it will be noted, under class 1, that there is set forth subsections (a) and (b). Subsection (a) pertains exclusively to life insurance and subsection (b) exclusively to accident and health insurance.

Attention is further directed to classes 2 and 3 of section 5, referred to above, wherein it will be noted that there are numerous subsections, each relating exclusively to a separate and distinct type, class or kind of insurance.

Article 11, section 78 et seq., Nevada Insurance Act, pertains to life insurance only. Article 12, section 86 et seq., Nevada Insurance Act, pertains to accident and health insurance only.

OPINION

Giving due consideration to the above, it is seemingly clear that the legislative intent in the enactment of the Nevada Insurance Act was to deal separately and distinctly with the numerous kinds, classes and types of insurance sold within the State of Nevada.

Section 145(d), Article 18, Nevada Insurance Act, being section 3656.145(d), 1929 N.C.L., 1941 Supp., as amended, 1949 Stats. 521, entitled, "Application for Agent's License," reads as follows:

(d) Full information concerning the experience of the applicant or instructions he has had in the *kind or kinds of insurance business which the applicant proposes to transact* and concerning his knowledge of the insurance laws of this state and of the provisions, terms and conditions of the contracts *he proposes to sell*. (Italics ours.)

Section 147, Article 18, Nevada Insurance Act, being section 3656.147, 1929 N.C.L., 1941 Supp., was amended 1947 Stats. 509, adding, among other subsections, subsection (e) which reads as follows:

(e) Each applicant for a license to act as an agent for life, accident, and health insurance, being the type of insurance enumerated in class 1 of section 5 of this act and as hereinafter defined; for casualty, fidelity, and surety insurance, being the type of insurance enumerated in class 2, section 5 of this act and as hereinafter defined; for fire, marine and other kinds of insurance, being the type of insurance enumerated in class 3, section 5 of this act, and as hereinafter defined, within this state, shall submit to a personal written examination to determine his competence with respect to *the kind of business for which the license is sought * * **. (Italics ours.)

The presumption that the framers of an Act intended not only to give effect to the main legislative intent, but also to its several parts, words, clauses, and sentences, is removed only when it appears that effect cannot be given to the paramount purpose unless particular words and clauses are rejected. [42 Nev. 397](#).

It is the opinion of this office that an agent for an insurance company, who has applied for a license to sell a specific kind, class or type of insurance (i.e., accident and health, motor vehicle and aircraft, fire, marine and transportation, etc.) need be examined only upon his knowledge of that specific kind of insurance and not upon all kinds set forth under the particular heading of which the specific kind is a subsection.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-24. DOMESTIC STOCK COMPANY doing life, accident, and health insurance business must meet surplus requirement when annual license is issued.

Carson City, March 1, 1951.

Hon. Peter Merialdo, Insurance Commissioner, Carson City, Nevada.

Attention: Mr. Paul A. Hammel, Insurance Director.

Dear Mr. Merialdo:

This will acknowledge receipt of your letter received in this office February 21, 1951, submitting the following inquiry, and requesting an opinion from this office.

STATEMENT

In order to reduce your question to a particular class of insurance business and remove its abstract character, we learned from your office that the inquiry referred to a domestic stock company engaged in the insurance business under the classification of life, accident, and health.

QUERY

1. Whether or not a domestic insurance company is required to maintain as a surplus at all times the minimum amount required prior to the issuance of a license.
2. If a domestic insurance company is required to have as a surplus the minimum amount required at the issuance of its license each year thereafter when the license is renewed.

OPINION

Article 2 of the general insurance laws of this State, included in sections 3656-3656.166, N.C.L., 1931-1941 Supp., as amended, relates to domestic insurance companies. Section 13 under this article provides:

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

The table following this paragraph specifies the various classes of insurance. Life, accident, and health is subdivided as follows:

- (a) Class 1 (a) or (b) one hundred thousand (\$100,000) dollars.
- (b) Class 1 (a) and (b) one hundred twenty-five thousand (\$125,000) dollars.

Subsection 2 of section 13 provides as follows:

A company in addition to the minimum capital required by subsection (1) shall have at the time of issuance to it of a license, a paid-in surplus of not less than fifty (50%) percent of its required capital.

The language "shall have at the time of the issuance to it of a license," is that part of the subsection which requires interpretation. The scope of Article 2 as defined in section 7 provides: "This article shall apply to all domestic companies, either stock or mutual, transacting or being organized to transact any of the kinds of insurance business enumerated in section 5."

Article 7, section 70 applies to fees and charges, and defines the annual license fee to be paid by each company doing an insurance business in this State.

Article 5, section 35 provides that no company shall do an insurance business in this State unless authorized to do so by a license issued and in force pursuant to the provisions of the Act.

Article 5, section 39 provides for a financial statement each year for the period ending December 31 immediately preceding the first of March. The first of March is the time of the issuance of the annual license to transact business.

To hold that a company must have the required surplus only upon its organization and that thereafter its annual license would be issued without meeting the required surplus would be inconsistent with the purpose and intent of the Act.

As held in *Las Vegas et al. v. Clark County*, 58 Nevada 470, a statute will never be interpreted so as to attribute an absurdity to legislature, if such interpretation is avoidable.

Therefore, we are of the opinion that a domestic stock company engaged in the insurance business under the classification of life, accident, and health, must meet the requirements of subsection 2 of section 13, and have at the time of issuing its annual license, a surplus of not less than 50 percent of its required minimum capital.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-25. INSURANCE—Payment of commissions by insurance company to a nonresident broker not licensed in this state for contract of insurance covering a risk within this state.

Carson City, March 2, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Attention: Paul A. Hammel, Insurance Director.

Dear Sir:

This will acknowledge receipt of your letter of March 1, 1951, requesting the opinion of this office as follows:

The opinion of the Attorney General is respectfully requested as to the interpretation of sections 144, 153 and 154 of the Nevada Insurance Laws on the following question:

May an insurance company pay a commission to a nonresident broker, who is not licensed in Nevada, for insurance written on a risk in Nevada?

OPINION

It is the opinion of this office that there is conflict between sections 144 and 154, Nevada Insurance Act.

There is a cardinal rule of statutory construction that where there is conflict between statutes the later in time will prevail over the former.

Under these circumstances, without further consideration of the question presented, it is recommended that this matter be submitted to the Legislature for clarification.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-26. CONSTITUTIONAL LAW—COUNTIES—MUNICIPAL CORPORATIONS—Combining of governments and territories thereof cannot be effected without constitutional authorization therefor.

Carson City, March 5, 1951.

Hon. Kenneth F. Johnson, Senator, Ormsby County, and Hon. Ellis J. Folsom, Assemblyman, Ormsby County, Carson City, Nevada.

Gentlemen:

Reference is hereby made to your joint letter of February 27, 1951, wherein you request the opinion of this office upon the following matter:

At a joint meeting of the Carson City Board of Trustees, the Ormsby County Commissioners, the Board of School Trustees for Carson School District, and the Ormsby County legislative delegation, which was held in the District Court Rooms, Carson City, February 23, the legislative delegation was requested by this joint meeting to obtain from your office an opinion on the legality of combining the governing bodies of the city of Carson and the county of Ormsby, without sacrificing the Carson City charter.

The proposal set forth would provide for a governing body to consist of five members, three of which would be elected from the county at large, and two would be elected from within the confines of the city of Carson.

The plan would be to embrace the entire county into the city of Carson, zoning all territories situated outside the city proper, for purposes of taxation.

An early opinion would greatly be appreciated in order to make it possible for the necessary enabling legislation to be passed at the present session of the Legislature, in the event the community should desire that this be done.

OPINION

The inquiry presents a question of constitutional law. The plan proposed, if perfected, would result in the combining of the governing boards of Carson City and Ormsby County, thereby materially changing the composition and election of the members of the combined board and at the same time retain the Carson City charter, and, as stated, embrace the entire county into the city of Carson, zoning all territory situate outside of the city, for purposes of taxation. Would such a plan effect a constitutional change of form of county government and the combining

thereof with a form of municipal government? This office is of the opinion that such a plan would not effect a constitutional change in the scheme of government for the following reasons:

Ormsby County was created pursuant to an Act of the first Territorial Legislature, approved March 25, 1861, Chapter XXIV, page 50, Laws of Nevada 1861, section 1867, N.C.L. 1929. All counties created by the territorial legislature, as well as all counties thereafter created, were brought within the purview of the Constitution of this State in 1864, and made subject to all of its provisions relating to counties.

The Constitution provides:

1. "The legislature shall establish a system of county and township government, which shall be uniform throughout the state." Sec. 25, Art. IV, Const.
2. "The legislature shall provide by law for the election of a board of county commissioners in each county, and such county commissioners shall, jointly and individually, perform such duties as may be prescribed by law." Sec. 26, Art. IV., Const.
3. "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * regulating county and township business, regulating the election of county and township officers * * *." Sec. 20, Art. IV, Const.
4. "In all cases enumerated in the preceding section and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Sec. 21, Art. IV., Const.
5. "The legislature shall not abolish any county unless the qualified voters of the county affected shall at a general or special election first approve such proposed abolishment by a majority of all voters voting at such election. The legislature shall provide by law the method of initiating and conducting such election." Sec. 36, Art. IV., Const., as added at the general election of 1940. We express no opinion as to the effect of this provision of the Constitution with respect to the abolishment of a county. No case has arisen thereunder. What would become of the territory comprising a county in the event its people voted to abolish it is still in the realm of speculation.

Thus, the Constitution has created a county government that in its basic concept must be uniform throughout the State. In this respect the governing boards, i.e., the Boards of County Commissioners, being constitutional officers, must be provided for and elected by provisions of statute or statutes of uniform operation throughout the entire State and their offices cannot well be abolished, and, we think, cannot well be converted into governing offices under a municipal charter enacted to incorporate a town or city, without a constitutional amendment so permitting. It was long ago held in *State v. Tilford*, [1 Nev. 240](#), [that county](#) offices designated in the Constitution cannot be abolished without a constitutional change.

The Supreme Court of this State, we think, recognized this principle of constitutional law in the case of *State ex rel. Rosenstock v. Swift*, [11 Nev. 128](#), wherein the charter of Carson City, enacted at 1875 Statutes, page 87, was drawn in question. One of the objections being that the charter provided that certain of the county officers were made ex officio city officers inasmuch as their respective duties under the charter and the statutes fixing their duties as county officers were closely analogous. The Court held as to these officers that such ex officio duties were legally provided. However, as to the board of trustees a different rule was most inferentially adopted. The charter contained a provision that the first board of trustees, naming them, were to be appointed by the Legislature, thereafter such trustees were to be elected by the electors of Carson City. It was contended the Legislature had no power to appoint the first trustees, in that such power belonged only to the electors of the city. The Court sustained the first appointment and then said:

But it is claimed that the legislature, by conferring these city offices upon the county officers, have permanently deprived the citizens of the state, residing within the municipal subdivision, of a fundamental right: the right of local self-government.

The existence of a fundamental right of municipal local self-government, is necessarily dependent upon some constitutional grant or manifest implication,

neither of which can be found in the constitution of this state. Hence, 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. Its officers or agents, who administer its affairs, are created by the legislature, and chosen or appointed in the mode prescribed by the legislature, and chosen or appointed in the mode prescribed by law of its creation. (*People v. Coon et al.*, 25 Cal. 649; *Giovanni Herzo v. San Francisco*, 33 Cal. 134; *Payne et al. v. Treadway*, 16 Cal. 220.) Nevertheless, the principle of local self-government has always been recognized, to a certain extent, by the legislature of this state in the passage of statutes creating and providing for the government of municipal corporations, and the selection of officers and agents to administer the affairs of such corporations has generally been intrusted to the electors of the respective municipalities, or their appointment committed to the authorities thereof; and it cannot, with propriety, be said that the legislature have wholly disregarded this principle in the passage of the act under consideration, because by section 3 of the act the entire government of the city is vested in a board of trustees, to consist of five members, who are required to be actual residents and owners of real estate in the city, and to be chosen by the qualified electors thereof.

An examination of the general law on the instant question discloses, we think, that it would require a constitutional amendment in order to constitute the proposed plan a valid scheme of local government.

In *Kahn v. Sutro*, 46 Pac. 87, the Supreme Court of California had under consideration the validity of the creation of the City and County of San Francisco. It clearly appears in such case that the Constitution of California clearly sanctioned the creation of such an entity, the Court pointing out:

The fact that a county essentially differs from a city does not prove that a city may not contain the features of a county organization. Cities and counties may be distinct organizations in the state generally, but the constitution may by special provisions establish a body which shall have the peculiar powers and obligations of a municipal corporation, properly so called, and yet shall bear those relations to the sovereign power which constitutes a county. (Page 90, 46 Pac. Rpt.)

See, also, People ex rel. Elder v. Sours (Colo.), 74 Pac. 167, wherein the constitutional provision consolidating the county of Arapahoe and the city of Denver was exhaustively examined and clearly showing the necessity for such constitutional sanction.

We think the question presented in the inquiry has been definitely determined and disposed of in the case of *Schweiss v. The First Judicial District Court of the State of Nevada*, in and for Storey County, [23 Nev. 226](#). The Legislature in 1895 enacted a statute entitled, "An act to incorporate Storey County and provide for the government thereof," approved March 15, 1895, being Statutes of 1895, page 73. The intent and the effect of this Act was to create a municipal corporation of the entire county of Storey and to, in effect, abolish the incorporated governments of Virginia City and Gold Hill, and making the Board of County Commissioners the governing board of an incorporated municipality. The Court held such Act wholly unconstitutional upon the following grounds, quoting from the syllabus:

County—Quasi Corporation—Powers.—A county is not a municipal corporation, in the full sense of the term. It is only a quasi corporation, and possesses such powers and is subject to such liabilities only as are specially provided for by law.

Idem—Constitutional Law—Government Uniform.—Art. IV, sec. 25, Constitution of Nevada, which requires the legislature to establish a system of

county governments, which shall be uniform throughout the state, means that all county governments must, in all essential particulars, be alike.

Idem—Storey County.—The act of the legislature of March 15, 1895 (Stats. 1895, p. 73), entitled “An act to incorporate Storey county and provide for the government thereof,” is void because in conflict with that section (Sec. 25, art. IV) of the constitution in many particulars.

Idem—Local and Special Act.—It is also a local and special act regulating county business, and consequently in conflict with sec. 20 of art. IV, of the constitution, which forbids such legislation.

There has been no constitutional change since the decision in the Schweiss case that will admit of a different conclusion as to effect thereof upon the instant question.

It is, therefore, the considered opinion of this office that the proposed plan set forth in the inquiry cannot be legally effected until a constitutional provision providing therefore adopted.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-27. COUNTIES—CITIES—Cooperative agreements for use of common facilities, Chapter 94, Statutes of 1943, construed.

Carson City, March 8, 1951.

Mr. Donald M. Leighton, City Attorney, Winnemucca, Nevada.

Dear Mr. Leighton:

Reference is hereby made to your letter of March 5, 1951, requesting the opinion of this office concerning the charging of rental by the Board of County Commissioners of Humboldt County to the city of Winnemucca for the use of the county jail. You state that the County Commissioners adopted a resolution in which the city was to be charged a rental of \$100 per month for the use of such jail. You state that you have been instructed by the City Council to obtain an opinion of this office upon the matter.

Your inquiry is as follows:

- (1) Would a cooperative agreement for the joint use of the County Jail, by the City and County, come under the agreements authorized by Sec. 2212 of the Nevada Compiled Laws, 1949 Supplement?
- (2) Under the provisions of Secs. 1128 (77), can the Board of County Commissioners properly charge rental for the use of the County Jail by the City of Winnemucca, for imprisonment of City prisoners?
- (3) Under Sec. 2212, would the participation of the City in a joint use agreement, affecting the County Jail, be limited to expenses which are properly defined as “incident to and necessary for the joint participation”?
- (4) Would a portion of the salary of one of the jailers be, more properly, an expense as above defined?

OPINION

It has been the policy of this office for many years not to render opinions to incorporated cities and towns for the reason that, under the law, the Attorney General is not required to render official opinions except to State officers, State boards and commissions, and to district attorneys. However, your request for an opinion also concerns the county and county business and for that reason we have consented to render this opinion.

Answering query (1)—It is the considered opinion of this office that a cooperative agreement for the joint use of the county jail by the city and county comes within the provisions of the Act of 1943 authorizing County Commissioners and city councils to enter into cooperative agreements for the joint use of any personnel, equipment or facilities. Chapter 94, page 119, Statutes of 1943.

Answering query (2)—Assuming that the city of Winnemucca was and is incorporated under the General Incorporation Act for cities and towns, of which section 1128, subdivision 77, N.C.L. 1929 is a part, we are of the opinion that there is no prohibition contained therein against the County Commissioners charging rental for a county jail when used by an incorporated city for the reason we find no such condition imposed in subdivision 77 or elsewhere in the statutes of this State. Whether the amount of rental is an equitable proposition really does not enter into an opinion upon the abstract interpretation of the law.

Answering query (3)—We think that section 2 of the 1943 Act is susceptible to the construction that the Board of County Commissioners and the city may enter into an agreement whereby the city would pay monthly rental for the use of the jail in lieu of participating in expenses for the operation of the jail. In our opinion this is a matter of contract between the respective entities, and, while a prorating of the expenses for operating the jail would probably be a more equitable method of procedure, still, we cannot say as a matter of law that the commissioners cannot charge a rental. And in this connection, we desire to point out that in the negotiation of a contract of the nature in question here, and which should be given due consideration by the Board of County Commissioners, that there was enacted in 1861 the statute relative to the construction and maintenance of jails. This statute is still effective and its sections 11520-11530, N.C.L. 1929. Section 11520 provides:

There shall be built, or provided, kept, and maintained in good repair, in each county, one common jail, at the expense of the county.

While this particular section provides for the construction and maintenance of common jails, still, we must remember that such statute was enacted prior to the general Act incorporating cities and towns, and also such special Acts as were thereafter enacted, and by reason of the later Acts relating to cities and towns, particularly where they were and are empowered to construct their own jails, it is most reasonable to suppose that counties may require rental or other financial assistance from cities and towns in the maintenance of the jail. However, the term “common jail” also implies that it is to be used where necessary by all entities. We think there is no doubt that the citizen taxpayers of the city of Winnemucca have in the past paid taxes for the retirement of bonds for the construction of the courthouse and jail and also have been taxed for the maintenance thereafter, so, in the final analysis, it would seem that most equitable agreement should be entered into between the county and city with respect to the use of the jail.

Answering query (4)—We are in agreement that a portion of the salary of one of the jailers could be properly set up as an expense for the operation thereof.

This office has never been called upon to prepare any form for joint participation of agreements as contemplated under the 1943 Act.

Respectfully submitted,

W.T. MATHEWS
Attorney General

cc: Hon. James A. Callahan, District Attorney, Humboldt County, Winnemucca, Nevada.

OPINION NO. 51-28. A MEMBER OF THE STATE SENATE while holding such office may not be appointed a member of the State Tax Commission Board.

Carson City, March 21, 1951.

Hon. E.L. Nores, State Senator, Lincoln County, Senate Chambers, Carson City, Nevada.

Dear Senator Nores:

This will acknowledge receipt of your letter of March 7, 1951, submitting the following inquiry:

QUERY

I have a chance of being appointed on one of the important State Boards of Nevada.

Kindly let me know if this will jeopardize in any way my present standing in the State Senate as well as the future. An early opinion in this matter will be greatly appreciated.

STATEMENT

The Constitution of Nevada, Article IV, section 8, contains the following provisions:

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.

To give our opinion a specific application, and remove the abstract character of your inquiry, we were informed by you that your term of Senator continues until the next general election, and that the State board in question is the Tax Commission.

OPINION

The section of the Constitution quoted above is plain and unmistakable, if the emoluments provided for the members of the Tax Commission have been increased in the present session of the Legislature.

There is a further provision in the Constitution which requires attention to determine the compatibility when an office is held in more than one department of government by the same person. Article III, section 1 of the Constitution provides as follows:

The powers of the government of the State of Nevada shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

There is no direction or permission in the Constitution relative to the present question.

The Tax Commission is composed of the Governor and six commissioners who are appointed by the Governor. Each of the members, except the Governor and the Public Service Commissioner, is required to furnish bond and subscribe to the official oath. The office of commissioner is not a mere agency or employment, it is a public office. The Tax Commission is an administrative department within the executive department and has supervision and control over the entire revenue system.

Express provisions of the law declaring this separation of duties have the effect of prohibiting an officer in one department from holding at the same time an office in either of the others. 42 Am.Jur., sec. 63, page 930.

In the case of *Gibson v. Kay*, 137 P. 865, a State Senator, whose term had not expired, instituted a mandamus proceeding to compel the State Treasurer to pay his claim for compensation under appointment by the corporation commissioner to assist him in the performance of his duties. One of the reasons for the decision of the Court was that the Senator was a member of the Legislature when the position of assistant was created. The Court, however, after referring to a provision in the Oregon Constitution like that of the Nevada Constitution held:

There is a further reason for not upholding the claimant in the situation involved. It is said in section 1, art. 3, of the state constitution that the powers of the government shall be divided into three separate departments, the legislative, executive, including the administrative, and the judicial; no person charged with official duties in one of these departments shall exercise any of the functions of the other, except as in this constitution expressly provided.

As stated by the Court in *Gibson v. Mason*, 5 Nevada 283:

But another government, that of the State, is formed, which is usually clothed with all the sovereign authority reserved by the people from the grant of powers in the Federal Constitution. This is accomplished in this as in all the States but once, by means of the Constitution adopted by themselves, whereby all political power is conferred upon three great departments, each being endowed with and confined to the execution of powers peculiar to itself.

The language employed in Article III, section 1 of the Constitution is with sufficient precision to convey the intent. It does not merely indicate principles, but lays down a rule which forbids an officer in one of the three departments of government from holding at the same time an office in either of the other departments.

Section 9021, N.C.L. 1929, provides that the common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision of all the courts of this State.

Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right so to do. This limitation operates upon offices that are in their nature incompatible, for it is a settled rule of the common law that a public officer cannot hold two incompatible offices at the same time. 42 Am.Jur., sec. 59, page 926.

One of the tests is if one office is subordinate to the other. Ann.Cas. 1915A, 529.

The office of State Senator legislates on matters that control the administration of the State Tax Commission and the Tax Commission is subordinate to the office of Senator.

Therefore, we must conclude that the office of State Senator and membership on the State Tax Commission is incompatible so long as the incumbent Senator retains such office.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-29. REVISED OPINION REGARDING SURPLUS REQUIREMENT FOR A DOMESTIC STOCK COMPANY doing life, accident and health insurance business, when issued annual license.

Carson City, March 19, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Dear Sir:

The following is the conclusion we have reached after a reconsideration of our opinion given you on March 1, 1951, respecting the requirement that a domestic stock company doing life, accident and health insurance business must meet the surplus requirement when each annual license thereafter is issued.

STATEMENT

After a consideration of the effect upon a solvent company of the conclusion reached in the former opinion from this office, and the information from the director of the insurance department of the State of Illinois, the State from which the Nevada Insurance Act was copied, that the Illinois department since the year 1937 had construed section 13, subparagraph 2, to mean that the surplus was only required for organization, and from an exhaustive examination of the general law on the question, we have changed our opinion to a more liberal construction of the Act.

OPINION

Article 2 of the Insurance Act relates to the organization of domestic companies, either stock or mutual, transacting or being organized to transact any kinds of insurance business enumerated in section 5 of the Act, as amended by Chapter 50, Statutes of Nevada 1949.

Section 13 of Article 2 provides that a stock company organized under this article shall have and at all times maintain a paid-up capital of the amount set forth in its articles of incorporation, which amount shall not be less than the minimum capital requirement applicable to the class and clause or clauses of section 5 describing the kind or kinds of insurance which it is authorized to write. Class 1(a) is defined as life insurance, and class 1(b) as accident and health. The table in section 13 requires a minimum capital of \$125,000 for a company doing class 1(a) and (b) insurance.

Subsection 2 of this section contains the following language: “A company in addition to the minimum capital required by subscription (1) shall have at the time of issuance to it of a license, a paid-in surplus of not less than fifty (50%) percent of its required minimum capital.”

The article applies to the organization of companies and the issuance to a company which qualifies, of a license to commence business. The paid-in surplus is an additional requirement at such time. This license is the granting of a franchise to do business. The franchise is continued upon the company complying with the law and paying an annual license.

Article 9 of the Insurance Act applies to rehabilitation, liquidation, conservation and dissolution of companies. Section 66 defines the grounds for rehabilitation, reorganization and liquidation of domestic companies. Fourteen grounds are defined in the section. Paragraph (h) provides as follows: “Is found to be in such condition that it could not meet the requirements for organization and authorization as required by law, *except as to the amount of the surplus required of a stock company in section 13*, and except as to the amount of surplus required of a mutual company in excess of the minimum surplus required by this act to be maintained.” (Italics supplied.)

The latter part of section 66 provides for the filing of a petition in the Court for the appointment of a receiver, if the commissioner finds that any of the grounds enumerated exist and that the same cannot be reasonably removed.

The appointment of a receiver in such cases is extreme in its effect and it is evident from the use of the language italicized that if a company can meet the requirement for organization and is solvent as shown by examination, it is not required to maintain the paid-in surplus to establish its solvency.

As stated in 45 Am.Jur. page 46: “In various cases the courts have pointed out the reluctance with which such drastic relief as the appointment of a receiver is granted, and the broad rule has been laid down that the appointment of a receiver for a solvent company is a duty which should not be performed unless, after a careful examination of all the facts in the case, the court is convinced that under the circumstances it is an absolute necessity and that irreparable injury will result from refusal to do so.”

“A statute may provide that where the capital of an insurance company is impaired to a certain proportionate amount, a certain public officer may require the company to make up the deficiency, or cease doing business, but under such a statute it does not necessarily follow, from the facts that such condition exists, that the company is to be deemed insolvent. Nor is an insurance company insolvent when the value of its property is greater than the amount of its liabilities and it is able to pay its debts when they mature, although the excess of the value of its property above its liabilities may be less than the par value of its stock.”

Cyclopedia of Insurance law, Couch, Vol. 8, sec. 2037.

Section 13, subsection 2 uses the term “paid-in surplus,” which is applicable to the surplus when the company begins business as a result of stock issued at a price above par.

In *United North & South Development Co. v. Heath, Secretary of State*, 78 SW (2) 650, the Court said: “The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. The surplus may be ‘paid-in surplus,’ as where the stock is issued at a price above par; it may be ‘earned surplus’ as where it was derived wholly from undistributed profits, or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company’s fixed property.”

Therefore, when we test the question as to the required surplus at the time of issuing the annual license, taking into consideration the term “paid-in surplus,” the exception noted in section 66, paragraph (h), the drastic remedy provided, and that the company be deemed insolvent, it is evident that the statute should be construed to mean a paid-in surplus of 50 percent of the required capital before the issuance of the initial certificate to transact business, and not that such surplus must be shown thereafter at the time of the annual license.

Very truly yours,

W.T. MATHEWS

Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-30. ASSEMBLY BILL NO. 208, CHAPTER 94, STATUTES OF 1951,
relating to pensions for widows of justices of the supreme court, construed.

Carson City, March 27, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Dear Mr. Merialdo:

Reference is hereby made to your letter of March 26, 1951, requesting the opinion of this office with respect to the payment of benefits to widows and Justices of the Supreme Court and District Judges, being approved by Governor Russell, is now law. Section 1 of the Act provides that under certain conditions to the widow of a Justice or Judge is entitled to receive a pension of two hundred dollars per month. Section 2 of the Act is to the effect that the widow applicant must make application to the "board, commission, or authority entrusted with the administration of the judges pension act." The judges' pension Act appears in Vol. 1 of the 1931-1941 Supplement, sections 4481.01 to 4881.05. You inquire as follows:

- (1) To whom should the widow make her application for the pension;
- (2) What type of information should be required on the so-called application form;
- (3) What officer or officers have the authority to approve the application?

OPINION

Assembly Bill No. 208 is now Chapter 94, Statutes of 1951. The bill was amended by striking therefrom the words "or district judge," so that the law now relates to widows of Supreme Court Justices only. The bill was inartistically drawn and is somewhat ambiguous. However, the intent of the Legislature is clear, i.e., that a widow of a Supreme Court Justice, who was eligible to receive a pension pursuant to the judges pension Act in effect at the time of his death, is to receive a pension provided she qualifies therefor as provided in said Chapter 94.

To qualify for the pension provided in the Act, the widow is required to show:

1. That she has attained the age of sixty-five years and has not remarried.
2. That her husband prior to his death was eligible to receive a pension under the provisions of the judges pension act in effect at the time of his death. Sec. 1, Chap. 94.

To ascertain the qualifications of the deceased husband at the time of his death, it is necessary to examine the judges pension law in effect at that time. Such law was enacted in 1937, being Chapter 118, Statutes 1937, and is now sections 4481.01-4881.05, 1929 N.C.L., 1941 Supp. Section 1 of such Act reads as follows:

Any justice of the supreme court or any judge of the district court within the State of Nevada who has served as a justice or judge in any one ore more of said

courts for a period or periods aggregating twenty (20) years, when he or she reaches the age of seventy (70) years, and shall by resignation have ended such service, shall after such service of twenty years, and after reaching the age of seventy (70) years, be entitled to and shall receive annually from the State of Nevada, as a pension during the remainder of his or her life, so long as he or she remains a resident of Nevada, a sum of money equal in amount to two-thirds (2/3) the sum received as salary for his or her judicial services during the last year thereof, payable in monthly installments, out of any fund in the state treasury not otherwise appropriated.

This section was amended at 1947 statutes, page 404, reducing the retirement age of the Judge or Justice to 65 years, and providing a reduced retirement pension for Judges or Justices who had so served 16 years. The 1947 amendment was approved and became effective on March 27, 1947. In 1949 this section was further amended in 1949 Statutes 412, approved and effective March 28, 1949, reducing the retirement age to 60 years, with 15 years service required for reduced allowances.

Thus the eligibility for retirement of a Supreme Court Justice from 1937 to March 27, 1947, was that he shall have reached the age of 70 years and had served a period aggregating 20 years as a District Judge and/or Supreme Court Justice, or both, during such period. From March 27, 1947, to March 28, 1949, such Judge or Justice shall have reached the age of 65 years, with 20 years service shown, except for the reduced retirement allowance 16 years service was sufficient. From and after March 28, 1949, the age requirement was and is 60 years, with 20 or 15 years required.

From the foregoing 1937 Act providing for retirement pension for Judges and Justices of the Supreme Court, and the provisions of section 1 of the Widows' Pension Act, it is, we think, clear that the widow, in making application for the pension, must show the eligibility qualifications of her deceased husband at the time of his death and such eligibility qualifications must be those incorporated in the law in effect at that time, i.e., that the deceased Judge or Justice shall have reached the retirement age and shall have served the required number of years on the bench then and at the time of his death as provided in the law.

Further answering your inquiry as to whom the widow should make her application for the pension—Section 2 of Chapter 94 provides that to be entitled to receive the benefits the widow must make application to the board, commission, or authority entrusted with the administration of the Judges' Pension Act. An examination of the Judges' Pension Act (cited hereinabove) discloses no board or commission was created in that Act to administer it. The procedure to secure a pension under that Act was and is for the applicant to give notice in writing of his intention to retire to the Governor, and also file with the State Controller and State Treasurer an affidavit setting forth the facts entitling him to his retirement, i.e., his age and term of service as Judge or Justice, and the fact that he has resigned from the judicial post. This provision, we think, constituted and constitutes the named State officers the authority to administer the Judges' Pension Act, and that section 2 of the Widows' Pension Act authorizes the same authority to administer such Act.

We are advised that no rules or regulations have been promulgated by the foregoing officers for the administration of the Judges' Pension Act, save that a compliance with the statute has always been required. We suggest that rules requiring adherence to both pension Acts so far as deemed necessary in the making of applications for widows pensions can now be properly adopted.

As stated hereinbefore, the Act in question is not devoid of ambiguity, still we think that it is sufficiently clear to warrant the following conclusions with respect to procedure:

1. The widow to make application in writing to the Governor of her desire and right to receive the pension, giving therein her qualifications.
2. The widow, at the same time, shall file with the State Controller and with the State Treasurer, each, an affidavit setting forth therein all facts entitling her to

receive the pension as hereinabove in this opinion set forth, i.e., her age, marriage status, age of her husband at the time of his death, and the period of his service as Judge or Justice, as the case may be.

In conclusion, some question may be raised relative to the fund from which the widows' pension is to be paid. The Act is ambiguous in this respect, leaving the payment to be made out of any fund now or hereafter created for the purpose of paying benefits to Justices of the Supreme Court. Sec. 3 of the Act. No special fund was or is set up in the Judges' Pension Act. The language of that Act is that the pension is "payable in monthly installments, out of any fund in the State Treasury not otherwise appropriated." Secs. 1 and 3. We assume that judges' pensions have been paid out of the General Fund in the State Treasury, and that the widows' pensions will be paid from the same source.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-31. APPORTIONMENT OF FUNDS in aid to rural schools to be made under amendment effective March 22, 1951.

Carson City, March 30, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter of March 21, 1951. You request an opinion as to the interpretation of Assembly Bill No. 168, which was passed by the Legislature and approved by the Governor March 22, 1951.

STATEMENT

Chapter 63, Statutes of 1947, the School Code, sections 201-205, as amended by Chapter 259, Statutes of 1947, provided aid to rural schools. Section 201 established a fund in the State Treasury to be known as the "aid to rural schools." This section provided for the levy of a State tax to provide money for this fund, but by a proviso which declared that there was sufficient money in the fund at that time to provide the relief required for the next biennium the tax levy provided was waived for the years 1947 and 1949.

Assembly Bill No. 264 of the 1951 Legislature, approved March 20, 1951, amended section 201 and deleted the provision requiring a tax levy provided for this fund, leaving the other provision in the section applying to appropriation made by the Legislature for the purpose of aiding rural schools.

No appropriation was made by this Legislature for this purpose. The only money in this Aid to Rural Schools Fund is the balance which has been carried over from previous years.

Assembly Bill No. 168, approved March 22, 1951, amended section 205 of the School Code and provided that the amount to be paid as aid to the rural schools shall be the difference between \$3,200 in the case of a one-teacher school and \$6,400 in the case of a two-teacher school, and the amount determined in subparagraph 2 of the section to be available for the support and maintenance of the rural school for the then current school year after deducting the cost of

transporting pupils. This Act is made effective immediately upon passage and approval and shall expire June 30, 1953.

QUERY

Inasmuch as applications for rural aid have been received by March 15, should this calendar year's payments to rural schools be made under the amendment of 1947 which allowed for the year 1948 and succeeding years \$2,900 in the case of a one-teacher school and \$5,800 in the case of a two-teacher school, or should the apportionment be made under the provisions of Assembly Bill No. 168?

OPINION

Chapter 203 of the 1947 School Code provides that in order for a rural school to receive aid there shall have been levied in the district a tax of 25 cents on each one hundred dollars of assessed value of all taxable property in the district, and that such school for which participation is requested shall maintain the school for a period of nine months during the then current year.

Paragraph 3 of this section provides as follows: "On or before the 15th day of March of each year, file with the superintendent of public instruction a request for aid, which request shall be accompanied by a true copy of its budget for the then current year and by a statement from the county assessor showing the assessed valuation of all taxable property of that school district and the school district tax levy for the then current school year."

The required applications were received by the Superintendent by March 15 of the present school year.

Assembly Bill No. 168 was approved March 22, 1951. It amended section 205 to increase the amount to be paid to the rural schools, and provides in paragraph 4 that the sum provided in the amendment shall be paid to the County Treasurer as soon as practicable after the 15th of March each year. The section provided that all Acts and parts of Acts in conflict are repealed, made the amendment effective immediately upon passage and approval, and provided that it should expire June 30, 1953.

The previous action of the Legislature on this subject makes it apparent that the balance in the fund for aid to rural schools was deemed sufficient to meet the requirement of the amendment and no appropriation was made.

We are, therefore, of the opinion that if the apportionment for aid to rural schools was not made before March 15, 1951, such apportionment should be made under Assembly Bill No. 168, which will be chapter 271, Statutes of 1951. When the money in the aid to rural school fund is exhausted, there is no statutory authority to make the payments. Article IV, section 9, of the Constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-32. COUNTY HEALTH OFFICER not authorized or required to sign death certificates in event death is occasioned by suicide.

Carson City, March 30, 1951.

Mr. John J. Sullivan, Director, Division of Vital Statistics, State Department of Health, Carson City, Nevada.

Dear Mr. Sullivan:

Reference is hereby made to your letter of March 29, 1951, wherein you request the opinion of this office as follows:

This office today received a letter from a county health officer of this state in which he stated that he has been directed, following an investigation on the part of the police officer and deputy coroner, to sign a certificate of death for an apparent suicide. In this instance, the investigating officers had not conducted an inquest in accordance with state law. Is a county health officer authorized to sign certificates of death for deaths due to suicide or homicide?

OPINION

Section 8 of the State Board of Health Act, as amended at 1937 Statutes, page 162, the same being section 5242, 1929 N.C.L., 1941 Supp., provides as follows:

That in case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the local health officer of such death, and refer the case to him for immediate investigation and certification prior to issuing the permit; provided, where there is no qualified physician in attendance, and in such cases only, the local health officer is authorized to make the certificate and return from the statements of relatives or other persons having adequate knowledge of the facts; provided further, that if the death was caused by unlawful or suspicious means, the local health officer shall then refer the case to the coroner for investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit shall state in his certificate the name of the disease causing death, or if, from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal or homicidal; and shall, in either case, furnish such information as may be required by the state board of health in order properly to classify the death.

It is clear from the foregoing statute that where death has been caused by unlawful or suspicious means, including death caused by suicide, it is the duty of the coroner to make an investigation and thereafter to make his certification as to cause of death. It is clearly apparent that in the situation disclosed in your letter the county health officer was not authorized by law to sign the certificate of death.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-33. OLD-AGE RECIPIENTS are to receive three dollars additional to the maximum amount provided or to any lesser amount to which they may be eligible.

Carson City, March 30, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

This will acknowledge receipt of your letter of March 28, 1951, in this office March 29, 1951, requesting an interpretation of Assembly Bill No. 346 respecting payments to old-age recipients.

QUERY

(1) Does the provision for the additional \$3 per month to be paid from State funds mean that the maximum individual payment which can be made is now \$58 per month?

(2) If so would the determination of eligibility for payment up to the new maximum be made in accordance with the provisions of sec. 3 of the Old-Age Assistance Act, taking into account the individual's available resources and necessary expenditures?

OPINION

Section 14 of the Old-Age Assistance Act is amended by Assembly Bill No. 346, which will be Chapter 317, Statutes of Nevada 1951. This section provides for the levy and collection of a tax in each county to provide a fund sufficient to pay old-age assistance expenses to be paid by each county. The sentence in the section that is amended reads as follows: "The proceeds of such tax so collected in each county in this state shall be placed in a fund in the county treasury thereof and shall be designated the 'old-age assistance fund' out of which such county treasurer shall, for convenience and economy in administration and in auditing accounts, transmit to the state treasurer monthly, or quarterly, at the time required by the rules and regulations of the state board, the full amount of old-age assistance, after deducting federal matching, *not counting so much of such expenditure with respect to any individual for any month as exceeds fifty-five dollars (\$55)*, to be paid in that county pursuant to section 3 of this act as certified to him by the county clerk of that county." The italics are supplied by us to call attention to the language added by the amendment.

Section 15 of the Act is also amended by the foregoing chapter and reads as follows:

The funds to pay for the state's participation in old-age assistance under this act shall be provided by direct legislative appropriation from the general fund, sufficient to produce enough money to pay the state's one-half of the total amount, after deducting federal matching of such old-age assistance *up to a maximum payment to an individual of fifty-five dollars (\$55) per month plus an additional amount per individual as determined by the legislature*, and administration thereof, as provided for in this act. Such fund in the state treasury shall be known and designated as the "State Old-Age Assistance Fund," out of which the state's portion of the old-age assistance provided for in this act shall be paid upon warrants drawn by the state controller and paid by the state treasurer as hereinafter provided. *The additional amount hereinabove referred to shall be three dollars (\$3) per month.* (Emphasis supplied.)

The language in section 14 limits the amount of the county participation in the payment with respect to any individual for any month as exceeds \$45.

Section 15 provides that the State's participation in payments to an individual shall be up to a maximum payment of \$55 per month.

The maximum payment per month to an individual, in which the State and county and Federal government participate according to the ratio fixed by the State statute and the Federal

regulations, is \$55. The \$3 additional payment provided for in section 15 is an increase to any amount allowed, not exceeding the maximum. It is paid out of the State fund independent of the payment ratio for Federal, State and county.

The answer to your second question is that the eligibility for payment up to the new maximum should be made in accordance with the provisions of section 3 of the Act relative to resources and necessary expenditures of the individual. When the amount of the allowance is determined, whether it be \$10 or \$55, under the provisions of section 15 of the fixed amount of \$3 should be added, and the same should be paid out of the State fund.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-34. EXEMPTION OF PRIVATE MOTOR CARRIERS limited to location of principal place of business.

Carson City, April 4, 1951.

Public Service Commission, Carson City, Nevada.

Attention: Lee S. Scott, Secretary.

Gentlemen:

This will acknowledge receipt of your letter of March 30, 1951, requesting the opinion of this office on the following question:

Is a private carrier of property exempt from obtaining private carrier licenses when operating within a five-mile radius of a city or town which is not a city or town in which the carrier makes his home or place of business? For instance, a resident of the city of Las Vegas, where he resides and has his business headquarters, shops, garages, etc., claims he is exempt from the payment of private carrier licenses under this exemption when operating within a five-mile radius of the city of North Las Vegas; also, because he has procured a business license in North Las Vegas.

OPINION

Section 4437.02, 1929 N.C.L., 1941 Supp., as amended by Chapter 237, 1947 Statutes 754, provides as follows:

None of the provisions of this act shall apply to any motor vehicle, operating wholly within the corporate limits of any city or town in the State of Nevada; nor to United States mail carriers operating star routes, when not engaged in other business as a common or contract carrier; nor to city or town draymen and private

motor carriers of property operating within a five-mile radius of the limits of a city or town; * * *.

This office construed this particular section in Attorney General's Opinion No. 303, 1944-1946 Biennial Report, as it pertained to taxicabs which were operating between Reno and Sparks and we quote here a portion of that opinion which is analogous to the problem you have presented:

We are of the opinion that the exemption provided in section 3, Statutes of 1933, as amended by chapter 219, Statutes of 1945, extends only to taxicabs which have an established place of business in the city issuing the license, and such taxicabs must confine their service within that city. To operate beyond the corporate limits of such city will require the proper certificate from the Public Service Commission. The fact that the corporate limits of the two cities are contiguous does not change the construction of the statute.

Section 3, chapter 165, Statutes of 1933, as amended by chapter 219, Statutes of 1945, quoting the language deemed relevant, reads as follows: "None of the provisions of this act shall apply to any motor vehicle operated wholly within the corporate limits of any city or town in the State of Nevada * * *."

See also, Continental Baking Co. v. Woodring, 55 F.2d 347.

Although it is not the identical portion of the section that is in question here, we are of the opinion that the same rule should apply. It is, therefore, our opinion that "within a five-mile radius of the limits of a city or town" has reference to the particular city or town wherein the principal place of business is located.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-35. CONTRACEPTIVES—Vending machines illegal.

Carson City, April 5, 1951.

Hon. Paul D. Laxalt, District Attorney, Ormsby County, Carson City, Nevada.

Dear Mr. Laxalt:

This will acknowledge receipt of your letter of April 3, 1951, requesting the opinion of this office as follows:

QUERY

In light of sections 10133 to 10137, inclusive, 1929 N.C.L., can machines which vend contraceptives be legally installed, exhibited and used in the State of Nevada?

STATEMENT

The following sections, 10133 and 10137, N.C.L. 1929, are the legislative expression of public policy relative to devices to prevent conception or pregnancy in women:

10133. Advertising goods to prevent conception. It shall not be lawful for any person to advertise or publish, or cause to be advertised or published in a newspaper, pamphlet, handbill, book, or otherwise, within this state, any medicine, nostrum, drug, substance, or device for the prevention of human propagation, or which purports to be, or is represented to be, a preventative of conception or pregnancy in women.

10137. *Idem.*—Circulation of publications containing prohibited matter forbidden. Every person who shall knowingly sell, distribute, give away, or in any manner dispose of or exhibit to another person any newspaper, pamphlet, book, periodical, handbill, printed slip, or writing, or cause the same to be sold, distributed, disposed of, or exhibited, containing any advertisement prohibited in sections 186 or 187 of this act, or containing any description *or notice of, or reference to, or information concerning, or direction how or where to procure any medicine, drug, nostrum, substance, device, instrument, or service,* the advertisement of which is herein prohibited or declared to be unlawful, shall on conviction thereof, be liable to the same punishment as prescribed in section 187 of this act; provided, that nothing in this act shall be construed to interfere with or apply to legally licensed physicians in the legitimate practice of their profession. (Italics ours.)

OPINION

As will be noted above, notice of or reference to, or information concerning, *or direction how or where to procure* any medicine, drug, nostrum, substance, device, etc., is unlawful.

A vending machine merely having instructions as to the place for coin insert is a direction how or where to procure the contents of said machine.

It is unnecessary to allude to numerous authorities to substantiate that a word or words, a design or illustration, can through common usage or association become to mean “Prophylactic or Contraceptic.” That a secondary meaning has been attached to a particular word is clearly shown in the case of *People v. Pennock et al. (1940)*, 293 N.W. 759, 294 Mich. 578. Justice North of the Supreme Court of Michigan, holding it unlawful to display or advertise prophylactics, said:

The word “Latex” means a rubber substance, but has become associated with the sale of prophylactic rubber goods to purchasers of these articles in the City of Detroit.

Justice North in referring to a city ordinance likened to the statutes of this State, above mentioned, proceeded further:

It may be admitted that the sale and use of the articles contemplated in this ordinance are under certain conditions wholly legitimate and even essential to public health and welfare; but as disclosed by the testimony, indiscriminate merchandising of these articles *which renders them offensively available and tends to encourage their use for other than legitimate reasons,* is a menace to public morals and public welfare. Therefore traffic in them is subject to regulation within the police power of the city. It was not an abuse or an excessive exercise of the police power by the city to enact an ordinance making it unlawful to display such articles for sale or to advertise the same for sale. (Italics ours.)

It is, therefore, the opinion of this office that the installation and exhibiting of vending machines containing contraceptives is a menace to public morals and public welfare and is in violation of the laws of this State, 1929 N.C.L. 10137.

Very truly yours,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-36. PUBLIC SCHOOLS—Property owned by a member of school board may not be purchased by school board of which the owner is a member.

Carson City, April 5, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Department of Education,
Carson City, Nevada.

Dear Mr. Duncan:

You request the opinion of this office as to the legality of the purchase of property adjoining a school site, the ownership of which belongs to a member of the school board concerned.

OPINION

After a thorough consideration of the facts presented by your office it would seemingly be a proper act by the school board to purchase the property herein concerned, but for the fact that the owner of said property is a member of the school board. The facts so presented meet all the necessary requirements to a valid contract of purchase if such contract were with other than a member of the school board.

This office is constrained to so hold because the law of the State of Nevada has since 1866 been clear that a member of *any* board, common council, a trustee or commissioner shall not have any pecuniary interest in a contract made by or entered into by any such board or body.

Section 296, 1947 Stats. 214, referred to in your letter of inquiry is a relatively recent expression of the legislative intent. Section 71 of "An act concerning public schools," approved March 20, 1911, being section 5720, N.C.L. 1929, is as follows:

No trustee shall be pecuniarily interested in any contract made by the board of trustees of which he is a member.

Section 4827, N.C.L. 1929, approved March 9, 1866, is as follows:

It shall not be lawful for any officer of state, or member of the legislature, alderman, or member of the common council of any city in this state, or for the trustees of any city, town, or village, or for any county commissioners of any county, to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature, or either branch thereof, or by or for the aldermen or common council,

board of trustees, or board of county commissioners of which he is a member, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.

Section 10015, N.C.L. 1929, approved March 19, 1911, is as follows:

Every public officer who shall— * * * Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; * * *.

Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void.

In view of the consistency in which the Legislature has declared the policy of this State, this office is of the opinion that no valid contract for the purchase of the school site can be entered into with the owner thereof being a member of the board of school trustees.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-37. INJURIOUS AND NOXIOUS WEEDS—Halogeton Glomeratus.

Carson City, April 9, 1951.

Mr. George G. Schweis, Director, Division of Plant Industry, Department of Agriculture, P.O. Box 1027, Reno, Nevada.

Dear Mr. Schweis:

This will acknowledge receipt of your letter of March 29, 1951, presenting the following questions in light of Senate Bill No. 38 recently enacted.

(1) What is the responsibility of the County Commissioners in providing funds for control of injurious weeds on public lands?

(2) If the counties have a responsibility in providing funds, is it necessary that halogeton be declared a noxious weed, or is it sufficient that it be declared an injurious weed?

STATEMENT

Senate Bill No. 38, approved March 22, 1951, directs that the State Department of Agriculture conduct a study on the poisonous plant halogeton glomeratus, covering its distribution and prevalence, poisonous properties for livestock and means of combatting and controlling same.

The legislative expression indicates concern over the propensities of the plant halogeton necessitating a study to determine the extent of its detrimental effect. The result of said study to determine its properties, method of combatting and its control.

OPINION

(1) Section 420, N.C.L. 1929, clearly sets forth the responsibility of County Commissioners in the control of injurious weeds on public lands. Said section provides as follows:

Whenever any injurious or noxious weed, or weeds, are found growing upon the public domain, or any other lands in this state owned by the federal government, the state quarantine officer shall serve notice, as provided in section three of this act, upon the board, or boards of county commissioners of the county, or counties, wherein such lands are located, to cut, destroy, or eradicate such weeds in accord with the provisions of the notice so served. Any expense of cutting, destroying, or eradicating injurious or noxious weeds upon the public domain, or other lands owned by the federal government, in accord with the provisions of this section, shall be paid from the general fund of the county, or counties, concerned; provided, that the total amount expended by any county under the provisions of this section in any one calendar year shall not exceed an amount equal to a tax levy of five (5) cents upon each one hundred dollars (\$100) of the total assessment roll of said county.

(2) Section 414, N.C.L. 1929, provides among other things that the State Quarantine Officer is authorized and empowered to designate and declare by regulation the injurious and noxious weeds of the State of Nevada.

In view of the provision above referred to, the opinion of this office is that the plant halogeton glomeratus may be declared either injurious or noxious by the State Quarantine Officer. However, to give full force and effect to the recently enacted Senate Bill No. 38, the question as to whether or not said plant is noxious or injurious must be determined by the results of the study contemplated by the Legislature. The duty to conduct said study, as aforesaid, is placed upon the State Department of Agriculture.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-38. APPLICATION FOR REGISTRATION OF AUTOMOBILE should be made in county where applicant resides and taxes collected or placed on assessment roll of such county. veteran when not in actual military service should make application for exemption before county assessor of his county.

Carson City, April 9, 1951.

Hon. Jon R. Collins, District Attorney, White Pine County, Ely, Nevada.

Dear Mr. Collins:

This will acknowledge receipt of your letter in this office April 5, 1951.

You request an interpretation of section 6418, N.C.L. Supp. 1949, as amended by Chapter 22, Statutes of 1949.

STATEMENT

A resident of White Pine County, an honorably discharged veteran of the United States military forces had filed his affidavit for exemption from taxation in White Pine County within the time required by statute. The veteran at the time of filing owned no taxable property to which the exemption would apply. He subsequently purchased an automobile in Clark County, and was required to secure 1951 license plates and pay the personal property taxes on the car to the Clark County Assessor.

The Assessor refused to recognize a copy of the affidavit forwarded by the Assessor of White Pine County, and statement by such Assessor that the exemption had not been utilized by the veteran. The Clark County Assessor relied on the statute which provides that such exemption is claimed in no other county, and that the veteran must file his exemption claim in person before the Clark County Assessor or one of his deputies in order to secure his exemption from taxation on the personal property.

QUERY

Under the statute and the facts of the case, can the veteran claim his tax exemption in Clark County without appearing personally before the Clark County Assessor or his authorized deputy.

OPINION

Chapter 22, Statutes of Nevada 1949, amended section 5 of the Act to provide revenue for the support of the government, the same being section 6418, N.C.L. 1929, as amended by Chapter 32, Statutes of 1945, and by Chapter 200, Statutes of 1947.

The section provided certain exemptions from taxation. The seventh subsection under this section provides a certain exemption to any person who has served or is still serving in the armed forces of the United States in time of war. Quoting that part deemed relevant to the question presented, the language is follows:

* * * Such exemptions shall be allowed only to claimants who shall make an affidavit annually, on or before the third Monday 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; * * * and provided further, that the assessors of each of the several counties of this state shall require, before allowing any veteran's exemption pursuant to the provisions of this act, proof of status of such veteran, and for that purpose shall require production of an honorable discharge or certificate of service or certified copy thereof, or such other proof of status as may be necessary, * * *.

It is evident from the language in the statute, "before the county assessor," that the claimant not in actual service must appear in person and make his affidavit. The County Assessor at such time is directed to require proof as to the status of the claimant.

Notwithstanding this provision in the revenue statute, the statute relating to the registration of motor vehicles would apply in the case presented in the statement.

Section 6 of the Act to require the registration of motor vehicles, as amended by Chapter 233, Statutes of 1949, in subsection (b), quoting the language deemed relevant, reads as follows:

Application for the registration of a vehicle herein required to be registered shall be made in the office of the department, located in the county within the State of Nevada of which the owner shall be a resident, * * *.

Section 11 of the Act, as amended by Chapter 218, Statutes of 1949, provides that the applicant must pay the registration fee and the personal property tax on the vehicle registered before receiving a license and certificate of registration. If the applicant is the owner of real estate and improvements in the county in which the application is made, payment of the personal property tax may be deferred if the vehicle so owned is placed forthwith on the real property roll.

From these sections it is clear that the application for registration, the payment of registration fees, and the payment or securing of payment of personal property taxes must be in the same county in which the owner of the vehicle actually resides.

See Attorney General's Opinion No. 205, 1944-1946 Report.

Therefore, it appears from the statute that the veteran in question was not required to pay the personal property tax in Clark County on the car purchased in that county. The tax should be paid in White Pine County, the county in which the veteran resided.

The statute in effect at the present time, which requires the annual filing of an affidavit for such exemption on or before the third Monday in August, is confusing when applied to cases like the one presented. This, however, has been remedied by Chapter 200, Statutes of 1951, which amends section 5 of the revenue Act. Under the seventh paragraph which requires the affidavit for exemption to be made annually on or before the second Monday in July, there is a provision that such affidavit may be made at any time by a person claiming exemption from taxation on personal property. However, this amendment does not fix an effective date and it will not become effective until July 1, 1951.

A general rule of law as stated in *Pettibone v. Cook County*, 31 Fed. Supp. 881, is that taxes paid under a mistake of law cannot be recovered. However, under section 6637, N.C.L. 1929, which provides the procedure for the obtaining of refunds of taxes under certain circumstances, one of which is that when in the opinion of the Board of County Commissioners of the county in which the taxes are paid, the applicant has a just cause for making an application for a refund, the same may be made if granting such refund would be equitable.

The purpose of the Legislature in granting a certain exemption in tax payments to veterans should not be defeated by a mistake in law of an official charged with the duty of collecting a tax.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-39. BOARD OF TRUSTEES OF SCHOOL DISTRICTS effected by federal activities in the district may accept grants of funds from the federal government without the necessity of an election to approve such acceptance.

Carson City, April 12, 1951.

Hon. L.E. Blaisdell, District Attorney, Hawthorne, Nevada.

Dear Mr. Blaisdell:

This will acknowledge receipt of your letter in this office on April 11, 1951, relative to the application by the board of trustees of Hawthorne elementary school district for funds under Title II of Public Law 815, 81st Congress, for construction of a schoolhouse in the district.

STATEMENT

The trustees of Hawthorne elementary school district No. 7, Mineral County, Nevada, have made application under the provisions of an Act of Congress providing for school construction in areas affected by Federal activities; Public Law 815, 81st Congress; U.S.C.A. Title 20, sections 251-280 U.S.C.A.

The copy of the application on file with the State Superintendent of Public Instruction shows that there are no funds available to defray any non-Federal share in the proposed construction of the school facility. The amount applied for is to defray the entire cost of providing an elementary school facility in the district which amounts to an entitlement of \$817,600. The application appears to be for an outright grant or gift from the Federal Government to bear the cost of the proposed school facility.

QUERY

May the entitlement determined by the Federal Commissioner of Education be received and expended by the Board of Trustees of the Hawthorne elementary school district for the construction of school facilities without a school election, considering Chapter 63, Statutes of Nevada 1947, and section 274(2) and section 285, or other applicable Nevada statutes?

OPINION

Chapter 63, Statutes of Nevada 1947, the School Code, section 246, provides as follows:

The trustees of a school district shall constitute a board for such district to be known as the board of trustees of the particular district naming it; and such board is hereby created a body corporate.

Section 247 provides:

All property which is now vested or shall hereafter be transferred to the board of trustees of a school district for the use of schools in the district shall be held by them as a corporation.

Sections 274 and 275 define the powers and duties of boards of school trustees. Among these powers is the power to buy, build or rent schoolhouses, when directed to do so by vote of the registered electors of the district. Certain limitations are defined in the expenditure of money for such purposes. Districts having five hundred or more school children enrolled may without a vote of the electors purchase any school site or erect additions to school buildings. Provision is made in such cases for the levy of an additional tax within the district to pay the cost of such expenditures. It is evident from the language in the sections that the expenditure of money beyond the limitations mentioned for such undertakings must first receive the approval of the electors of the district. The reason for an election would be baseless if a school building could be secured without increasing the debt of the district.

Section 275 provides further powers and duties of school trustees. Subsection 12 of this section provides: "To accept on behalf of and for the school district any gift or bequest of money or property for a purpose deemed by said board to be suitable; and to utilize such money or property for the purpose so designated."

Section 201, Title II, Public Law 815, 81st Congress, relating to school construction in federally affected areas, recognizes the impact which certain Federal activities have had on school construction needs in the areas in which such Federal activities are being carried on, and Congress has declared it to be the policy of the United States to bear the cost of constructing school facilities in such areas.

A contribution by the Federal Government to bear the cost of construction of a school building, based upon the additional facilities necessary to take care of the children whose attendance results from such Federal activities, can only be considered as a gift of money or property to the school district.

The enactment of the School Code is later than that of Chapter 61, Statutes of 1945, which prescribes regulations under which agreements may be made with Federal agencies for funds, services or commodities to be made to public schools. The form of application for contributions under Public Law mentioned above is prescribed by the Federal Act, which must be submitted by the local educational agency to entitle it to payment. Chapter 61, Statutes of 1945 is therefore not applicable to such a grant.

We are of the opinion, therefore, that if the entitlement to funds from the Federal Government is granted the board of trustees of the school district to defray the entire cost of providing the school facility in the district, without the assurance that adequate funds to defray any non-Federal share is required, that the board of trustees of the school district has authority under the statutes to receive and expend the money granted, without the consent of the electors of the district at an election.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

**OPINION NO. 51-40. ACT TO ENABLE COUNTIES TO ESTABLISH AND MAINTAIN
PUBLIC HOSPITAL** construed, and jurisdiction of board of hospital trustees determined.

Carson City, April 13, 1951.

Hon. Grant Sawyer, District Attorney, Elko County, Elko, Nevada.

Dear Mr. Sawyer:

This will acknowledge receipt of your letter in this office April 11, 1951, in which you submit for answer three questions relative to the matter of jurisdiction of the board of hospital trustees and the County Commissioners in the purchase and establishment of a receiving or emergency hospital in your county.

STATEMENT

The town of Wells in Elko County desires the purchase of certain buildings in the town for the use as a receiving or emergency hospital in that area. Certain questions have arisen between the board of hospital trustees and the County Commissioners as to the matter of jurisdiction and authority.

QUERY

1. Would such a hospital be considered as an adjunct to the present County Hospital, or would the proposed hospital be instituted pursuant to N.C.L. 2225, 1943-1949 Supplement requiring the necessity of the presentation to the County Commissioners of petitions, with a new hospital board to be appointed.

2. Would the Board of Trustees of the Elko County Hospital purchase the building or buildings and the equipment to be used in the emergency hospital, or would the County Commissioners make such purchases.

3. Should the present Board of Trustees of the Elko County Hospital determine that the Wells receiving hospital is not needed or necessary, would the Board of County Commissioners have authority to purchase the buildings for the hospital and appoint a new Board of Trustees for such hospital.

OPINION

Section 1 of the Act to enable counties to establish and maintain public hospitals, the same being section 2225, N.C.L. 1929, as amended by chapter 150, Statutes of Nevada 1943, defines the procedure to establish a public hospital in a county, and also the method of securing funds for such purpose.

Section 2 of the Act, being section 2226, N.C.L. 1929, directs the County Commissioners to appoint five trustees, when, as the result of an election, a hospital is to be established in the county. The trustees appointed shall hold office until the next general election. At such election five trustees shall be elected in the same manner as other county officers are elected. The authority of the County Commissioners is at an end when the trustees are elected, except in case of a vacancy on the board as provided in section 2229, N.C.L. 1929, when such vacancy may be filled in like manner as the original appointments. This section was amended by Chapter 64, Statutes of 1949, to make the County Commissioners ex officio members of the board of hospital trustees in counties wherein there was cast a vote for Representative in Congress in excess of 19,000 votes in the general election held in 1948. According to the official returns of the 1948 general election, Elko County did not cast the number of votes to come within the amendment.

Section 2227, N.C.L. 1929, provides that the hospital trustees shall qualify and organize as a board of hospital trustees.

Section 2228, N.C.L. 1929, as amended by Chapter 19, Statutes of 1943, defines the powers and duties of the board of hospital trustees. One of such powers is expressed in the following language: “* * * They shall have exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of the site or sites, the purchase or construction of any hospital building or buildings, and of the supervision, care, and custody of the grounds, rooms, or buildings purchased, constructed, leased, or set apart for that purpose; * *

*”

Section 2243, N.C.L. 1931-1941 Supp. declares that in counties where a tax for the establishment and maintenance of a public hospital has been or is hereafter authorized that the supervision, management and control of the county hospital, county isolation hospital, county home for the indigent sick, county work house, and county poor farm, shall vest in and be exercised by the board of trustees of the county public hospital, and shall be operated by said board.

The powers conferred and the duties to be discharged by the board of hospital trustees and the Board of County Commissioners have been directly defined by the Legislature.

The powers given the hospital trustees are not confined to one place within the county. Their powers extend to hospitals as county institutions where persons receive medical or surgical care.

There is no authority in the statute under which the County Commissioners may duplicate the initial procedure for the establishment of a hospital in a county where a hospital has been

established and is being maintained, and no authority to appoint or elect any other board of hospital trustees, other than the board provided for by the statutes.

Answering your first question, it is our opinion that the proposed hospital quarters would be considered an adjunct or a part of the general county hospital.

The answer to your second question is that the board of trustees is the only board authorized to make the proposed purchase of the building or buildings and the equipment for the emergency or receiving hospital.

Your third question, in our opinion, must be answered in the negative.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-41. SUICIDE—Duties of health officer, coroner and district attorney.

Carson City, April 17, 1951.

Hon. Roger D. Foley, District Attorney, Clark County Courthouse, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter of April 5, 1951 requesting the opinion of this office as follows:

We would appreciate an opinion from your office as to whether a County Health Officer may make certification of death in the case of death manifestly occasioned by suicide or accident and not by unlawful or suspicious means.

We would also appreciate an opinion as to whose powers are superior under Section 11427, Nevada Compiled Laws 1943-1949, if a situation were to arise where the coroner would demand an inquest and the District Attorney in the exercise of his discretion in the case of death manifestly occasioned by suicide or accident would certify that no inquest was required.

STATEMENT

Before a proper disposition of the above questions may be effected, it is necessary to ascertain the legislative intent of the two statutes herein concerned.

Section 11427, 1929 N.C.L., 1949 Supp., provides that a certain procedure be followed when there is information "that a person has been killed, or *committed suicide*, or has suddenly died under such circumstances as to afford reasonable ground to suspect that the death has been occasioned by *unnatural means*, * * *."

Section 5242, 1929 N.C.L., 1941 Supp., sets forth the duties of the undertaker and the local health officer when death has occurred without medical attendance. A fair reading of the first paragraph of this section indicates the legislative intent to be that the local health officer is authorized to issue certification when death has been occasioned by *natural means* where there was no qualified physician in attendance.

OPINION

As to the first inquiry presented, this office is of the opinion that the contemplation of the Legislature in the enactment of section 5242, 1929 N.C.L., 1941 Supp., was to provide for the proper certification when death has been occasioned by natural means, i.e., old age, illness of long duration, known disease, etc.

Death by suicide is not death by natural means and was not contemplated that such type of death be investigated and certification issued by a local health officer. Therefore, this office is constrained to hold that the provisions of section 11427, 1929 N.C.L., 1949 Supp., shall apply in all cases involving death by suicide. The coroner shall make the investigation and if the death is manifestly suicide an inquest need not be conducted.

Section 11427 provides as follows: "The holding of an inquest *as provided by this act shall be within the sound discretion of the district attorney or district judge of said county, * * ** however, an inquest shall be held unless said district attorney or district judge certifies that no inquest is required."

This office is of the considered opinion that the above provisions clearly give the District Attorney and the District Judge superior power over the coroner should such a question arise.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-42. STATE PLANNING BOARD—State agencies charged with duty of carrying out provisions of Chapter 280, Statutes of 1951, (A.B. 331) may invoke services of State Planning Board.

Carson City, April 17, 1951.

State Planning Board, Carson City, Nevada.

Attention: Mr. A.M. Mackenzie, Secretary.

Gentlemen:

This will acknowledge receipt of your letter in this office on April 13, 1951, in which you request an opinion respecting the application of Assembly Bill No. 331, Chapter 280, Statutes of Nevada 1951, in relation to the Act creating the State Planning Board as amended.

STATEMENT

Some of the State agencies which have been authorized and directed to undertake certain projects connected with their departments have contacted the State Planning Board to handle all details of construction authorized in their particular departments. This would involve preliminary estimates and plans, employment of architects, review of plans, specifications, calling for and

acceptance of bids, processing contracts, supervision and inspection and other duties provided in the Act creating the State Planning Board.

QUERY

What is the responsibility and jurisdiction of the State Planning Board, when any of the agencies mentioned in Assembly Bill No. 331 request the services of the planning board instead of employing architects and engineers and other services independent of the planning board which they are authorized to do under the Act?

OPINION

Section 6975.05, 1929 N.C.L., 1931-1941 Supp., as amended by Chapter 81, Statutes of Nevada 1947, defines the powers and duties of the State Planning Board. Subsection (b) of this section makes provision for this board to furnish engineering and architectural services to all State departments charged with the construction of any State building, and all departments are required and authorized to use such services. The cost of all architectural and engineering services, supervision and inspection of construction or major repairs are made a charge against the appropriation for such projects.

Assembly Bill No. 331, Chapter 280, Statutes of 1951, is, in its nature a special Act. It designates seven district projects and makes an appropriation for each of the undertakings. The officers and boards of the department to which the Act applies are charged with the duty of carrying out the provisions of the Act. They shall do so with their own staffs, tools and facilities to such extent as shall be practicable. When necessary and practicable they may employ architects or engineers to prepare plans and specifications, call for and accept bids, and let contracts. It is also provided that plans and specifications now in existence shall be made available for the use of said officers or boards.

The words "necessary and practicable" are repeated several times in the Act, which permits a condition to be determined by the officers in securing the services required.

The special Act does not require the officers to use the services of the State Planning Board. This provision in the Act creating the planning board was evidently considered as not adaptable to each of the separate projects authorized under the special Act and in the particular cases authority independent of the planning board was given the designated officers and boards. This, however, does not deny the authority of the name departments to seek and require the use of the services of the State Planning Board.

The reference to plans and specifications now in existence which shall be made available for the use of the officers or boards included in the later Act, and the repeated expression "when necessary and practicable," discloses the intention of the Legislature to permit the employment of the State Planning Board in carrying out any of the projects which are within the jurisdiction, powers and duties of such board.

We are, therefore, of the opinion that it becomes the duty and responsibility of the State Planning Board, when requested by any of the officers or boards charged in the Act with construction, reconstruction and making major repairs, to furnish the services defined in the general Act creating the State Planning Board.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-43. WELFARE DEPARTMENT—No statutory authority to pay transportation for persons coming into State for employment in department.

Carson City, April 17, 1951.

Mr. Chester H. Smith, Ex Officio Clerk of Board of Examiners and Budget Director, Office of the Governor, Carson City, Nevada.

Dear Mr. Smith:

This will acknowledge receipt in this office of your letter on April 12, 1951.

You submit a "Policy Proposal—Effective December 15, 1950," adopted by the Nevada State Welfare Department, and inquire if the same conforms to the statutes of this State.

STATEMENT

A summary of the policy proposed—effective December 15, 1950, discloses that because of the limited supply of trained workers some of the department's positions have remained unfilled for long periods.

Expenses of transportation have added to the difficulty of recruiting qualified workers to the department from out of State. Payment of transportation, not to exceed \$300, is made to persons out of the State to come to the State for the purpose of receiving an appointment in the department under the merit system of this State. Advanced cost of transportation is made to such person under an agreement if he leaves the department of his own volition prior to receiving a permanent appointment under the merit system, he must reimburse the department for the money advanced.

Payment of transportation is also advanced to workers granted educational leave, to and from the school of social work attended out of State. Reimbursement of the funds advanced is covered by agreement which provides that a worker who fails without good cause to return and continue in the employment of the department for one year, the full amount advanced must be returned.

QUERY

Does such a policy or regulation conform with the State statutes governing the expense allowance of officials or employees of the state while traveling on official business, as provided in section 6942, N.C.L. 1929?

OPINION

Chapter 327, Statutes of Nevada 1949, created the State Welfare Department and defined its powers and duties. Section 6 provided that the State Welfare Board shall prescribe rules and regulations for its own management and government, "*** and it shall have only such powers and duties as may be authorized by law." Quoted from the section.

Section 7 provides a per diem and travel expense for members of the board as fixed by law.

Authority to make rules, regulations, or adopt such regulations as a policy must be found in the statutes and must not exceed the powers therein granted.

The Act authorizing and empowering the State Board of Examiners to fix the amount of expense money for traveling and subsistence of State officers and all other employees of the State, contains the following language in section 1 (section 6942, N.C.L. 1929): "*** or other employees of the state while traveling on official business outside the state ***."

This language cannot be construed to permit payment for transportation to persons outside the State to come to the State to take advantage of an opportunity offered for employment with the

State. The agreement for the refund of the money advanced if the person leaves before receiving permanent employment, if made in the name of the State department, would be a contract not authorized by statute.

We find no authority in the statutes for the granting of educational leave and consequently there would be no statutory authority to allow transportation expense to and from the school outside the State.

We are therefore of the opinion that the State Welfare Department, or the State Welfare Board, has no authority under the statutes, express or implied, to adopt the policy proposed and make the expenditures therein provided.

If such power is necessary and proper for the standardization of work, and to expedite business, it is a matter to be submitted to the Legislature for appropriate action.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-44. PUBLIC SCHOOL AUTHORITIES have no power to prohibit attendance at school of pupil for the reason that such pupil is married.

Carson City, April 18, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office on April 17, 1951.

QUERY

You request an opinion on the legality of a school board's right to ban from attendance at school students who are married while attending school.

OPINION

Chapter 63, Statutes of Nevada 1947, the School Code, section 1, contains the following quoted language: "Each parent, guardian, or other person in the State of Nevada, having control or charge of any child between the ages of seven (7) and eighteen (18) years, shall send and be required to send such child to a public school during all the time such public school shall be in session in the school district in which such child resides; * * *."

Subchapter 31 of Chapter 63 defines school trustees and prescribes their powers and duties. Among these powers is the power to prescribe and enforce rules, not inconsistent with law or those prescribed by the State Board of Education.

Subsection 5 of section 275 gives the trustees power to expel from school within their district, with the advice of the teacher and Deputy Superintendent of Public Instruction, any pupil who will not submit to reasonable and ordinary rules of order and discipline.

Only such powers can be exercised by the trustees in the establishment of rules as are clearly comprehended within the language of the statute.

The Legislature has conferred upon school boards power to make reasonable regulations that will promote the efficiency of the school system, and to attain the ends for which public schools are established.

The right to attend school is a civil right that cannot be denied to one who will submit to ordinary and reasonable rules of order and discipline.

We are therefore of the opinion that trustees or school authorities have no power to ban from attendance at school, pupils who marry and attend school, for the only reason that such pupils are married.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-45. PUBLIC EMPLOYEES RETIREMENT ACT making it mandatory that appointive officers be members of the Public Employees Retirement System not retroactive.

Carson City, April 19, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your letter in which you ask the following questions:

1. May an appointive officer who has elected—prior to July 1, 1951—not to participate in the Public Employees Retirement System continue in such nonparticipation after July 1, 1951?
2. If the answer to Question 1 is in the affirmative will such election of nonparticipation be effective beyond the terminal date of the current appointment if the appointment is for a fixed period?

STATEMENT

These questions are based on the fact that the 1951 Legislature amended section 8, subsection 6, of the Public Employees Retirement Act, to provide that elective officials only might elect as to participation in the retirement system, whereas, the former statute provided that both a person holding an elective office or an appointive office may make a choice as to whether or not they want to become members of the retirement system.

OPINION

“Retrospective operation is not favored by the Courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended retroactive application. The rule is the converse of the general principle that statutes are to operate prospectively and is founded on judicial premonition that retroactive laws are characterized by want of notice and lack of knowledge of past conditions and that such laws disturb feelings of security * * *.”

The above quotation is found in Sutherland’s Statutory Construction, Vol. 2, sec. 2201, and is directly applicable to the present situation.

Therefore, in answer to your first question it is our opinion that an appointive officer, who has elected prior to July 1, 1951, not to participate in the Public Employees Retirement System, may continue in such nonparticipation after July 1, 1951. Any other interpretation would result in making the 1951 amendment retroactive.

The answer to question No. 2 in our opinion is in the negative. In the event an officer has an appointment for a definitely fixed and determinable time and such appointment terminates and he is subsequently reappointed, it would be necessary that he then become a member of the Public Employees Retirement System. Obviously this would not result in giving the amendment in question retroactive effect, as the officer in question is no longer serving under the same appointment as he was when he had his choice of participation.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-46. TAX—The tax contemplated by the Mosquito Abatement District Act is a special tax, and is not within the \$5 constitutional limit.

Carson City, April 19, 1951.

Hon. Jack Streeter, District Attorney, Reno, Nevada.

Dear Mr. Streeter:

This will acknowledge receipt of your letter of April 12, 1951, presenting the following inquiry:

QUERY

This office respectfully requests your opinion as to whether the tax in the Mosquito Abatement District Act would come under the \$5.00 limit, or whether it would be considered an assessment.

OPINION

The tax on the property owners is a special tax, and is not to be included within the \$5 limit. The tax contemplated is for the administration of a particular Act and no part of the money derived from the tax goes to the support of the government of the State, hence is clearly a special

tax. (See Opinion of the Attorney General, No. 342, August 14, 1946.) Article 10, section 2 Nevada Constitution, provides: "The total levy *for all public purposes* etc." This tax being for a *special purpose* does not fall into the category provided for in the Constitution.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-47. REAL ESTATE—Jurisdiction of Real Estate Commission.

Carson City, April 24, 1951.

Nevada Real Estate Commission, No. 8 Arcade Building, Reno, Nevada.

Attention: Mr. Ray P. Smith, Secretary-Treasurer.

Dear Mr. Smith:

This will acknowledge receipt of your letter of April 19, 1951, presenting in substance the following question:

QUERY

Does the Real Estate Commission have jurisdiction to entertain a complaint of misrepresentation and fraud by a purchaser of real property wherein the seller of the property is a real estate broker owning in his own right the property concerned.

STATEMENT

The pertinent provisions of section 2, Real Estate Brokers Act are as follows:

Sec. 6396.02. *Real Estate Broker Defined—Real Estate Defined.* A real estate broker within the meaning of this act, is any person, copartnership, association, or corporation who *for another* and *for a compensation*, or who with the intention or expectation of receiving a compensation sells, exchanges, purchases, rents. * * *. (Emphasis supplied.)

Upon the filing of a verified complaint in writing, it then becomes the mandatory duty of the Board to investigate the facts, and initiate such further proceedings thereon as facts, circumstances and the law requires for the protection of the public. (Opinion of the Attorney General, No. 666, Biennium 1948-1950.)

The facts presented in your letter of inquiry show that the seller of the property in addition to being the owner thereof is also a real estate broker. You have stated "no agency relationship existed between said broker and any other person insofar as said sellers were concerned."

OPINION

If, after a proper and diligent investigation, the facts are clear to the satisfaction of the commission that: (1) the real estate broker was not acting "for another"; or (2) was not acting for compensation as a broker; and (3) the purchaser had knowledge that the broker was acting in his own right and not as a real estate broker as defined by section 2, Real Estate Brokers Act, then and only then should the commission deny its jurisdiction.

The converse being: If the commission has not, by proper and diligent investigation, clearly established to its satisfaction the above-mentioned facts, then the commission is duty bound to take all necessary means to determine these facts and a hearing for such purpose is then clearly within the contemplation of the law.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: THOMAS A. FOLEY
Deputy Attorney General

OPINION NO. 51-48. BASIC SCIENCE ACT construed in connection with Medical Practice Act to determine status of applicants for license to practice medicine.

Carson City, April 24, 1951.

State Board Of Medical Examiners, 112 Curry Street, Carson City, Nevada.

Attention: G.H. Ross, M.D., Secretary-Treasurer.

Gentlemen:

This will acknowledge receipt of your letter in this office requesting an opinion as to the effect of Senate Bill No. 55, which is Chapter 332, Statutes of Nevada 1951, upon applications and examinations for licenses to practice medicine under the existing Medical Practice Act.

STATEMENT

The Board of Medical Examiners, on dates prior to the 24th day of March 1951, received applications from persons desiring to secure a certificate authorizing the practice of medicine in this State. Prior to the above-mentioned date the applications were approved and a date set for examination of the applicants. The examination was held April 2, 1951. The applicants who successfully met the requirements were not issued the certificate to practice medicine as provided in the Medical Practice Act for the reason that the board was uncertain as to the effectiveness of Senate Bill No. 55, due to the provision in the Act which provided that the appointment of the Board of Examiners in the Basic Sciences should be within 60 days after the Act takes effect. This board, however, was appointed on April 16, and evidently organized.

QUERY

(a) What is the status of the persons referred to in the statement who were permitted to take the examination without first having presented a certificate of ability in the basic sciences named in Senate Bill No. 55?

(b) Can the medical board issue certificates to practice medicine to such persons without such person presenting to the board a valid certificate from the State Board of Examiners in the Basic Sciences?

OPINION

Chapter 169, Statutes of 1949, is an Act to regulate the practice of medicine in the State of Nevada.

Section 8 of the Act defines the procedure for the application to the board for a certificate to practice medicine, and the fee that must accompany such application, which fee cannot be returned.

Section 9 provides for the holding of examinations before the board. The statute provides when regular meetings of the board shall be held, and at such time and place as shall be most convenient to the board. It does not specify the time for holding examinations. When a person receives the credits according to the provisions in the section, he is entitled to receive a license to practice.

The Board of Medical Examiners having received applications for examination, approved the same and set hearing for such examination as April 2, 1951.

The Legislature in the 1951 session passed an Act to establish a State Board of Examiners in the Basic Sciences underlying the practice of the healing art, the same being Senate Bill No. 55. This Act was approved March 24, 1951, and became Chapter 332, Statutes of Nevada 1951. The Act is supplemental to the Act regulating the practice of medicine. There is nothing in the Act to indicate its emergency nature, but it was made effective from and after its passage and approval. Section 4 of the Act provides that the Board of Regents of the University of Nevada, within 60 days after the Act takes effect, shall appoint three members of the State Board of Examiners in the Basic Sciences. We are informed that the appointment of the members was made April 16. This information came to the attention of the medical board after the examination of applicants was held April 2, 1951.

The new Act provides in section 2 that no person shall be permitted to take an examination for a license to practice the healing art, or be granted any such license, unless he has presented to the board a certificate of ability in the basic sciences enumerated in the Act.

Section 15 of the Act makes it a misdemeanor for any person who knowingly issues or participates in the issuance of a license to practice the healing art, to any person who has not presented to the licensing board a valid certificate from the State Board of Examiners in the Basic Sciences.

Although the Act became effective March 24, 1951, the mode of performing the provisions of the Act was not brought about until April 16, when the board was appointed.

The Act is supplemental to the Act regulating the practice of medicine, and it also contains a provision in section 18 that nothing should be construed as repealing any statutory provision in force at the time of its passage with reference to the requirements governing the practice of medicine. The substance of the Act is to require an additional qualification in the procedure to obtain a license to practice medicine.

A rule of statutory construction as expressed in *Ferro v. Bargo Min. & M. Co.*, 37 Nevada 139, is, that in construing or applying the provisions of any statute, the purpose or object of the statute should ever be kept in mind, and a construction or application should be avoided which sacrifices substance to a mere matter of form.

The purpose of the Act is not to penalize those who in good faith followed the provisions of the Medical Practice Act. A reasonable construction of the Act will resolve the confusion occasioned by the uncertainty as to the date when the Act was in actual effect.

Section 7 of the Basic Science Act provides that the board shall conduct examinations on the first Tuesday after the first Monday in January, April, July, and October of each year. There is nothing in the Act to prohibit the board from holding examinations at other times.

In view of the circumstances surrounding the request for this opinion, we think it would be most equitable for the examining board to now conduct an examination of the present applicants with respect to the basic sciences.

We are, therefore, of the opinion that before a license to practice medicine is issued to the persons involved in the incident presented that the board of medical examiners should require from the applicants a certificate of ability in the basic sciences.

There is nothing in the statute, in our opinion, to prohibit the board of basic sciences from holding an examination for these persons before July next.

Although the presentation of such certificate is not in accord with the stated provision in section 2, the applicants have paid the fee and taken the examination and they should only be required to follow the additional procedure provided in the basic sciences, that is, secure a certificate of ability and present the same to the board of medical examiners. The provisions of section 15 of the Basic Science Act would then be complied with in substance and the license to practice medicine could be issued to those who qualified.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-49. INTERPRETATION OF MINING LEASE and option for the purpose of determining payments to be considered as royalties.

Carson City, April 2, 1951.

Nevada Tax Commission, Carson City, Nevada.

Attention: R.E. Cahill, Secretary.

Gentlemen:

This will acknowledge receipt of your recent letter in which you have enclosed a copy of a lease and option agreement with the request that we interpret the said agreement for the purpose of determining the taxable status of the amounts paid to the lessor pursuant to section 8 of this agreement. Section 8 of the agreement in part as follows:

In consideration of the foregoing premises and the payment of the sum of One Dollar (\$1.00), paid by Lessees to the Lessor, the receipt whereof is hereby acknowledged, the said Lessor does hereby give and grant to said Lessees the exclusive right and option to purchase from said Lessor the whole of those certain mining claims, premises and appurtenances, as in the foregoing lease set forth, for the full purchase price of fifty thousand dollars (\$50,000.00) payable by the Lessees to the Lessor as follows:

One Thousand Dollars (\$1,000.00) down, the receipt whereof is hereby acknowledged by Lessor; and the balance in the monthly payments of not less than \$200.00 per month beginning June 15, 1950, and a like and similar payment on or before the 15th day of each and every calendar month thereafter, however, it is

understood and agreed that the purchase price of said premises in full shall be paid by Lessees to the Lessor on or before April 30th, 1955, the termination date of the lease hereinbefore set forth.

The payment of \$200.00 per month as herein provided shall be interpreted to be and designated as advance and guaranteed monthly royalties.

All royalty payments paid by Lessees to the Lessor either in cash as herein set forth or upon production as in the lease agreement set forth shall be credited upon the purchase price and each installment thereof as herein provided.

Any and all payments paid to the Lessor by the Lessee, either under the lease or the option to purchase herein, shall immediately become the property of the Lessor. All payments provided to be made herein by the Lessees to the Lessor at c/o Box 1062, Elko, Nevada, until the Lessor shall be paid direct to the Lessor shall have received the sum of \$5,000.00 upon the purchase price and thereafter to the Escrow Holder hereinafter named.

Section 5 of this agreement provides as follows:

To pay to Lessor a royalty of not less than ten percent (10%) of the gross mill or smelter returns on each and every ton of ore taken, treated or extracted from said property, which said royalty shall be paid to the Lessor direct from the mill or smelter effecting treatment thereof upon instructions given to said mill or smelter by the parties hereto and pursuant to this lease and option agreement, and said Lessor shall be entitled to and shall receive a copy of the mill or smelter returns on each and every shipment of ore made from said premises. In connection with the shipment of ore to the mill or smelter aforesaid, it is understood and agreed that Lessor shall bear and pay one-half (1/2) of all freight charges of shipments via railroad, but none of the expense of shipment by truck from the mining premises to a railroad, however, in the event that shipments of ore are made direct from the premises to the mill or smelter via truck the said Lessor shall bear and pay one-half (1/2) of said trucking charges. Such freight charges to be paid by Lessor shall be deducted from the gross royalty to be paid him by the mill or smelter and as provided for herein.

In order to determine the meaning of any particular section it is essential that the entire agreement be read together and one section construed in the light of others dealing with the same particulars.

First, it is important to note that the relationship existing between the parties to an option agreement is not a vendor-vendee relationship, but that of lessor-lessee, with the lessee obtaining the privilege of becoming a purchaser—in legal effect an option. *Colver v. Lahonton Mines Company*, [54 Nev. 353](#).

The agreement provides in section 8 for a forfeiture in the event the lessee in any way defaults, consequently the \$200 monthly payments would be nothing more than rent. There are numerous cases that stand for the proposition that rent and royalties are synonymous. *Barnard v. Jamison*, 177 Pac. 351; *McIntires Admin'r v. Bond*, 13 S.W.(2) 772; 64 A.L.R. 630.

The \$200 monthly payments are to be paid to the lessor in cash or upon production and the parties have expressly designated the said payments as advance and guaranteed royalties, which is some assistance in ascertaining intent of the parties at the time the agreement was executed.

With the above in view, we are of the opinion that the \$200 monthly payments from the lessee to the lessor are royalties and taxable to the lessor under the applicable statutes.

In our opinion the \$1,000 down payment, which receipt has been acknowledged by the lessor, to be applied on the purchase price is not to be considered as a royalty payment, as it would not be considered as rent but merely as a bonus or part payment of the total purchase price. This \$1,000 in reality has nothing whatsoever to do with the actual mining of the property in question, therefore, it is not taxable to the lessor.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-50. CORPORATIONS—Similarity of corporate names.

Carson City, April 26, 1951.

Hon. John Koontz, Secretary of State, Carson City, Nevada.

Dear Mr. Koontz:

This will acknowledge receipt of your letter of April 23, 1951, Re: Nevaco Lumber Company. You present, substantially the following inquiry:

QUERY

Is there such similarity between the corporate names “Nevada Lumber Co.” and “Nevaco Lumber Co.” as to warrant the Secretary of State to refuse to accept the articles of incorporation of the latter?

STATEMENT

You submitted with the request for this opinion letters of counsel and draft of the proposed articles of incorporation of the Nevaco Corporation. An examination thereof, we think, precludes the necessity of a hearing of the parties with respect thereto.

OPINION

Section 4, General Corporation Laws of 1925, being section 1603, 1929 N.C.L., 1949 Supp., provides that the name chosen by a corporation proposing to incorporate under the statute shall be such as to distinguish it from any other formed or incorporated in this State. The desired effect of this section is to prevent confusion, fraud, and infringement.

With respect to corporate names, it has been held that unless the words have acquired in the mind of the public a secondary meaning as denoting the goods or business of a particular company, a corporation cannot acquire the right to the exclusive use of geographical words in its corporate name. “Nevada” is clearly geographical.

Words used in corporate names which have been held to be geographical or generic are names incapable of being used exclusively. *Kansas Mill Co. v. Kansas Flour Mills Co.*, 133 Pac. 542; *Michigan Sav. Bank v. Dime Sav. Bank*, 127 N.W. 364; *Nebraska Loan & T. Co. v. Nine*, 43 N.W. 348; and a long line of authorities.

In consideration of the question of similarity or probability of confusion, the court in *Middletown Trust Co. v. Middletown Nat. Bank*, 147 Atl. 22, said:

It is not sufficient that some person may possibly be misled, but the similarity must be such that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would be likely to mistake one for the other.

And in *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 66 Atl. 561, is the following:

Possibility of confusion in correspondence, telephone calls, deliveries, etc., is not usually regarded as sufficient to justify the granting of the injunctive relief.

In view of the foregoing, it is the opinion of this office that the similarity between Nevada Lumber Co. and Nevaco Lumber Co. is not such as to warrant the Secretary of State to refuse to accept the articles of incorporation of the latter.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

cc: Lloyd V. Smith, Esq., and E. Frandsen Loomis, Esq.

OPINION NO. 51-51. ACT MAKING APPROPRIATION TO CARSON SCHOOL DISTRICT CONSTRUED.

Carson City, April 26, 1951.

Hon. Peter Merialdo, State Controller, Carson City, Nevada.

Dear Mr. Merialdo:

This will acknowledge receipt of your letter in this office April 19, 1951, in which you request an opinion as to the construction of Assembly Bill No. 232, the same being Chapter 329, Statutes of 1951.

QUERY

- (1) In what fund should the appropriation of \$46,000 which the bill carries be placed?
- (2) When would the allotment to the fund be made?
- (3) Would the allotment be made in one lump sum or in equal yearly payments?

OPINION

Chapter 329, Statutes of Nevada 1951 (Assembly substitute for Assembly Bill No. 232) reads as follows:

An Act making an appropriation to provide support for Carson City school district No. 1, Ormsby County; to cover an expected deficiency in the cost of providing educational facilities for the children of the Nevada state children's home, and other matters relating thereto.

WHEREAS, the children attending school from the Nevada state children's home are in attendance in Carson City School District No. 1, Ormsby County; and

WHEREAS, the daily attendance of children from the state children's home constitutes an average daily attendance of eighty-five children per day; and

WHEREAS, it has been necessary to secure certain emergency classrooms at a total cost of \$16,400, and to amortize the cost thereof at the rate of \$4,100 per year for a period of four years; and

WHEREAS, the total cost of providing classrooms and general educational facilities for the students of the Nevada state children's home is approximately \$23,000 per year; and

WHEREAS, by reason of the increased attendance and general higher costs of operation occasioned thereby the Carson City school district No. 1 will have insufficient funds during the next biennium to satisfactorily meet the additional expenditures set forth herein; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. For the biennium commencing July 1, 1951, there is hereby appropriated from the general fund the sum of \$46,000 to effectuate the purposes of this act as above recited.

The title of the Act and the preamble recite the purpose of the Act in making the appropriation provided in section 1, the only section in the Act.

The general rule is that the preamble is no part of the law, but in case of ambiguity in the language of the statute it may be considered to resolve uncertainty.

As stated in Sutherland Statutory Construction, Vol. 2, section 4807: "Many preambles are used as recitals of fact upon which legislative action is based. This is particularly true in the case of special and local laws."

Chapter 329 quoted above quoted is a special and local Act.

The preamble recites that by reason of the increased attendance as the result of children from the State Home in daily attendance at the Carson City school, and the general costs of operation occasioned thereby that the total cost of providing classrooms and general educational facilities is approximately \$23,000 per year.

The Act makes an appropriation of \$46,000 to effectuate the purposes of the Act as recited into the preamble. The purpose of the Act and the intention of the Legislature in enacting the same is evidenced by consideration of the title and the preamble.

A rule of construction followed in *Escalle v. Mark*, 43 Nevada 172, is quoted as follows:

In order to reach the intention of the legislature, courts are not bound to always take the words of a statute in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict, or extend the meaning of the words, so as to meet the plain, evident policy and purview of the act, and bring it within the intention which the legislature had in view at the time it was enacted.

The meaning of the words in section 1 of the Act, according to its evident purview is that the appropriate of \$46,000 is made to Carson City school district No. 1.

In answer to your question, we are of the opinion:

(1) That the sum of \$46,000 should be, by the State Controller, transferred from the General Fund of the State to a Carson school district No. 1 fund.

(2) There being no effective date named in the Act, the same will become effective July 1, 1951, at which time the transfer should be made.

(3) When the fund is established, disbursements should be made upon claims filed by the trustees of Carson school district No. 1.

Such claims may be based on the average daily attendance of children from the State Home at a cost per pupil ratio, or claims for the purpose of constructing necessary classrooms or other educational facilities, and paid as other claims against the State are paid.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-52. ACT PROVIDING FOR THE UNLAWFUL ADVERTISING OF PETROLEUM PRODUCTS and motor vehicle fuel unenforceable by reason of no penalty being provided therefor.

Carson City, April 27, 1951.

Hon. Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada.

Dear Mr. Allen:

Receipt is hereby acknowledged of your letter of April 24, 1951, relative to the enforcement of Senate Bill No. 60, which bill relates to the advertising of petroleum products or other motor vehicle fuel. You advise that you put out copies of the Act to your patrolmen for the purpose of eventual enforcement of the Act. You also advise that the individual gasoline dealers will not comply with the new law regulating such advertising and that they state no further action can be taken until the District Attorney has a copy of the law, including penalties. You further state the Act does not specifically state just what the penalty is and request our advice thereon, particularly as to how the Act can be enforced.

OPINION

We have before us a printed copy of the enrolled Senate Bill No. 60, which became effective immediately upon its passage and approval. We have not as yet been advised of the chapter number of such bill in the 1951 Statutes.

Briefly, the Act provides for the regulation of advertising of petroleum products and motor vehicle fuel, and particularly is it directed to alleged unlawful practices in the advertising of such products. The Act is quite comprehensive in defining what constitutes unlawful advertising and uses the word "unlawful" in several of the sections thereof. The title, after reciting the purpose of the Act, contains the following provision, "and assessing a penalty for the violation thereof."

A very careful and close examination of the Act fails to disclose that the Legislature has incorporated therein any specific penalty whatsoever. The result is that while the advertising matter therein is defined as being unlawful and creates an unlawful act, yet the failure to include within the provisions of the Act any language stating what the penalty will be for the violation thereof has the effect of making the entire Act a deadletter Act and unenforceable.

We are, therefore, of the opinion that the Act, containing no penal provisions, cannot well be enforced.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-53. TWO STATUTES AMENDING THE SAME SECTION OF THE LAW which contain irreconcilable repugnancies, the later in time controls.

Carson City, May 1, 1951.

Nevada Tax Commission, Carson City, Nevada.

Attention: R.E. Cahill, Secretary.

Gentlemen:

Reference is hereby made to your letter of April 27 requesting the opinion of this office concerning the discrepancy apparent between Senate Bill No. 96, which is now Chapter 303, and Assembly Bill No. 234, which is now Chapter 200, Statutes of 1951, with respect to the elimination from the ninth subdivision of Chapter 303 the limitation placed upon the exemption of the properties therein specified to the amount or value of such properties to \$5,000 to each organization.

You inquire which of the statutes should now be followed.

OPINION

Chapter 200, page 300 of the 1951 Statutes, purports to amend section 6418, N.C.L. 1929, as amended, which section contains the statutory exemptions from assessment and taxation.

Subdivision ninth of said chapter was not changed in any way by reason of the amendments incorporated in said chapter as approved. Such subdivision contained the following language, after stating what property and associations were exempt from taxation, that is to say, "provided, that such exemption shall in no case exceed the sum of five thousand dollars (\$5,000) to any one association or organization thereof."

Chapter 303, page 467 of the 1951 Statutes, amended the subdivision ninth by including therein "Nevada Art Gallery, Inc." and striking therefrom the following language, "provided, that such exemption shall in no case exceed the sum of five thousand dollars (\$5,000) to any one association or organization thereof." This later amendment strikes from the law any limitation upon the amount and value exempted from taxation of the organizations in the ninth subdivision provided for.

The question then arises—which of the said chapters controls with respect to the ninth subdivision above mentioned?

Chapter 200 was approved March 20, 1951. Chapter 303 was approved March 22, 1951. Chapter 303 then became a law later in time than Chapter 200. It is a canon of statutory construction in this State that two statutes on the same subject must be construed together so as to give effect to the language of both, as far as consistent, and where there is a conflict, or an irreconcilable repugnancy is apparent, the later statute controls. *State v. Nevada Tax Commission*, [38 Nev. 112](#); *Ex Parte Smith*, [33 Nev. 466](#); *Ronnow v. City of Las Vegas*, [57 Nev. 332](#).

It is further provided in Chapter 303 as follows: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

Applying the foregoing rules of statutory construction, it is clear that the Legislature in Chapter 303 provided such an inconsistency in subdivision ninth and subdivision ninth of

Chapter 200 that we are of the opinion that the provisions of Chapter 303, subdivision ninth, controls over subdivision ninth of Chapter 200.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-54. STATE WELFARE DEPARTMENT—Duty to investigate financial ability of parents of children in State children’s home, to contribute to support of such children receiving public assistance.

Carson City, May 7, 1951.

Mr. R. van der Smissen, Superintendent, Nevada State Children’s Home, Carson City, Nevada.

Dear Mr. van der Smissen:

This will acknowledge receipt of your letter in this office on May 7, 1951, respecting the effect of the 1951 statute defining the responsibility of relatives to contribute to the support of children at the State Children’s Home who receive public assistance.

STATEMENT

The children at the State home have been committed to such home by order of the district court on petition presented by the District Attorney of the county where the dependent or neglected child resides. The expense of maintenance is made a charge against the county from which the child is committed, and the court usually orders that the parents or guardian shall reimburse the county for such expense.

QUERY

Should the superintendent of the State home request the State Welfare Department to make an investigation of the financial responsibility of the parents of each child at the home, or should the various District Attorneys refer this matter to the welfare department?

OPINION

Chapter 197, Statutes of 1951 amends the Act relating to public welfare, creating the State Welfare Department and defining its powers and duties, by adding thereto section 12a.

The husband, wife, father, mother, and children of an applicant for or recipient of public assistance if of sufficient financial ability so to do are liable for the support of such applicant or recipient. “Public assistance,” for the purpose of this act, shall include old-age assistance, child welfare services and Nevada state children’s home, on the state and county level. The state welfare department shall investigate the ability of responsible relatives to contribute to the support of an applicant for or recipient of public assistance and shall determine the amount of such support for which such relative is responsible. In determining the amount of support for which such relative is responsible his or her financial circumstances shall be given due

consideration. In no case shall a relative be required to make contributions greater than the amount of the relative responsibility scale set forth below.

Then follows the relatives responsibility scale. The next paragraph provides: "The county commissioners shall advise the district attorney of the county in which such relative resides of failure to reimburse the county and the circumstances incidental thereto and the district attorney shall cause appropriate legal action to be taken to enforce such support, * * *." The section provides that by accepting such public assistance the recipient thereof shall be deemed to consent to suit in his name by the county against such responsible living relative and secure an order for his support.

The Act does not designate an effective date, and it therefore, according to statute, becomes effective July 1, 1951.

Confirming our opinion to the question submitted, it is evident from the language in the Act that the Legislature intended that the State Welfare Department shall make the investigation, independent of a request, of the ability of responsible relatives, as defined in the Act, to contribute to the support of children in the State Children's Home who are recipients of public assistance.

The findings of the welfare department should be submitted to the County Commissioners of the county affected, as the section provides that the County Commissioners shall advise the District Attorney to take appropriate legal action to enforce the claim.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-55. INSURANCE COMMISSIONER—No power to suspend insurance agent's license unless provided for in the statute.

Carson City, May 8, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

Receipt is hereby acknowledged of your letter of May 3, 1951, wherein you request the opinion of this office as to whether the Insurance Commissioner of this State has the authority to temporarily suspend the license of an insurance agent pending a hearing to determine if adequate cause exists to revoke the agent's license.

OPINION

Your inquiry is answered in the negative for the following reasons:

A license granted by a board under statutory authority cannot be revoked by such board in the absence of statutory authority, or some provision in the license itself for revocation; and where a statute or ordinance authorizes the revocation of a

license for causes enumerated, such license cannot be revoked on any ground other than the causes specified. 33 Am.Jur. 382, sec. 66.

It is further held:

Licenses from the public are in all cases granted under statutory enactments or municipal ordinances, and where these provide a method of revocation, that method must be followed. If notice and a hearing are provided for, a revocation without these is a nullity. 33 Am.Jur. 383, sec. 67.

An examination of the Insurance Code of this State discloses that it contains no specific statutory authority for the suspension of an agent's license. On the other hand, section 151 of such code, the same being section 3656.151, 1929 N.C.L., 1931-1941 Supplement, specifically provides:

A license may be denied or a license issued under this article may be revoked or the renewal thereof refused by the commissioner if, after notice and hearing of the matter hereinafter provided, he finds that the holder of or the applicant for such license was wilfully violated any provision of the insurance law, etc., as thereafter mentioned.

We, therefore, conclude that the Insurance Commissioner in the absence of statutory authority providing for the suspension of the matter, that then such power has not been delegated to the commissioner.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-56. STATE DEPARTMENT OF PURCHASING is the department to purchase or contract for purchase of all supplies, material and equipment needed by the State. No authority under statute to change construction of two cottages to construction of duplex at Nevada State Hospital.

Carson City, May 8, 1951.

State Planning Board, A.C. Grant, Vice Chairman, Carson City, Nevada.

Gentlemen:

This will acknowledge receipt of your letter in this office on May 7, 1951, relative to equipment for the new State Office Building, and the construction of a duplex apartment in lieu of the two cottages as provided in Chapter 280, Statutes of 1951.

QUERY

(1) Chapter 325, Statutes of 1949, provides for the construction of State Office Building and mentions equipment to be procured from the appropriation. What type of equipment would be included, and is the State Planning Board authorized under the Act to make the decision?

(2) Assembly Bill No. 341, 1951 Legislature, provides for the construction of two cottages at the Nevada State Hospital, and makes an appropriation for the same. The superintendent at the hospital prefers a duplex apartment rather than two cottages. Can a duplex be constructed instead of two cottages under the provisions of the Act?

OPINION

Chapter 325, Statutes of 1949, is an Act to provide for the construction of a State Office Building in Carson City and defining the duties of the State Planning Board and the Board of Control. Section 2 of the Act provides that the State Planning Board is charged with the duty of carrying out the provisions of the Act in the manner now provided by law, and shall consult and cooperate with the Highway Department and the Board of Control on plans and specifications, heating, lighting, ventilation, equipment, and other general problems of construction.

Chapter 320, Statutes of 1949, created the State Department of Buildings and Grounds. Section 5 provides that the superintendent of buildings and grounds should have supervision of certain State buildings, and all other State buildings and property not otherwise provided by law.

Section 9 repealed certain sections of the State Board of Control Act. The sections repealed included the section giving this board the control of the expenditure of all appropriations for furnishing, repairing and maintaining buildings, offices and property connected therewith.

The Legislature at its last session by Chapter 333, Statutes of 1951, created a State Department of Purchasing. Section 48 of this Act contains the following provision:

Any purchase, and any contract for the purchase of any supplies, materials, or equipment, made or entered into by any state officer, department institution, board, commission, or agency contrary to the provisions of the act and the rules and regulations of the director promulgated pursuant thereto, shall be void and of no effect, but the head of the using agency and the employee who actually made such purchase or entered into such contract shall be personally liable for the cost of any supplies, material or equipment delivered pursuant to such purchase or contract.

The Act repeals sections 7 and 8 of the Act creating the State Board of Control, and also sections 10.1-10.9 of Chapter 184, Statutes of 1947, which amended the Act providing for a State Board of Control, and also all Acts or parts of Acts in conflict with the provisions of the State Department of Purchasing Act.

Section 11 of the Act provides: "The director shall be required to purchase or contract for all supplies, materials, and equipment needed by any and all using agencies, unless otherwise provided by law."

A rule of construction as held in *Ex parte Zwissig*, 42 Nevada 360, is that in construing a statute, words shall be given their plain meaning, unless to do so would clearly violate the evident spirit of the Act.

Equipment as defined in Webster's New International Dictionary is "* * * act of equipping; state or manner of being equipped; material or articles used in equipping—as furnishings or apparatus, equipage, as laboratory equipment * * *."

We are therefore of the opinion, in answer to your first question, that the director of purchasing—after a discussion on the matter of equipment with the representatives of the State agencies which will occupy the State Building, as to the needs and requirements of such agencies—should purchase or contract for the purchase of the equipment as provided in Chapter 333, Statutes of 1951.

Your second question must be answered in the negative.

Chapter 280 and Chapter 267, Statutes of 1951, each specifically enumerate "two cottages" at the Nevada State Hospital.

Under the rule of statutory construction as expressed in *Ex parte Arascada*, 44 Nevada 30, the enumeration of certain cases in a statute is an exclusion of all cases not mentioned. Therefore, a

duplex may not be constructed instead of two cottages, and such change be compliant with the statute.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-57. EMPLOYEES—Federal Government not entitled to participate in Public Employees Retirement System.

Carson City, May 10, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to the following question:

Is a person who was stationed at Blanch Field in Reno, Nevada, and served as a guard of the registered mail, Federal property and planes using the field, whose salary was paid by the Federal Government although he had been deputized as a deputy sheriff of Washoe County, entitled to credit toward retirement under the Public Employees Retirement Act?

OPINION

Section 2(2) of the Act provides as follows:

The term “public employer” means the state, one of its agencies or one of its political subdivisions and irrigation districts created under the State of Nevada.

A person who does not fall within this definition is not considered an employee of the State or of one of its political subdivisions. The Federal Government certainly does not come within the definition as set out above and, obviously, one whose salary is being paid by the Federal Government and whose duties are to protect Federal property is an employee of the Federal Government and not the State of Nevada or one of its political subdivisions. Therefore, it is our opinion that a person who comes within the Federal situation you have set out in your question is not an employee of the State or one of its political subdivisions within the purview of the Public Employees Retirement Act.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald

Deputy Attorney General

OPINION NO. 51-58. COUNTY COMMISSIONERS have no authority under the law to delegate police power to unauthorized persons.

Carson City, May 16, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter in this office May 10, 1951, requesting an opinion from this office on the problem presented.

STATEMENT

The Board of County Commissioners of Clark County have enacted ordinances prohibiting the running at large on streets, roads and highways of all animals, providing for the impoundment and disposal of unlicensed dogs, providing a quarantine of dogs which have bitten human beings or animals, or which have been exposed to rabies, and providing for the establishment of a public pound.

The commissioners deem it desirable for the county to turn enforcement of the ordinances and the State laws relating to the care and treatment of animals over to the Clark County Humane Society, Incorporated, and the city of Las Vegas desires to enter into a joint contract with the county and the humane society. You have advised the County Commissioners that such a contract would be void, as it would be an unlawful delegation of police powers.

QUERY

May the County Commissioners lawfully delegate the police power vested in such board for the safeguarding of health, safety and welfare of the county to an incorporated humane society by contract to enforce such ordinances and laws?

May the County Commissioners attain the purpose of the contract by deputizing the employees of the society?

You request an opinion as to your advice given the County Commissioners.

OPINION

Section 1942, 1929 N.C.L., 1941 Supp., as amended by Chapter 95, Statutes of Nevada 1945, defines the powers granted the Boards of County Commissioners.

Subsection 14 empowers the commissioners to fix and collect a license tax and to regulate all character of lawful trades, industries, occupations, professions and business conducted in their respective counties outside the limits of incorporated cities and towns.

Subsection 13 authorizes the commissioners to do and perform all such other acts and things as may be lawful and strictly necessary to the final discharge of the powers and jurisdiction conferred on the board.

There are several statutes relating to the prevention of livestock running at large. The latest expression of the Legislature respecting estrays and the impounding of livestock is found in sections 3978-3991, N.C.L. 1929, as amended. The sections require that the State Board of Stock Commissioners shall be notified upon the taking up of any stray bovine animal, horse or mule,

and the procedure to be followed in disposing of the animal. The State Board of Stock Commissioners is a governmental agency.

The statutes defining the powers of Boards of County Commissioners generally do not grant the authority to fix and collect a tax on dogs and make provision for the capture and destruction of dogs on which the tax is not paid, except with regard to unincorporated towns or cities as provided in section 1231, 1929 N.C.L. 1949 Supp., as amended by Chapter 298, Statutes of 1951. We have not seen the Clark County ordinance, but it appears that it is an exercise of the police power for the welfare of the county.

This power cannot be delegated to some unauthorized commission or group of individuals. As held in *Dahlberg v. Pittsburgh & L.E.R. Co.*, 138 F(2) 121, there can be no valid delegation of governmental power to nongovernmental agencies.

In *Wittengill v. Woodward County*, 174 P. 489, the court held that a Board of County Commissioners, in the absence of express legislative authority, has no power to contract with and employ another to perform duties which have been placed upon public officers.

In *Cox v. Board of County Commissioners Anne Arundel County*, 31 A(2) 179, it was held that the ownership of property is subject to power of the State for public good—exercise of that power must be by a duly constituted legislative body, which cannot surrender a delegated power to some unauthorized commission or group of individuals.

We are, therefore, of the opinion that your advice to the County Commissioners is based upon a sound legal basis, and the contemplated contract would be void.

Sheriffs and constables, under the statutes have the power to appoint deputies who have power to transact all official business to the same extent as their principals.

The enactment and enforcement of ordinances are the exercise of a governmental function. *City of Philadelphia v. National Surety Corp.*, 48 Fed. Supp. 381.

We are of the opinion that the appointment of employees of the Humane Society would not make such society a governmental agency to perform a governmental function.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-59. FISHING RIGHTS IN NAVIGABLE STREAMS—OWNER OF LAND ADJACENT THERETO HAS RIGHT TO PREVENT TRESPASS UPON HIS LAND—Fisherman has right to fish in stream on privately owned land so long as he remains in the bed of the stream.

Carson City, May 17, 1951.

State Fish and Game Commission, P.O. Box 678, Reno, Nevada.

Attention: Frank W. Groves, Director.

Gentlemen:

Under date of May 11, 1951, you requested the opinion of this office as follows:

A serious problem has arisen in regards to fishermen fishing along the banks of the Truckee River. Certain private landowners bordering the stream have evicted many fishermen even to the extent of a threat of bodily harm.

We would appreciate very much receiving your opinion on whether or not the Truckee River is considered a navigable stream and such, whether or not fishermen have the right to proceed along the immediate bank of the river for the purpose of fishing.

OPINION

An examination of the available records in this State fails to disclose that there has been a formal statute holding, or decision that the Truckee River has been declared a navigable stream. However, the Supreme Court of this State in *Shoemaker v. Hatch*, [13 Nev. 267](#), in the year 1878, said:

It is unnecessary to decide the question incidentally discussed by counsel as to whether the Truckee is a navigable stream within the meaning of the laws regulating the public surveys. *It is conceded to be a highway for the floatage of wood and timber, and has been treated by the officers of the government as a navigable stream. Their action upon the matter is conclusive, so far as this case is concerned, and the district court held correctly that the low water mark, and not the middle thread of the stream, was the proper boundary of the lands of plaintiffs.* It is only error as to this point consisted in treating the northern channel as the only navigable channel of the river, and the island as a part of the main land on the south of the stream. (Italics ours.)

The Supreme Court, we think, in the foregoing statement recognized the general rule that a stream of sufficient capacity to float logs to market is deemed to be navigable. Such is the rule enunciated in *Nekoosa Edwards Paper Co. v. Railroad Commission*, 228 N.W. 144; *Collins v. Gerhart*, 211 N.W. 115.

We assume for the purposes of this opinion that the Truckee River is navigable.

With respect to the ownership of the soil or bed under navigable streams in the several States of the Union, the rule is, we think, well and conclusively stated in 56 Am.Jur. 865, sec. 453:

In the United States the several states have succeeded to all the right of the Crown and Parliament in the soil under navigable tidewaters, and each, subject to limitations to be found in the Federal Constitution, has the ownership and control of the bed of all such waters within its limits. After the American Revolution the absolute right to all navigable tidewaters and soils under them, within each state, was held by its people for their common use, subject only to the rights since surrendered by the Constitution to the general government. In that instrument, the soil under navigable waters was not granted to the United States, but was reserved to the states respectively. Although the title to the soil under tidewaters was acquired by the United States by cession equally with the title to the upland, it was held only in trust for the future state, and hence it is that the title to and right of control of such soil are in the state, subject only to the reservation and stipulation that such streams shall forever be and remain public highways, with the right in Congress to regulate commerce thereon. *James v. Dravo Contracting Co.*, 302 U.S. 134.

This rule is supported by the overwhelming weight of authority, and, in our opinion, states the rule applicable to the instant question, i.e., that upon and along the Truckee River the bed thereof does not belong to the riparian owner of land abutting thereon, but lies in the State in trust for its people for use as a navigable stream. Further, it has been held that where a stream was at one

time in fact navigable and was recognized as such by both the State and national governments, the fact that it is later not navigable and is not used for navigation purposes at all does not change the title to its bed from the State to the riparian owner. *State v. Akers (Kans.)*, 140 P. 637, affirmed U.S. Sup. Ct. 245 U.S. 154.

Does the fact that the Truckee River is a navigable stream with the ownership of the bed thereof in the State provide the public or an individual the right to go upon the land belonging to another and abutting on such stream, and without the consent of such owner fish therein? This office is of the opinion that such question must be answered in the negative.

It is true that the Fish and Game Act of this State authorizes the catching of game fish during the open season thereon, and that such Act grants licenses for the right to fish in the streams and lakes in the State. But, nowhere in such Act or any other Act has the Legislature, even assuming it had the power to so enact, authorized the going upon privately owned lands for the purpose of fishing without the consent of the owner thereof.

The rule with respect to fishing is the same as that applied to hunting wild game, thus as stated in 24 Am.Jur. 377, sec. 5:

Since the title to wild game within the boundaries of a state is vested in the people in their sovereign capacity, each of the inhabitants thereof may be said to have an equal right to kill such game. But this equal right is subject to at least two limitations. In the first place, the state may make regulations relative to the killing and marketing of game. Secondly, every landowner has an exclusive common-law right to kill or capture game on his own land, subject to the regulatory action of the state in the preservation of all game for the common use. This right is regarded at common law as property *ratione soli*, or in other words, as property by reason of the ownership of the soil. The state cannot, within constitutional limits, by the issuance of hunting licenses which purport to give a hunter the right to invade the private hunting grounds owned by another person, or by any other means, authorize one to enter another's premises, for the purpose of taking game, without the latter's permission.

With respect to the right of the public to fish in navigable waters the general rule of law is as set forth in 22 Am.Jur. 677, sec. 14:

The owner of upland adjoining navigable waters clearly has a right of way to deep water for purposes of fishing, may land his nets, and make other uses of the tidelands. His right to take fish from the waters is a right which he enjoys as a member of the public, but the use of the shore is a right vested in him by reason of his ownership of the land. As to that part of the shore which is above the high watermark, the right of the owner is exclusive. The fact that all the members of the public have a common right of fishing in waters in front of an owner's premises gives them no right to trespass on his lands, and no legislature can take the property of the adjoining owner and authorize a fisherman to cross private premises in order to reach a public fishing place.

Again as stated in sec. 16, 22 Am.Jur. *supra*:

A riparian owner has no exclusive right to a fishery in tidal or navigable waters. Hence a stranger has a right to row a boat upon navigable streams flowing through private property and to take fish from the water, *provided he does not trespass on the adjacent property*. * * * In other words, there is no necessary *connection between a common right of fishing and a common right of navigation; the public easement of navigation does not of itself sustain a common right of fishing in the waters*. (Italics ours.)

Many cases of appellate courts of many States sustain the foregoing general rules with respect to the fishing. For example, in *International Shore Co. v. Heatwole*, 30 S.E.2d 537, the Court held that a riparian owner has no exclusive right to fish in the waters adjacent to his property, though he can prevent others from doing so on his land, the Court said:

He can sit on his land and fish therefrom, and could prevent others from doing so, but anyone whomsoever could fish in the same water to the very edge of the river and to the same extent as the respondent, if such other could reach the waters from a boat, a bridge, or by any other means, as long as he does not trespass on the land.

In *Herrin v. Sutherland*, 241 P. 328, a leading case on the subject, it was held that a person rowing his boat upon the river and fishing therein was well within his rights, and that he also had the right to shoot wild ducks flying thereover, provided he did not trespass upon the riparian owner's adjacent land. The riparian owner may not control the channel of the stream, but the other person in going upon such land thereupon became a trespasser. The Court further held that the exclusive right of hunting and fishing on land owned by a private individual is in the owner of the land or those having his permission as his guest or by his grant, and that no person is warranted in entering on privately inclosed land for the purpose of hunting and fishing because all may have the right by statute to hunt and fish on public domain.

Again, as held in *Diversion Lake Club v. Heath*, 86 S.W.2d 441, the right to fish in public water does not carry with it the right to cross or trespass upon privately owned land in order to reach such water. *See, also, Bolsa Land Co. v. Burdick*, 90 P. 532, wherein the Supreme Court of California held that a person may not lawfully obtain access to navigable waters by passing over private property. *See, also, Anno.* 53 A.L.R. 1191, 1194; 32 A.L.R. 538; *Dickerson Lake Club v. Heath*, 58 S.W.2d 566; *Johnson v. Bunghorn*, 179 N.W. 225.

It is, therefore, the considered opinion of this office that the following conclusions of law are to be applied in the administration of the Fish and Game Act with reference to fishing in the navigable streams of this State:

1. That the bed of such stream belongs to the State of Nevada below the water mark thereof.
2. That the public have the right to fish in such streams at the time and in the manner provided in the Fish and Game Act.
3. That, notwithstanding the ownership of the bed of such streams, no individual of the public has the right, in order to fish in any such streams, to trespass on the land of the riparian owner thereof above the low water mark without the consent of such owner, and that if such person does so enter such land without such consent, he or she will be guilty of trespass as provided by law for the trespass on real property.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-60. SUICIDE—Coroner to investigate and issue certificate of death.

Carson City, May 21, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Attention: George M. Dickerson, Deputy.

Dear Sir:

This will acknowledge receipt of your letter of May 17, 1951, presenting the following inquiry:

QUERY

We would appreciate an opinion from your office as to whether the coroner, after investigation, can issue a death certificate where the death is manifestly occasioned by suicide or accident and the District Attorney, in the exercise of his sound discretion, deems there to be no necessity of holding an inquest.

STATEMENT

As pointed out in opinion No. 41 of this office, dated April 17, 1951, the first paragraph of section 5242, 1929 N.C.L., 1941 Supp., pertains to undertakers and local health officers, however, it will be noted that the second paragraph entitled, "Coroner to Investigate, When" provides that in case of death by other than natural means the coroner is to investigate and issue a certificate of death.

OPINION

It is the opinion of this office that when a death has been occasioned by suicide or accident, not being natural means, the coroner must investigate and issue the required certification.

Applying the provisions of section 11427, 1929 N.C.L., 1949 Supp., to a case where there is death manifestly suicide, the coroner would proceed to the scene and investigate. Upon his determination that said death is manifestly suicide, he must obtain a certificate from the District Attorney or District Judge that no inquest need be held. If said certificate is not so obtained, an inquest must be held. Hence, in either case after an investigation the coroner must issue a death certificate whether an inquest is conducted or not.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-61. PRIVATE DETECTIVE ACT—Armored car operators must be licensed.

Carson City, May 22, 1951.

Hon. Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada.

Dear Mr. Allen:

This will acknowledge receipt of your letter of May 15, 1951, wherein you present the following question:

QUERY

Are operators of armored car service required to be licensed under the Private Detective Act?

OPINION

Section 5175.01(3) (c), 1929 N.C.L., 1949 Supp., provides, "(3) As used in this act 'private detective' shall mean and include any of the following: * * * (c) Any person who furnishes policemen, *guards*, or watchmen; * * *." (Emphasis added.)

The intent of the Legislature in the enactment of this Act is not easily ascertained, since "guards" though mentioned only in the title and as quoted above are not, in the ordinary usage of the word, employed to furnish or supply information as to the personal character or actions of other persons. However, the words "private detectives" are specifically stated to mean and include "guards."

If the operators of an armored car service furnish guards for said service, then it is the opinion of this office that they must be licensed under the Private Detective Act.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-62. PRACTICING DENTISTS who are not licensed as specialists in any of the branches of dentistry are subject to the provisions for specialists' licenses under Chapter 152, Statutes of Nevada 1951.

Carson City, May 22, 1951.

Nevada State Board Of Dental Examiners, c/o L.D. Sullivan, D.D.S., First National Bank Building, Carson City, Nevada.

Gentlemen:

This will acknowledge receipt of your letter in this office May 18, 1951, requesting an opinion as to the interpretation of section 5, Chapter 152, Statutes of Nevada 1951, the statute regulating the practice of dentistry.

QUERY

1. Under heading "Specialists License," section 5, the question has been raised as to whether or not the Act as passed does apply to those dentists already practicing a specialty at the time it was enacted into law?

2. Should such dentists be granted specialists' licenses by the Board of Dental Examiners whether or not their training and length of practice meets the standards for specialists' licenses as set forth in the present Act?

3. If a dentist, prior to the enactment of this law, has been practicing a specialty only part of his time and the balance of his working time has been devoted to general practice, would such a dentist be entitled to a specialist's license without fulfilling all the requirements for a specialist's license?

OPINION

Chapter 152, Statutes of 1951, is an Act defining and regulating the practice of dentistry and dental hygiene. Section 5 of the Act, among its provisions, contains provisions relative to "Specialist's License," as follows:

The board is empowered to establish higher standards for and make additional requirements of any licensee who announces or holds himself out to the public as a specialist or as being specially qualified in any particular branch of dentistry, and may issue a certificate authorizing practice in any particular branch of dentistry to any licensee who has complied with the requirements established by the board for the particular branch of dentistry at the time of making application.

No licensee shall announce or hold himself out to the public as a specialist or as being specially qualified in any particular branch of dentistry, unless he has:

(a) Been in the practice of dentistry for three years or more, prior to making application for certificate to practice as a specialist.

(b) Has proven to the satisfaction of the board (1) That for a period of not less than one academic year he has pursued an intensive course of study in such branch of dentistry at a university, institution or college of dentistry recognized by the board, or (2) That in the branch of dentistry to which he wishes to confine his practice he is a member in good standing of a national association, society or group of specialists which is recognized by the board, and

(c) Has complied with such other additional requirements as may be established by the board to show his fitness to practice in that specialty of dentistry.

The fact that any licensee shall announce by card, letterhead, or any other printed matter using such terms as "specialist," "practice limited to," or "limited to specialty of," with the name of such branch of dentistry practiced as a specialty, or shall use equivalent words or phrases to announce the same, shall be prima facie evidence that such licensee is practicing as a specialist.

The intent of the Legislature, as appears from the quoted language, is to require a licensed dentist who advertises or practices as a specialist to qualify under the provisions named in subdivisions (a), (b) (1) and (2), and (c) of section 5, as well as such other additional requirements as may be established by the board to his fitness to practice in the particular specialty of dentistry.

Section 14 of the Act provides that all licenses and renewal certificates issued by the board and in force at the time this Act takes effect shall remain in force subject to the provisions of the new Act.

We have been unable to find in the previous Acts relating to the practice of dentistry a provision relating to the licensing of specialists. The saving clause would only apply to licenses and renewals issued under the statutes which are repealed by the Act. The specialists' licenses are to establish higher standards for and make additional requirements of those licensed to practice dentistry.

Answering your first question, we are of the opinion that section 5 of the Act applies to dentists already practicing a specialty at the time Chapter 152, Statutes of Nevada 1951, became effective, and requires such persons to apply for and obtain specialists' licenses.

The answer to your second question, in the opinion of this office, is that an applicant for a specialist's license should meet the requirements provided in the Act for specialists' licenses.

The answer to your third question is embraced in our answer to your first two questions.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

**OPINION NO. 51-63. CONSTITUTION OF CHAPTER 253, STATUTES OF 1951,
RELATIVE TO SPECIAL LICENSE PLATES FOR AMATEUR RADIO STATION
LICENSEES.**

Carson City, May 23, 1951.

Ellis J. Folsom, Director, Motor Vehicle Registration Division, Public Service Commission,
Carson City, Nevada.

Dear Mr. Folsom:

This will acknowledge receipt of your letter in this office May 21, 1951, requesting an opinion relative to Chapter 253, Statutes of 1951.

QUERY

1. We would appreciate an opinion concerning Assembly Bill No. 40; passed by the 1951 Legislature, pertaining to the issuance of license plates by the Motor Vehicle Division, bearing the call letters of certain licensed radio operators.
2. Is the Motor Vehicle Division compelled to issue special plates as of July 1, 1951, or does the issuance of these special license plates commence December 15, 1951, to comply with the issuance of 1952 license plates?

OPINION

Assembly Bill No. 40 is Chapter 253, Statutes of Nevada 1951. Section 1 reads as follows:

Owners of motor vehicles who are residents of the State of Nevada, and who hold an unrevoked and unexpired official amateur radio station license issued by the federal communications commission, upon application, accompanied by proof of ownership of such amateur radio station license, complying with the state motor vehicle laws relating to registration and licensing of motor vehicles, and upon the payment of the regular license fee for plates as prescribed by law, and the payment of an additional fee of three dollars (\$3) shall be issued a license plate, as prescribed by law for private passenger cars, upon which in lieu of the numbers as prescribed by law shall be inscribed the official amateur radio call letters of such applicant as assigned by the federal communications commission.

The second section provides that the Motor Vehicle Division shall make such rules and regulations as necessary to ascertain compliance with all State license laws relating to the use and operation of a private passenger car before issuing such plates.

Section 4 provides:

This act is supplementary to the motor vehicle licensing laws of the State of Nevada, and nothing herein shall be construed as abridging or amending such laws.

The Motor Vehicle Licensing Act, section 14, section 4435.13, 1929 N.C.L., 1941 Supp., provides that registration of motor vehicles shall be renewed annually.

Section 15, section 4435.14, 1929 N.C.L., 1941 Supp., provides for the expiration of registration upon transfer of title, and registration of such vehicle as provided for an original registration.

Section 15, section 4435.10, 1929 N.C.L., 1949 Supp., provides for the payment of personal property tax at the time the motor vehicle is registered, unless the applicant is the owner of real property in the county, when the tax may be placed on the real property tax roll.

The new Act provides that the special plates be issued by the motor vehicle division, which shall furnish the County Assessors with a list of those to whom special plates are issued. The motor vehicle division does not collect the personal property tax payable in the county where the car is registered.

To construe Chapter 253 according to the literal meaning of the words "in lieu of" would make the Act a special Act which required an annual tax of eight dollars from certain persons for the same privilege granted others under an annual tax of five dollars.

A rule of statutory construction expressed in *State v. Martin*, [34 Nev. 493](#), is that courts will construe the language of a statute so as to give effect to, rather than nullify it.

The chapter in question provides that the Motor Vehicle Division shall make rules and regulations to determine as to whether there has been a compliance with the State license laws relating to use and operation of a private passenger car before issuing the plates. The Motor Vehicle Division, not being authorized to collect taxes on such cars, must ascertain as to whether the personal property tax is paid or placed on the real property tax roll.

The only construction of the statute to give it effect, rather than nullify it, is that the plate inscribed with the official amateur call letters is an additional plate to the registration number assigned to the car. The three dollars once paid for this plate will entitle the holder to use the same on his car as long as he is qualified to hold the same. This construction will not abridge the rights of such license holder or amend the Motor Vehicle Registration Laws, and would be in harmony with the purpose of the Act as expressed in the preamble. In our opinion such a construction is supported by decisions of the State Supreme Court.

State v. Eggers, 36 Nevada 373, held that 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 language.

National Mines Co. v. Sixth Judicial District Court, [34 Nev. 67](#), held that where a statute is equally susceptible of two constructions, the Court will presume that the Legislature did not intend a radical change in existing proceedings and will construe the statute in harmony therewith.

See *State v. Brodgian*, [34 Nev. 486](#); *Orr Ditch & Water Co. v. The Justice Court of Reno*, [64 Nev. 138](#).

We are, therefore, of the opinion that when the radio station licensee applies for the special plates he should satisfy the Motor Vehicle Division as to his qualifications as such licensee, and in addition a showing that his car is registered under the general law and that the personal property taxes on the car are paid or placed on the tax roll in the county of his residence. The payment of the additional fee of three dollars entitles him to the special plate which may be used on his car so long as he is a qualified amateur radio station licensee without the payment each year of the additional tax.

We are of the opinion, in answer to your second question, that in the event the Motor Vehicle Division can secure the special plates by July 1, 1951, when the Act goes into effect, the plates may be issued before December 15, 1951.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

cc: Hon. R.A. Allen, Chairman, Public Service Commission.

OPINION NO. 51-64. INTERPRETATION OF CHAPTER 276, STATUTES OF 1951, RELATIVE TO THE EXEMPTION OF PAYMENT FOR HUNTING AND FISHING LICENSES AND DEER TAGS FOR PERSONS 65 YEARS OF AGE AND OVER.

Carson City, May 23, 1951.

State Fish And Game Commission, P.O. Box 678, Reno, Nevada.

Attention: Frank W. Groves, Director.

Gentlemen:

This will acknowledge receipt of your recent letter in which you request our opinion as to the following question:

QUERY

Does Chapter 276, Statutes of 1951, amend the 1935 Statutes relative to the age of those persons who are eligible to free hunting and fishing licenses and free deer tags?

OPINION

It is a well decided rule of statutory construction that where there are two irreconcilable conflicting statutes, the later in time is controlling. *State v. Esser*, [35 Nev. 429](#); *State v. Nevada Tax Commission*, [38 Nev. 112](#).

Although the 1951 Act does not expressly repeal the 1935 Act, it is in conflict. Consequently, the 1951 Act is controlling and only those persons who are 65 years of age, or more, are entitled to free hunting and fishing licenses and deer tags.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-65. RULE 2 OF THE PUBLIC EMPLOYEES RETIREMENT BOARD
requires policemen and firemen to be employed as policemen or firemen for one-half of the number of years which entitles them to retire at the age of 55.

Carson City, May 29, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to the following question:

QUERY

In the case of policemen or firemen with 20 or more years of service is the phrase “and at least one-half of his time in Rule 2 to be construed as one-half of total service or one-half of the twenty years which entitles a member of the retirement system to the maximum retirement allowance?”

OPINION

Rule 2 as adopted in accordance with section 6 reads as follows:

A police officer or fireman must have served his last five years and at least one-half of his time as policeman or fireman to qualify for the earlier retirement age which is allowed for police officer or fireman.

Section 18(1) provides as follows:

On and after July 1, 1949, a police officer or fireman who is a member of the system and who has attained the age of 55 years may be retired from service and thereafter, except as this act otherwise provides, the date of his retirement shall be the first day of the calendar month next succeeding the one in which he attains that age.

Section 18 does not make it a requirement that a policeman or fireman be employed for any definite period as a policeman or fireman in order to be eligible to retire at the age of 55. No such requirement is found elsewhere in the Retirement Act.

The board in adopting Rule 2 does make it a requirement that the last five years of employment be in the position of a policeman or a fireman, and further makes it a requirement that one-half of the time be in such position. This would make it essential that one be employed as a policeman or fireman for a minimum of five years before retiring; however, if the word “total” was to be read into the rule it would have the effect of penalizing rather than rewarding those persons engaged in a hazardous occupation, as no other employee is obligated to comply with the same or similar requirements.

The rule was adopted obviously to prevent persons with less than five years employment in one of the hazardous occupations from retiring at an earlier age and it is therefore our opinion that the time mentioned in the rule refers to one-half of the time essential for one to be eligible to retire, and not one-half of the total time employed.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-66. BANKS AND BANKING—Interpreting Sections 17 and 18 of the Nevada Banking Act.

Carson City, June 1, 1951.

Hon. Grant L. Robison, Superintendent of Banks, Carson City, Nevada.

Dear Mr. Robison:

This will acknowledge receipt of your letter in this office May 29, 1951, submitting a request for an opinion as to the interpretation of sections 17 and 18 of the Nevada Banking Act.

STATEMENT

Bank director "A" is a partner in two separate business enterprises. Business "1" borrows from the bank and as security gives a negotiable check drawn against the funds of business "2," said check being unleashed by the bank, but held in the collateral file.

QUERY

Would the transaction violate the provisions of section 17 of the Bank Act in that it may be considered as an endorsement for money borrowed. Also, would a negotiable check be considered "sufficient security" for a loan as provided in section 18?

OPINION

Section 17 of the Nevada Banking Act, section 747.16, 1929 N.C.L., 1941 Supp., provides that it shall be unlawful for any director of any bank to become an indorser or surety for loans to any other person, or in any manner become obligor for money borrowed from or loaned by such bank.

Under the provisions of section 15 of the Uniform Partnership Act adopted by Nevada, section 5028.14, 1929 N.C.L., 1941 Supp., all partners are liable jointly for all debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

The ordinary meaning of the word endorse is to sign one's name on the back of a check to obtain the cash, or credit represented on the face of the check. It also means to give one's name to support or sanction.

The director as a partner in the business becomes an obligor for money borrowed from the bank of which he is a director.

Section 18 of the Nevada Banking Act, section 747.17, 1929 N.C.L., 1941 Supp., provides as follows:

It shall be unlawful for any director, officer or employee of any bank, directly or indirectly, for himself or as agent of others, to borrow money from such bank or trust company, unless he give good and sufficient security for the payment of such loan, which loan and security must be approved by a majority vote of the directors, in regular or in special meeting assembled, the applicant not voting, and all proceedings relating thereto shall be recorded at length in the records of the bank, and shall immediately be reported in writing to the superintendent of banks.

Section 189 of the Negotiable Instrument Law of Nevada, section 4658, N.C.L. 1929, provides as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

As stated in 7 Am.Jur. 277, "A check may be defined as a bill of exchange drawn on a bank payable on demand; it is drawn against funds on deposit in a bank, and its office is well understood in all commercial circles."

In *Traction & Equipment Corporation v. Chain Belt Co.*, 50 F. Supp. 1001, it was held that the retention of a check for an unreasonable time may be deemed to be an acceptance just as though it had been deposited or cashed.

The acceptance of a check for the amount of indebtedness may constitute an accord and satisfaction. *See* 75 A.L.R. 905. The drawer of a check may before its certification or acceptance, revoke the check and countermand its payment. 7 Am.Jur. 437.

We are therefore of the opinion that a check as understood in commercial circles is not such good and sufficient security for the payment of a loan directly or indirectly to a director of a bank when such check is held as collateral by the bank and not cashed.

The transaction as set out in the statement herein in our opinion would be in violation of the Nevada Banking Act.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-67. PUBLIC SCHOOLS—Average daily attendance for purpose of apportionment of school moneys determined on basis of six months highest daily attendance for preceding school year.

Carson City, June 5, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office on June 4, 1951, submitting the following inquiry:

QUERY

Does Chapter 119, Statutes of 1951, which amends Section 179 of the School Code of 1947, Section 6084.189, N.C.L. 1949 Supp., direct or permit the State Superintendent of Public Instruction to make all apportionments of school monies authorized to be made under the act concerning public schools by using the six months of highest average daily attendance of the school year last preceding?

OPINION

Section 179 as amended, quoting that part of the section deemed relevant, reads as follows: "Apportionment of State Distributive School Fund. The superintendent of public instruction is hereby empowered to establish uniform rules to be used in calculating the average daily attendance of pupils for all public schools in the State. For making the apportionments now or hereafter authorized and directed to be made under the provisions of this *act*, the term "average daily attendance" shall mean the six months of highest average daily attendance for the school year last preceding. * * *." (Italics supplied.)

The intention of the Legislature, as disclosed by the language used, is that the Superintendent of Public Instruction for the purpose of making all appropriations directed to be made under the provisions of the School Code, shall use as a basis to determine the average daily attendance in all public schools of the State, the six months of highest daily attendance in that school for the last preceding year.

This rule is applicable to determine the school apportionment moneys to high schools and elementary schools, after July 1, 1951, at which time the amendment is in effect.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-68. NUISANCE—County Commissioners must order abatement.

Carson City, June 11, 1951.

Hon. Franklin H. Koehler, District Attorney, Lyon County, Yerington, Nevada.

Dear Mr. Koehler:

This will acknowledge receipt of your letter of June 6, 1951, wherein you request the opinion of this office as to whether or not it is the duty of the County Commissioners, upon receipt of a written complaint, to direct the District Attorney to abate a public nuisance, if such nuisance exists within the confines of an incorporated city.

In paragraph two of said letter you have stated that the County Commissioners have been advised that it is their duty (under penalty of forfeiture of office) to order said nuisance abated. This office concurs with your opinion, based upon the clear statement of our Supreme Court in *Kelly v. Clark County*, [61 Nev. 293](#), where on page 301 the Court said:

Lastly we say that there is no merit in the contention that sec. 1231 N.C.L. limits the jurisdiction of boards of county commissioners relative to public nuisances to unincorporated

towns or cities in their respective counties. Section 2043 expressly gives the boards of county commissioners authority in the premises. We said in *State ex rel. Edwards v. Wilson*, supra: “The statute makes it clear that the county is the real party in interest in an action brought under its provisions to abate public nuisances existing within the limits of said county.”

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-69. STATE EMPLOYMENT SERVICE may legally accept orders for placement of union workers when so specified by employer.

Carson City, June 11, 1951.

Mr. John F. Cory, Executive Director, Employment Security Department, Carson City, Nevada.

Dear Mr. Cory:

Reference is hereby made to your letter of May 29, 1951, wherein you request the opinion of this office upon the following. You advise that in the course of the usual functions of the Employment Service a potential employer calls upon such service for workers in a particular field, specifying the type of workers needed, and also specifying that only members of a certain labor union shall be referred for employment. Your inquiry is:

1. Can the Nevada State Employment Service lawfully accept an order for workers in which union membership is specified as a condition of employment, in view of Chapter 95, page 111, Statutes of 1951?
2. Would the State Employment Service be in violation of such law, either directly or indirectly, in referring to the employer so specifying only union members?

OPINION

Chapter 95, Statutes of 1951, amends section 10473, N.C.L. 1929, and provides as follows:

It shall be unlawful for any person, firm, or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall be required not to become or continue a member of any labor organization, or shall be required to become or continue a member of any labor organization. The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or condition of work.

There is no express provision nor even an implication contained in the language of the foregoing statute prohibiting any employer from employing union labor if he so desires. And neither is there any prohibition therein prohibiting any employer from employing nonunion labor if such is his wish. The statute only seeks to make it unlawful for any employer to enter into any agreement, either oral or in writing, whereby as a condition for continuing or obtaining employment that any person or prospective employee shall be required not to become or continue as a member of any labor organization, or shall be required to become or continue as a member of a labor organization.

The statute is a penal statute and is to be strictly construed and must be construed not to apply to an Act claimed to be in violation thereof. *Ex parte Todd*, 46 Nev. 214. Penal statutes must be liberally construed in favor of the accused, and it must appear that he committed acts which are clearly made an offense by the statute. *Ex parte Smith*, 33 Nev. 466.

There is nothing in the foregoing statute, nor any other statute or law of this State, that deprives the employer of his right to employ union or nonunion employees of his own free will. We think that such being the state of the law that it necessarily follows the employer has the legal right to specify in his application or order for the furnishing of workers the type, qualifications and labor union affiliations thereof.

We think that it must be assumed by the Employment Service that the employer requesting the furnishing of workers has not violated the statute in question by executing or requiring the execution of the agreement prohibited by the terms of the statute. The question of whether the statute has been violated is a judicial question and only determinable by the Courts. It is therefore the opinion of this office that the Nevada State Employment Service can lawfully accept orders for workers where union membership is specified, and in so doing it will not violate Chapter 95, Statutes of 1951.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-70. APPOINTMENT OF MEMBERS OF LEGISLATURE TO CIVIL OFFICE OF PROFIT.

Carson City, June 14, 1951.

Hon. Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada.

Dear Mr. Allen:

This will acknowledge receipt of your letter of June 1, 1951, wherein you request the opinion of this office as follows:

May we have your opinion as to whether or not there are any constitutional or legislative inhibitions against the employment of members of the last Legislature, for such positions as are available in this department and for which they are qualified. We have in mind, positions in the Motor Vehicle and Drivers License Divisions and in the Highway Patrol Division.

OPINION

In determining whether or not there are constitutional or legislative inhibitions against the employment of members of the 1951 Legislature, two pertinent questions must be resolved. First, were any of the several positions herein concerned created during the 1951 session of the Legislature? Second, were the emoluments of said positions increased during said session?

Section 8, Article IV, Constitution of the State of Nevada, provides as follows:

No senator or member of the 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 for the emoluments of which shall have been increased, during such term, except such office as may be filled by election by the people.

A complete review of the 1951 Statutes fails to disclose any change in office of director of the Motor Vehicle or Drivers License Divisions, insofar as the creation of new positions or increase in emoluments of said divisions. It is therefore the opinion of this office that there are no constitutional or legislative inhibitions to the appointment of members of the 1951 Legislature to the two above-mentioned positions.

Senate Bill No. 20, approved February 26, 1951, being 1951 Stats. 36, merely effected the designation of the Nevada State Police and the Nevada Highway Patrol, but did not in any way either create nor increase the emoluments of the office of highway patrolmen.

Assembly Bill No. 297, approved March 21, 1951, being 1951 Stats. 338, provided for an increase in the number of highway patrolmen from 25 to 31 members, and for the transfer of weighing scales from the Department of Highways to the Public Service Commission. There was, at the time of the passage of this 1951 Act, a Highway Patrol legally constituted, legislatively organized and existing by virtue of law, to wit, sec. 4435.50, N.C.L. 1949 Supp. The position of highway patrolmen also legally existed, under authority of the above-cited section of the Nevada Compiled Laws. There was but one Highway Patrol for the entire State. The 1951 Act did not create a new Highway Patrol or new officer. The creation of said patrol and office of patrolmen has long existed. The 1951 Act simply provided for an increase of patrolmen, clearly based upon the need for more efficient law enforcement upon the highways of this State.

The Supreme Court of the State of Nevada, in the case of *Walcott v. Wells* (1890), [21 Nev. 47](#), Chief Justice Hawley, delivering the opinion of the Court, on page 53, said:

The act supplemental to and amendatory of an act entitled "An act to redistrict the state," etc., approved March 4, 1885, was approved March 12, 1889; and section 1 of said act reads as follows: "The number of district judges in the judicial district of the state of Nevada shall, from and after the passage of this act, be four; and the governor of said state shall immediately upon the passage of this act, appoint a district judge from said judicial district to hold such office under such appointment until the next general election, when four district judges from said judicial district shall be elected." (Stat. 1889, 122.) *There was, at the time of the passage of this act, a district court legally constituted, constitutionally organized and existing by virtue of law, to be held in every county of the state. The office of district judge also legally existed.* There was but one judicial district for the entire state, but one district court, and one judicial office in connection therewith to be filled, to-wit: the office of district judge of the district court of the state of Nevada. This office was then filled by three district judges, each having equal and co-extensive and concurrent jurisdiction and power throughout the state to hold the district court in any county, and to exercise and perform the powers, duties, and functions of the court, and all other duties pertaining to the office of district judge. These judges were authorized to elect a presiding judge, who had, among other things, the power to direct the district judges to hold court in the several counties as the public business might require. (Stat. 1885, 60; *State ex rel. Coffin v. Atherton*, [19 Nev. 332](#).)

The legislature, in 1889, deeming it necessary for the proper and speedy transaction of judicial business in the district court, and believing that they were authorized to increase the number of district judges, passed the act in question,

authorizing the governor to appoint other judge. *This act did not create any new court or new officer. It was simply provided for an increase of judges.* (Italics ours.)

It is therefore the opinion of this office that a member of the 1951 Legislature may be appointed as a member of the Nevada Highway Patrol, provided however, that the emoluments received by said member conform with the statutory limitations.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-71. THE MEANING OF TERM "CONTINUOUS SERVICE" IS FOUND IN SUBSECTION 7, CHAPTER 217, STATUTES OF 1951.

Carson City, June 15, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to the following questions:

QUERIES

1. Under the definition of "continuous service" in Chapter 217, Statutes of Nevada 1951, may the period of service at Basic Magnesium, Inc., be considered as service with a Federal agency as specified in the said chapter? (Our factual information is admitted sketchy as to the identity of the employer but it is our understanding—which was conveyed to Mr. Johnson in a letter of April 13 and not subsequently controverted—that the work, in actuality, was directly for a private contractor operating under Federal contract.)
2. As a general question: Will service be regarded as "an uninterrupted continuation of duties then being performed" when changes in the conditions of employment involve a change in locale or a break in the continuity of tasks being performed at the time of change?

STATEMENT

The facts as we understand them are as follows:

Mr. Johnson was employed by the Department of Highways as an inspector, and due to the shortage of manpower he was "loaned" to Basic Magnesium on March 25, 1943, as an asphalt inspector and was employed in such capacity until October 16, 1943, at which time he returned to the Highway Department and to the same job which he had prior to his leaving. He was employed during his absence from State employment by a private contractor who was doing work at Basic Magnesium under a contract with the Federal Government.

OPINION

Subsection 7, Chapter 217, Statutes of 1951, provides as follows:

The term "continuous service" means service in public employment of the state and for its political subdivisions participating in the system, in positions subject to the provisions of this act or in positions which would have been subject to this act, not interrupted for five years or more; provided, the time spent by persons employed in the service of federal agencies prior to creation of the retirement system, when such service constituted an uninterrupted continuation of duties then being performed for the State of Nevada or an eligible participating political subdivision of the State of Nevada, shall not be considered an interruption of service.

This section was designed to protect those persons who through no fault of their own were transferred to a Federal agency to perform the identical duties they were performing prior to their transfer; the principal difference being that the Federal Government assumes the obligation of paying the salaries.

Situations have arisen wherein this particular section would directly apply. In 1938 the Employment Service Department was created and was at that time a branch of the Employment Security Department. In 1942 the entire Employment Service was transferred to the Federal Government and was so controlled. Persons employed by the Employment Service retained their identical status as far as positions were concerned, and did the identical work they were doing prior to the transfer and even occupied the same office, desks, etc. In 1946 the department was transferred back and is now controlled by the State.

A similar situation arose involving two employees of the Truckee-Carson Irrigation District. The Federal Government offered to place these two persons on the Government payroll after several C.C.C. members were placed under the control of Truckee-Carson Irrigation District for the purpose of supervision. The two persons involved were performing identical duties prior to their transfer to the Federal Government.

Therefore, it is our opinion that uninterrupted continuous service as used in this particular section is very narrow in scope and applies only to situations as set forth above, that is, when a Federal agency takes over duties that are being performed by a State agency and the employees of the State agency are transferred in the identical positions with identical duties as were being performed prior to the transfer. Consequently, Mr. Johnson would not be entitled to credit toward retirement for the period he was employed at Basic Magnesium.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-72. COUNTY COMMISSIONERS' MEETINGS.

Carson City, June 25, 1951.

Hon. Roscoe H. Wilkes, District Attorney, Lincoln County, Pioche, Nevada.

Dear Mr. Wilkes:

This will acknowledge receipt of your letter of June 5, 1951 requesting the opinion of this office as follows:

- (1) Whether County Commissioners must meet semi-monthly to pass on salary demands of appointive officers and employees.
- (2) Whether the elective officers and regular employees have any choice as to whether they are to be paid semimonthly or monthly.

OPINION

Quoted below is Section 9, Chapter 109, 1951 Statutes 131:

Every demand against the county, except the salaries of the district judge or judges, and the elective officers of the county, whose salaries are fixed by law, shall be acted upon by the county commissioners, and allowed or rejected in order of presentation, and must, after having been approved by the board of county commissioners, said approval to consist of a written approval of at least two members of the board of county commissioners, *before it can be paid, be presented to the county auditor to be allowed, who shall satisfy himself whether the money is legally due and the remains unpaid*, and whether the payment thereof from the treasury is authorized by law, and out of what fund. (Emphasis added.)

As will be noted in the above-quoted section, the final payment of salaries to appointive officers and employees is, in addition to the written approval of two County Commissioners, contingent upon the satisfaction of the County Auditor that said claim for salaries is legally due and unpaid.

The approval of the County Commissioners as provided by the above section is as such an approval of the payment of a specific salary for a specific office or employment, i.e., claim of John Doe, clerk, salary for period June 1 to June 15 and June 16 to June 30, in the total sum of \$200: approved June 5, 1951, signed by two County Commissioners. Such approval is, as directed by the statute, payable subject to the satisfaction of the County Auditor, that John Doe has fulfilled the requirements of the office of clerk and is therefore entitled to payment. Thereafter the auditor will accordingly issue his warrant on or about the 15th of June and the 30th of June for the amount legally due and unpaid in accordance with Chapter 73, 1951 Statutes, 77.

In answer to question No. 1, this office is of the opinion that the County Commissioners on the fifth day of each month may pass upon the salary claims for the remainder of said month.

The contemplation of Chapter 73, 1951 Statutes 77, being section 7576, 1929 N.C.L., 1949 Supp., as amended, was not to increase the duties of the respective County Commissioners, hence their approval or rejection of salary claims will continue as before the passage of the above-mentioned amendment. The County Auditor, however, must issue his warrant twice each month and before said issuance be satisfied that said claims are legally due and unpaid.

The wording of Chapter 73, 1951 Statutes 77, A* * * *shall* be paid their salaries as fixed by law in two equal semimonthly payments, the opinion of this office that the respective County Auditors must issue their warrants semimonthly. However, there is nothing in the law that suggests that it is mandatory that a person must accept his salary.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-73. MUNICIPAL CORPORATIONS—Incorporated cities' participation in county general road funds.

Carson City, June 26, 1951.

Hon. Roscoe H. Wilkes, District Attorney, Lincoln County, Pioche, Nevada.

Dear Mr. Wilkes:

This will acknowledge receipt of your letter of June 20, 1951, requesting the opinion of this office as follows:

Whether or not the city of Caliente is entitled to share in the revenue derived by the county by virtue of 1949 Statutes, page 647, section 2.1A?

Also if it is ruled that they are to share, whether or not the city shares in the revenue derived by the county by virtue of the formula set up in section 2.1A or whether they share in the same manner as provided in section 2.1B?

STATEMENT

Section 2.1(a), 1949 Stats. 648, in part, reads as follows:

The receipts of the tax as levied in this subsection and collected by the state treasurer shall be allocated quarterly by the state treasurer to the counties and shall be used exclusively on county roads under the direction of the boards of county commissioners of the several counties upon the following formula:

From your letter it is indicated that you are of the belief that the moneys received as a result of the one-half cent (1/2) levy should be allocated within your county in accordance with the formula set forth in section 2.1(a).

Conceding that the above-quoted sentence is unwieldy, if read in light of its subject, it would present substantially the following: "The taxes collected by the state treasurer shall be allocated to the 17 counties quarterly by the following formula:"

The State Treasurer, with the aid and assistance of other State departments, does quarterly allocate all the funds derived from the one-half cent tax to the respective counties in accordance with the statutory formula.

Section 5394, 1929 N.C.L., 1941 Supp., provides for the payment of expenses of construction and maintenance of streets, alleys and public highways of incorporated cities by the respective counties. Said payment is to be made from county road funds and not to exceed ten (10%) per centum of the total amount levied and collected for general road purposes.

This section, enacted long before motor fuel taxes, contemplates that incorporated cities shall participate in the general road funds derived by ad valorem taxes but not from motor fuel taxes, since section 2.1(a) specifically provides that the moneys so allocated shall be used exclusively for county roads.

OPINION

It is the opinion of this office that by the amendment of the 1949 Legislature of section 2.1, Chapter 276, 1947 Statutes of Nevada, that incorporated cities are not to participate directly in the receipts of the tax levied in subsection 2.1(a). The provisions of section 5394, 1929 N.C.L.,

1941 Supp., still abide, permitting the city of Caliente, upon request, to participate in the County General Road Fund.

Section 2.1(b) specifically directs that incorporated cities shall participate in the receipts of the one cent (1¢) tax levy and specifically sets forth how said tax should be allocated.

Since your first question is answered in the negative such precludes the necessity of consideration of your second question.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-74. COUNTY COMMISSIONERS—Members of board are not eligible to become members of the Public Employees Retirement System.

Carson City, June 26, 1951.

Hon. A. Loring Primeaux, District Attorney, Churchill County, Fallon, Nevada.

Dear Mr. Primeaux:

This will acknowledge receipt of your letter in this office June 19, 1951, requesting an opinion from this office upon the following subject:

QUERY

The Board of County Commissioners requested you to secure an opinion from this office as to the eligibility of its members to qualify for public employees retirement under the amendment to the Act establishing a system of retirement for certain officers and employees, as amended by Chapter 183, Statutes of Nevada 1951.

OPINION

Subsection 6 of section 2 of the amendment provides that a person holding an elective office, "if otherwise eligible," may become a member of the system, after notice to the board.

Subsection 4 of this section provides as follows: "No employee whose position normally requires less than 1,200 hours of service per year may become or remain a member of the system."

Section 1937, N.C.L. 1929, provides for the regular meeting of the Board of County Commissioners on the fifth day of each and every month, and for special meetings when authorized by the board.

The powers and duties of the members of the board are exercised and performed as a board, and such duties are performed when the board is in session at a regular or adjourned meeting, or a special meeting, and as a board of equalization.

When meeting as a board of equalization each year, such session is limited to the period between the fourth Monday of July and the third Monday in August.

It does not appear therefore that the position of a County Commissioner normally requires 1,200 hours of service per year.

We are of the opinion that under usual conditions requiring services of members of Boards of County Commissioners, such members are not eligible to become a member of the Public Employees Retirement System.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-75. NEVADA STATE HOSPITAL—Authority respecting feeble-minded minors.

Carson City, June 28, 1951.

Dr. S.J. Tillim, Supt., Nevada State Hospital, P.O. Box 2460, Reno, Nevada.

Dear Dr. Tillim:

This will acknowledge receipt of your letter in this office June 27, 1951, requesting an opinion as to the support and care of certain feeble-minded minors under Chapter 205, Statutes of Nevada 1937.

STATEMENT

Pursuant to section 20 of the Act concerning the insane of the State, as amended, the same being section 3524, 1929 N.C.L. 1941, two feeble-minded minors were committed to the Nevada State Hospital. As provided by the statute, these minors were received at the hospital and held temporarily until an out-of-State school was found available to properly educate and care for them. The school to which the minors were sent has now determined to terminate the contract with the counties on or about July 1, 1951. One of the children entered the school on September 13, 1948, and the other on March 17, 1950.

The Welfare Department in one of the counties has advised the school that the Nevada State Hospital must accept the children for further institutional care and that the county is not responsible in the premises.

In one case there is no responsible parent, and in the other the parent is unable to contribute to the cost of the care of the child which has heretofore been a responsibility of the county.

QUERY

Is the Nevada State Hospital required or permitted to receive the children on their return from out-of-State school without previous arrangement with the county?

What are the precise terms and conditions under which these children may be admitted to the Nevada State Hospital?

OPINION

Section 3524, 1929 N.C.L., 1941 Supp., section 20, of the Act concerning the insane, paragraph one, provides: "The said board for the care of the said hospital for mental diseases and

the superintendent of said hospital are hereby authorized to receive and care for, temporarily, the indigent feeble-minded minors of the State of Nevada at state expense, when properly committed to said hospital, and to hold them temporarily subject to an arrangement as may be made for their proper care and education in an institution in a neighboring state to be selected by said board, but only for such a reasonable time in each case as may be necessary in order to make such an arrangement.”

The intent of the Legislature, as appears from the language of the section, is that such children should be under the control of the superintendent only for such reasonable time as would enable him to place the child in an institution of a neighboring State for its care and education. When this is accomplished, it does not appear that the hospital or the superintendent has any further control or authority. The responsibility to pay the expense of such children, after they have been sent to such an institution or institutions, was made a charge against and paid by the county from which such minor was committed under the second and third paragraphs of the section.

There is no provision in this section for the return of a child to the State Hospital from an institution in which such child was placed. The superintendent of the hospital acted as the agent of the county in placing the child and it appears that his authority over the child came to an end when accepted by the school.

However, the Act concerning the insane and all Acts amendatory thereof, which includes section 20 of the Act, involved in this opinion, is repealed by Chapter 331, Statutes of 1951, effective July 1, 1951.

Section 38 of this Act provides as follows: “The superintendent of the hospital is hereby authorized to receive and care for mentally deficient, noneducable children of the State of Nevada at state expense when properly committed to said hospital.”

We are, therefore, of the opinion that the Nevada State Hospital is not required or authorized to receive the children if returned from the school before July 1, 1951. The responsibility is that of the county.

If the children are returned after the effective date of Chapter 331, Statutes of 1951, and are mentally deficient, noneducable children, they must be properly committed to the hospital from the county before the superintendent is authorized to receive them.

Very truly yours,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-76. WADSWORTH SCHOOL DISTRICT—Chapter 116, Statutes 1951, providing bond issue for Wadsworth School District No. 11, construed.

Carson City, June 28, 1951.

Hon. Jack Streeter, District Attorney, Washoe County, Reno, Nevada.

Dear Mr. Streeter:

Reference is hereby made to your letter of June 26, 1951, requesting the opinion of this office relative to the preparation and issuance of bonds of Wadsworth School District No. 11, as authorized by Chapter 116, page 150, Statutes of 1951.

Your inquiry directs attention to an inconsistency between section 2 and section 7 of the Act with respect to the term of the bonds and the annual retirement thereof. You inquire whether the inconsistency between section 2 and section 7 of the Act precludes the issuance of the bonds and further if it is our opinion that the inconsistency does not preclude the issuance, then could Washoe County legally retire more than one bond per year under the provisions of the Act.

You further inquire whether the language of section 10, "the bonds shall be prepared not later than July 1, 1951," means that the bonds shall be series of July 1, 1951, or does it mean that the proposed bonds which will be subsequently printed shall be prepared by that date. You also referred, in this connection, to section 7 of the Act with respect to the annual maturement of the bonds beginning with the first Monday in July, 1952, and state that if July 1, 1951, is interpreted as meaning the bonds shall be of the series of that date, then the first year's interest will be more than for one year for the reason that the first Monday of July will not necessarily fall on the first day of July.

OPINION

With respect to the question of inconsistency between section 2 and section 7, it is the opinion of this office that such inconsistency does not preclude the issuance of the bonds. Section 2 provides that, "They shall be redeemed and retired consecutively in the order of their issuance annually thereafter, according to the time specified therein from the date of their issue, respectively, and in no case shall any bond run for a longer period than twenty (20) years." This language clearly imports a time limitation upon the entire issue of bonds and that limitation is 20 years from the date of issuance. It necessarily follows that if the entire \$15,000 in bonds are issued and sold and all of the bonds are to be retired within a period of 20 years, the retirement of one \$250 bond annually would not square with the time limitation provided in section 2. It is our opinion that the provision in section 7 with respect to the collection of the annual tax sufficient to pay the bonds and interest thereon, levied by the Board of County Commissioners, is, in the final analysis, purely directory and if literally followed, would, in effect, be a strict departure from the general law relating to the issuance of school district bonds wherein the time limitation on bond issues was fixed at 20 years. Section 6089, N.C.L. 1929, as amended at 1933 Statutes 45.

It is, therefore, our opinion that the bonds may be issued and sold and at least three of said bonds retired annually.

With respect to your inquiry concerning the question of whether the language of section 10 means that the bonds shall be series of July 1, 1951, it is the opinion of this office that such language relates primarily to the preparation of the bonds, which preparation must be had not later than July 1, 1951, and does not necessarily relate to the date of the actual printing thereof. We are further of the opinion that such language imports that the series of bonds, as provided in the Act, shall be denominated the series of July 1, 1951, but this does not change the annual date of retirement, nor the payment of interest for one year, which under the terms of the Act falls on the first Monday in July of 1952, and annually thereafter.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-77. U.S. NAVAL AMMUNITION DEPOT—Jurisdiction of state authorities.

Carson City, July 2, 1951.

Hon. Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada.

Dear Mr. Allen:

This will acknowledge receipt of your letter of June 20, 1951, requesting the opinion of this office as follows:

We are advised that our Patrolman has been refused permission to tag cars in parking lots and on the Babbitt housing area. We are also advised that there are a great many 1950 plates yet in evidence on those lots, but we are unable to get the fees due the State because of the ruling of Captain Crenshaw. May we have your help and opinion on this matter?

OPINION

The area of land known as U.S. Naval Ammunition Depot was held by the United States only as a proprietor, as would be the case of an individual owner, until the Act of the 1935 Legislature, 1935 Stats. 311. Said proprietary ownership in the United States was not for the same use as intended by events leading up to and resulting in the 1935 Act.

The United States did not, prior to 1935, acquire the land in question by purchase with the consent of the State of Nevada, but, on the contrary, the holding of said land by the United States stems from the cession of Mexico to the United States of vast tracts of land, hence the only jurisdiction the United States has must be resultant of statutes of Nevada, since Nevada obtained Statehood. (*See* opinion No. 740, Opinions of the Attorney General 1948-1950.)

Irrespective of naval directives the jurisdiction of the State of Nevada over U.S. Naval Ammunition Depot is to be determined by the only pertinent Nevada statute which is Chapter 144 of the 1935 Statutes, page 311. Section 3 thereof reads as follows:

The State of Nevada reserves the right to serve or cause to be served, by any of its proper officers, any criminal or civil process upon such land or within such premises for any cause there or elsewhere in the State arising, where such cause comes properly under the jurisdiction of the laws of this State or any subdivision thereof.

It is uniformly held, by all State and Federal Courts, that any legislative enactment which attempts to in any way derogate the sovereign authority of the several States shall be strictly construed against the grantee.

Judge Wm. D. Hatton, in his "Ruling on Motion to Dismiss" in *State of Nevada v. John DeWitt*, filed January 30, 1951, in the Fifth judicial district, held that the United States did not have exclusive jurisdiction of the Naval Ammunition Area and the reservation to the State of Nevada to serve process within the area for any cause there or elsewhere in the State arising necessarily implies the right to prosecute upon such cause, whether the service be made within or without said area.

Service of process as used in the 1935 Act requires State law enforcement officers to procure summons or warrants from the proper State authorities before entering upon the Naval Ammunition Area for the purpose of making an arrest. It was not the contemplation of the 1935 Act that a patrolman be permitted to go upon said area and "tag" cars thereon believed to be in violation of State law without a warrant. Such a holding does not prevent proper law enforcement, as the State Highway Patrolman may determine through the Motor Vehicle Division the registered owner of any vehicle bearing dead license plates, or no plates at all, and with such information may readily procure a proper warrant for the arrest of said owner. Upon presentation of such a warrant the naval authorities, in accordance with their policy will not only aid but will assist in the turning over of the violator to the State authorities.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-78. APPORTIONMENT OF STATE SCHOOL FUNDS TO HIGH SCHOOLS offering courses beyond the 12th grade.

Carson City, July 5, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office July 2, 1951, respecting school apportionments for the 13th and 14th grades made possible by Chapter 76 of the 1951 Statutes.

QUERY

Since one of our schools is very much interested in the possibility of offering this advanced work and in learning of any possible revenue to finance it, we would appreciate it if you could at this time advise us as [to] the possibility of teacher apportionments for the 13th and 14th grade work.

OPINION

Chapter 76, Statutes of Nevada 1951, section 1, amends section 120 of the 1947 School Code which defines a district high school established in a county which has a duly established high school. Section 2 of the Act amends section 128 of the School Code which defines a district high school established in a county which has no established county high school. Section 3 of the Act amends section 147 of the School Code relating to the eligibility of pupils to enter high school.

The amendment relating to district high schools in the first two sections contains the following language: "provided, that no high school may offer courses normally accredited as being beyond the level of the 12th grade, without authority from the state board of education; provided further, that no such courses shall be started with less than fifteen pupils nor continued with less than an average daily attendance of ten pupils; and further provided that no such courses be given unless fees, for services rendered, equal to those charged at the University of Nevada, for both resident and nonresident students, are paid by the students to the board of education offering such courses."

The only difference in the language contained in the third section is the word "county" before high school.

The statute forbids a high school to offer courses beyond the level of the 12th grade, without authority from the State Board of Education. When such authority is granted the courses may be given in compliance with other provisions in the sections.

There is nothing in the statute to change the definitions of a high school. The only change is to add additional courses of study in such schools.

We are therefore of the opinion that the apportionment of State funds to high schools offering courses beyond the level of the 12th grade, when such schools meet the requirements as provided in Chapter 76, Statutes of 1951, should be made according to the apportionment of State funds as provided in the general provisions of the School Code to high schools.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-79. DISTRICT JUDGES entitled to traveling and subsistence expenses in attending conference with Board of Pardons and Parole Commissioners with respect to the Probation Act of 1951.

Carson City, July 9, 1951.

Hon. Milton B. Badt, Chief Justice, Supreme Court of Nevada, Carson City, Nevada.

Dear Justice Badt:

I have your letter of July 6, 1951, relative to a proposed meeting of the members of the Board of Pardons and Parole Commissioners and the District Judges of the State for the purpose of establishing some uniformity in the handling of probation matters. It is noted that it is proposed a meeting be called at the Justices' Chambers of all the District Judges of the State for a discussion of probation matters, as well as other matters of common interest among the District Judges. You request an opinion as to whether the District Judges would be allowed their usual traveling and subsistence expenses for attendance at such a meeting.

OPINION

I have examined the respective sections of the law relating to the traveling expenses of District Judges and I am of the opinion that, notwithstanding the somewhat express provisions contained in those sections, nevertheless, the District Judge should be allowed such expenses for the attendance at the proposed meeting.

Section 8450, N.C.L. 1929, does provide that the District Judges "shall receive mileage, traveling expenses and living expenses while away from home on official business while holding court elsewhere than at his home in the district, or by holding court elsewhere in this state." This statute was enacted in 1929.

Section 8454, N.C.L. 1929, as amended at 1933 Statutes, page 28, contains, so far as pertinent here, the same language as section 8450.

A strict construction of these sections would not doubt result in a holding that the traveling expenses were limited to travel necessary for the holding of court in some other county. However, section 6943, N.C.L. 1929, as enacted in 1928 and as amended at 1949 Statutes, page 542, contains this language: "When any district judge, * * * shall be entitled to receive his necessary traveling expenses in the transaction of public business within the state * * *," including a subsistence allowance as provided by law.

The 1951 Probation Act, being Chapter 320, 1951 Statutes, in my opinion, constitutes the matter of probation of persons convicted of crime a matter of great public interest and of necessity brings the respective District Judges into the picture as being the administrative officers of the Act in the actual granting of probation. It follows, then, that in order to perfect the operation and the administration of the Probation Act, uniformity thereof is of paramount importance and such uniformity can be arrived at in a far better manner by a conference with the District Judges and, no doubt, their advice will go far toward the preparation of a set of uniform rules.

It is my opinion, therefore, that the District Judges are legally entitled to their necessary traveling expenses and subsistence expenses in the attendance at a meeting with the Board of Pardons and Parole Commissioners and the Chief Parole Officer.

Respectfully submitted,

W.T. MATHEWS
Attorney General

cc: Justice Eather and Justice Merrill.

OPINION NO. 51-80. COUNTY LAW LIBRARIES—Trustees' power to act upon claims against the Law Library Fund.

Carson City, July 9, 1951.

Hon. James A. Callahan, District Attorney, Humboldt County, Winnemucca, Nevada.

Dear Mr. Callahan:

This will acknowledge receipt of your letter of July 2, 1951, requesting the opinion of this office as follows:

QUERY

My inquiry then, is specifically whether or not the Board of Law Library Trustees may continue to act upon claims against the Law Library Fund, and that the same be paid by the Auditor and Treasurer without any action thereon by the County Commissioners.

OPINION

Section 1943, N.C.L. 1929, approved March 8, 1865, was amended in 1935, 1935 Stats. 385, changing only to whom the exception shall apply. Again during the 1951 Legislature this section was amended changing only the manner of approval by the County Commissioners, 1951 Stats. 131.

The Legislature, cognizant of the above-named section, did in their 1913 session pass an Act to provide for the establishment, maintenance and operation of law libraries in the various counties of this State. Said Act being approved March 25, 1913, remains unchanged under sections 2250-2265, N.C.L. 1929.

The provisions of section 2255, insofar as is pertinent here, relating to the powers of the trustees, is as follows: "*Fifth*. To order the drawing and payment, upon properly authenticated

vouchers, duly certified by the president and secretary, of money from out of the law library fund, for any liability or expenditure herein authorized, and generally to do all that may be necessary to carry into effect the provisions of this act.”

Section 2256, Order of Trustees, How Paid, provides as follows:

“Sec. 7. The orders and demands of the trustees of any such public law library, when duly made and authenticated as above provided, shall be verified and audited by the auditing officer, and paid by the treasurer of such county out of the library fund properly belonging thereto, of which full entry and record shall be kept as in other cases.”

Section 2250 provides for the “Law Library Fund” which fund is derived not from county taxes but from court costs in the several counties.

In consideration of the foregoing it is the opinion of this office (1) that the “County Law Libraries” Act is uniform in that it applies equally to all the several counties of this State; (2) that such Act by its very nature is an exception to the provisions of section 1943, 1929 N.C.L., 1941 Supp., as amended 1951 Stats. 131; and (3) said Act is therefore in full force and effect and the expenditures for the establishment, maintenance and operation of County Law Libraries are within the powers of the Law Library Trustees and need not be approved in accordance with section 1943, N.C.L., 1929 as amended.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-81. TRUST—University holds lands deeded to it by Nevada Art Gallery, Inc., in trust for art gallery purposes.

Carson City, July 10, 1951.

Hon. Malcolm A. Love, President, University of Nevada, Reno, Nevada.

Dear Dr. Love:

Under date of June 21, 1951, on behalf of the Regents of the University, you requested the opinion of this office concerning the powers and duties of the Board of Regents with respect to the Nevada Art Gallery, Inc., and the proposed future close affiliation of the University and the Nevada Art Gallery in the acquiring, construction and/or maintenance of an art gallery on lands heretofore conveyed to the Nevada Art Gallery, Inc., and thereafter conveyed by the Art Gallery to the University of Nevada. The questions submitted by your inquiry present a very complex problem and one not easily solved, and which require a brief statement of the facts leading up to the request for the opinion of this office.

STATEMENT

It appears that in June of 1931 the Nevada Art Gallery, Inc., was incorporated under the laws of Nevada as a nonprofit, cooperative, educational association for the purpose of furthering educational art and in its articles of incorporation granted the power to acquire by gift, purchase or otherwise real property for the use and purposes of the corporation and to erect thereon

suitable buildings for art purposes. That from and after its incorporation the corporation, at divers times, received donations of land by gifts from adjacent landowners, which gifts were evidenced by deeds conveying the title of the donors to the Art Gallery purportedly for the purpose of erecting thereon an art gallery in line with purposes for which the Nevada Art Gallery WSA incorporated. The deeds being executed from time to time beginning with October, 1931, and ending on or about October, 1935. The deeds purportedly contained covenants relating to conditions subsequent, i.e., that if an art gallery was not constructed on the lands donated within a reasonable time, then the lands would revert to the donors. However, all of the deeds do not contain the same covenant with respect to the condition subsequent, as will appear later herein.

In the original articles of incorporation it was sought to affiliate the corporation with the University of Nevada to the extent that it might receive cooperation and support from the University, and it was provided that the Board of Regents should have veto power over the acts of the board of directors of the corporation in cases where such acts were in violation or contrary to the purposes for which the corporation was organized. Art. VI, Articles of Incorporation.

In Article VII of the Articles it was provided that if the corporation should be dissolved or cease to function, the property of the corporation should then become the property of the University, with a condition subsequent included that the University carry out the principal purpose of the corporation. In this connection, however, it is to be noted that on August 1, 1949, the Attorney General, in a letter opinion to the Board of Regents, held that said Articles VI and VII were ultra vires, and it now appears such articles have been stricken from the Articles of Incorporation as of April 12, 1951. Amended Articles of Incorporation.

In 1943 the Legislature enacted an Act authorizing and directing the Regents of the University to accept for and on behalf of the State of Nevada a good and sufficient deed to the lots and parcels of land theretofore acquired by the Nevada Art Gallery, Inc., for the site of a proposed art gallery. It is stated in the preamble to the Act that the Nevada Art Gallery "desires to deed this property to the state of Nevada for the use of the University in connection with its art department" and as "a valuable addition to the art department of the university." The body of the Act provides that the Board of Regents are authorized and directed to accept for and in behalf of the State of Nevada a good and sufficient deed for the land, free from all incumbrances, from the Nevada art Gallery, "said lots or parcels of land to be held in trust by the board of regents as a site for a proposed art gallery building," provided, however, "that nothing in this act shall be construed as authorizing the expenditure of any state funds for the improvement of said lots or parcels of land or for the erection of any building or buildings thereon." Chap. 8, page 8, Statutes of 1943.

Thereafter and on June 10, 1949, the Nevada Art Gallery conveyed by bargain and sale deed to the University of Nevada all the lots and parcels of land theretofore acquired by it for art gallery purposes. The deed contains no reversionary clause or covenant of condition subsequent.

One of the original corporators of the Nevada Art Gallery, Inc., was one Charles F. Cutts. On or about October 24, 1946, he executed a will wherein, after several bequests of his property were made, the remainder of all his personal property was bequeathed to the University of Nevada for the purpose of establishing therein a scholarship fund. Thereafter and on or about the 18th of February, 1949, Mr. Cutts executed another will wherein, after certain bequests were satisfied, the remainder of his estate, both real and personal, was demised and bequeathed to the Nevada Art Gallery, Inc., to be held in trust for the purposes of the organization of a gallery and art museum under the joint management of the Nevada Art Gallery and the Board of Regents of the University. The provisions relative thereto reading as follows:

(b) The said Nevada Art Gallery, Inc., shall apply the whole of the annual net income toward the organization of a Gallery and Art Museum, under the joint management and direction of the Nevada Art Gallery, Inc. and the Board of Regents of the University of Nevada. (This is public-spirited programme in which my old friend, Dr. J.E. Church, has long been interested, and I direct that it be carried forward as nearly as possible as conceived by him, myself and associates.) Dr. Church, The Latimer Art Club, and others have for this purpose, deeded to the

University of Nevada, certain property on University Terrace, Reno, Nevada, in furtherance of this programme.

(c) I direct that my Executor, hereinafter named, bear in mind that my whole object is to further cultural affairs, and that the Nevada Art Gallery, Inc. (later in connection with the University of Nevada, and the Gallery and Art Museum) is to further this object by using my present residence, 643 Ralson Street, Reno, Nevada, and all its contents suitable for use in the advancement of art and culture by continuing to use it, selling it, moving it, renting it, or disposing of it in any manner they may see fit.

Upon the death of Mr. Cutts his last will was offered for probate, written objections and protest thereto were filed by certain heirs under the will and also by the Board of Regents of the University. Thereafter the foregoing parties proposed a compromise of the matter, a special administrator to conserve the estate was appointed by the Second Judicial District Court of the State of Nevada, in and for Washoe County. Later a stipulation to effect a compromise of the distribution of the estate was entered into by the respective parties and signed by the attorneys for the absent heirs, the Board of Regents and the Nevada Art Gallery, Inc., approved in principle by the presiding District Judge, whereupon the will of February 18, 1949, was admitted to probate, subject to the final distribution of the residue of the estate of the deceased.

On the 12th day of May, 1950, the Judge of the District Court entered the final decree of distribution of the residue of the estate, wherein after all of the bequests made in the will were ordered distributed and certain adjustments made with respect to the real property of the deceased, the then remainder of the estate, pursuant to the stipulation of the interested parties, was ordered, and decreed as follows: "To the Nevada Art Gallery, Inc., in addition to the dwelling house and lots at 643 Ralston Street, Reno, Nevada, and certain objects of art, furniture and books, the sum of \$63,151.25, the same being one-half of the funds then remaining in the hands of the executor, all of which said estate was distributed to the Art Gallery upon the condition that it be held in trust by the Art Gallery for the use and purposes set forth in the Last Will and Testament of the decedent in his will dated February 18, 1949, hereinbefore quoted on page 3 of this opinion. To the University of Nevada, for the purpose of establishing a scholarship fund to be known as the Charles Francis Cutts Scholarship Fund, the income from which annually shall be given to the student or students found entitled thereto by the Board of Regents, the sum of \$9,500 payment in adjustment of the disposition of the real property, plus the balance then in the hands of the executor after payment of all prior legacies, being the sum of \$63,151.24."

At this point it is to be noted that under the Cutts will of October 24, 1946, the Nevada Art Gallery, Inc., was not a beneficiary, save and except it was therein provided as follows: "to said Library (of the University) all framed and unframed pictures and ceramics, to be held in trust for the Nevada Art Gallery to be located at Reno, Nevada," whereas in the will of February 18, 1949, all of the estate after the payment of the just debts of the decedent was bequeathed to the Nevada Art Gallery, Inc., with the proviso it should apply the whole annual net income from the estate toward the organization of a gallery and art museum under the joint management and direction of the Nevada Art Gallery and the Board of Regents. It is further to be noted that the Court adopted the provisions of the later will with respect to the distribution of the estate to the Nevada Art Gallery but applied such provisions only to that portion of the residue of the estate distributed to the Art Gallery approximating one-half of such residue and thereby limiting the Art Gallery to the use of the net annual income from such property so distributed to it for the organization of the gallery and art museum provided for in the will, in question, which distribution was no doubt premised upon the stipulation of the parties to that effect.

From your letter requesting the opinion of this office, we gather that the following queries are submitted:

1. In June 1949 under the provisions of Chapter 8, Statutes of Nevada, 1943, the Regents accepted a deed to the Regents, no mention is made of the conditions or restrictions carried in the deeds from the several donors to the Nevada Art Gallery.

(a) Did the Nevada Art Gallery have the legal right to transfer to the Regents this property deeded to it in trust as the site for an Art Center Building?

(b) If the conditions or restrictions embodied in the deeds from the several donors to the Nevada Art Gallery had been cited in the deed from the Nevada Art Gallery to the Regents, could the Regents have accepted the deed under the provisions of Chapter 8, Statutes of Nevada, 1943?

2. Since all of this property was deeded in trust to the Nevada Art Gallery in 1931 and since there is no likelihood of an Art Gallery building being constructed within the foreseeable future, hasn't the reasonable time expired (see conditions quoted from Latimer Art Club deed above) and with it all these deeds in trust?

3. The Nevada Art Gallery is proceeding under paragraph (c) using the Cutts residence at 643 Ralston Street, Reno, as the Art Gallery.

Referring to paragraph (b), would the acceptance or retention by the Regents of the land referred to in this paragraph be construed as consideration to give this paragraph (b) the force of a legal contract? And if so, in view of the fact that no building will be constructed in the foreseeable future, aren't the Regents, in fact, binding their successors in office? And can they legally do this? (Note—Paragraphs (b) and (c) are quoted on page 3, this opinion.)

4. Are the Regents now required to approve all claims paid from the annual net income under the "joint management clause" in paragraph (b)?

OPINION

Answering query 1(a)—An examination of the deeds conveying title to the properties in question from the grantors to the Nevada Art Gallery, Inc., discloses that they do not of themselves specifically or expressly restrict the sale or conveyance thereof, such a condition was not incorporated therein. Article II of the Articles of Incorporation of the Nevada Art Gallery provided and provides, inter alia, the right "to acquire by purchase, gift or otherwise real and personal property and to hold, lease, mortgage or otherwise, sell, donate, rent, and otherwise dispose of the same." Any restrictions contained in the foregoing deeds, if effective for the purposes for which they were inserted in the deeds, we think, constitute them conditions subsequent. Such being the status of the deeds of the original grantors to the Art Gallery, we are of the opinion that such conditions subsequent would not operate to cause the transfer of the property in question to the Board of Regents to be of such illegality as to warrant the raising of the question by any persons save the grantors of the property to the Art Gallery and/or their successors in interest, i.e., their heirs or legal representatives, for the following reasons:

1. The estate in the land in question here was granted to the Nevada Art Gallery in fee simple subject to the conditions subsequent contained in the respective deeds. In such a case the general rule of law is that the existence of a condition subsequent in no way lessens the quantity of the estate granted. The grantor is divested of the entire estate of the fee, and the grantee is invested with the same estate. The effect of the condition is simply that if a breach shall occur, the grantor shall have a right to re-enter and thereby become re-vested with his former estate. Thus the fee may pass by deed upon a condition subsequent to the same extent as though the condition did not exist, subject to the contingency of being defeated according to the condition. 19 Am. Jur. 546, sec. 84; 26 C.J.S. 482, sec. 147b. All that remains in the grantor is the possibility of reverter or right of entry on condition broken. The estate will remain defeasible until the condition is performed, destroyed, or barred by the statute of limitations. 18 C.J. 364, sec. 383.

In *State v. Salt Lake City*, 81 P.273, the Court said:

* * * and it is settled by the great weight of authority that when real estate is sold upon a condition subsequent, as the farmers propose to do in this case, the fee is transferred to and

remains in the grantee until a breach of the condition and re-entry by the grantor; that is such a sale carries with it all the attributes and incidents of absolute ownership until the condition is broken. *Towle v. Remsen*, 70 N.Y. 303; *Vail v. Long Island R. Co.*, 106 N.Y. 283, 12 N.E. 607, 60 Am. Rep. 449; *Bouvier v. Baltimore & N.Y.R. Co.*, 60 L.R.A. 750, and cases cited in note; 13 Cyc. 690; 1 Jones, Real Prop. in Conv. sec. 620. In *Shattuck v. Hastings*, 99 Mass 23, the rule is tersely and, as we think, correctly, stated as follows: "A deed of land upon conditions subsequent conveys the fee with all its qualities of transmission. The condition has no effect to the limit the title until it becomes operative to defeat it. Subject to this contingency, the estate will pass by deed or mortgage in the same manner and to the same extent as if no such incident were attached to it."

The general rule supported by the weight of authority is that the nonperformance or breach of a condition subsequent can be taken advantage of only by the grantor, his heirs, or by the grantor and his legal representative. 18 C.J. 364, sec. 384; 26 C.J.S. 482, sec. 148. It follows that until the grantors who annexed the condition subsequent to the grant of the fee, or his heirs, or legal representative alleges or determines that a breach of the condition subsequent has occurred and takes appropriate action to enforce the condition, the title to the fee granted to the grantee remains effective for all purposes, even to the extent of the alienation thereof, subject, of course, to the right of the original grantor to re-enter and recover the property. We are advised that the grantors of the property to the Art Gallery have so far never taken effective or any steps to question or enforce the conditions subsequent. Certainly no such steps were taken prior to the deeding of the property to the University.

The Art Gallery on June 10, 1949, conveyed by deed the property in question to the University. This deed conveyed a fee simple title without reservations or conditions subsequent, in brief such deed granted the University the property therein mentioned without encumbrance or restriction. This deed the Regents were expressly authorized to accept under and pursuant to subdivision thirteenth of section 3 of "An Act relating to the state university and matters properly connected therewith," approved February 7, 1887, as amended at 1945 Statutes, page 449, reading as follows:

To accept and take in the name of the University of Nevada, by grant, gift, devise, or bequest any property for the use of the university, or of any college thereof, or of any professorship, chair or scholarship therein, or for the library, workshops, farms, students' loan fund, or any other purpose appropriate to the university; and such property shall be taken, received, held, managed, invested, and the proceeds thereof used, bestowed, and applied by said regents for the purposes, provisions, and conditions prescribed by the respective grant, gift, devise, or bequest; provided, however, nothing in this act shall be deemed to prohibit the State of Nevada from accepting and taking any grant, gift, devise, or bequest any property for the use and benefit of the University of Nevada.

So that a strict legal question the Board of Regents had the right then to assume that the Art Gallery had the legal right to execute such deed, which in fact, we think it did have, subject only to the objections of the original grantors of the property to the Art Gallery.

2. The University has acquired title to the property in question by reason of the deed thereto of June 10, 1949, executed by the Art Gallery. There being no restrictions contained therein, but there being certain conditions subsequent contained in the original deeds to the Art Gallery, the question is do such conditions subsequent prevent the Gallery as a grantee from thereafter as a grantor from legally executing a deed without such conditions subsequent being expressed therein. We think not. The general law is most clear on such point in that, "A right or interest reserved in a conveyance will be effective as against all who deraign the title through the grantee, although the reservation is not expressed in subsequent deeds." 16 Am. Jur. 611, sec. 304; *Sheets v. Dillon*, 20 S.E.2d 344.

As shown hereinabove, the grantee of a deed conveying fee simple title subject to a condition subsequent is vested with title to the property absolute except as to the condition subsequent, which conditions is subject only to the enforcement thereof by the grantor creating such condition, or his heirs, or legal representative, then the law being that he has the right of alienation of his estate in the property, then unless the condition is sought to be enforced prior to his disposition of his interest therein, his deed therefor will be legal subject only to the acts of his grantors thereafter in seeking to re-enter upon the ownership of the property. We conclude that the Nevada Art Gallery had the legal right to transfer to the Regents the property in question in the deed of June 10, 1949, subject only to the right of re-entry thereon by the grantors, their heirs, or legal representatives, who created the conditions subsequent in the prior deeds thereto to the Art Gallery.

Answering query 1(b)—We think the answer to query 1(a) suffices for an answer here. If a deed from a grantor of real property contains no conditions subsequent which were then and there binding upon such grantor by reason of the conveyance to him of the same property in a prior deed is sufficient to also convey such conditions over to and make them binding upon the subsequent grantee, which subsequent deed is accepted by the subsequent grantee, then by the same token if such subsequent deed contained the same conditions subsequent no greater or less estate would be conveyed. The Regents could have rejected such deed, but they could also have accepted it, with the same result as now appears with respect to the acceptance of the deed of June 10, 1949.

We have so far dealt with the validity of the deed of June 10, 1949. We now advert to Chapter 8, Statutes of 1943, wherein the Board of Regents was authorized and directed to accept for and on behalf of the State a good and sufficient deeds for certain lots or parcels of land, free from all encumbrances, from the Nevada Art Gallery, Inc., said lots to be held by the Board of Regents in trust for a proposed art gallery building. We think the provisions of the Act of 1943 do not operate so as to affect the validity of the deed of June 10, 1949, for the reason, we think, that there was no such encumbrance resting upon the property or the title thereto conveyed in such deed as would serve to invalidate the transaction because the Act expressly required and requires that the Board of Regents shall hold the property *in trust as a site for a proposed art gallery*. Certainly if the conditions subsequent contained in the deeds from the original grantors thereof to the Art Gallery were and are effective, then all that has happened is that the Art gallery has transferred its trusteeship to the Board of Regents, with perhaps the ownership of the building, if erected, in the State of Nevada for the use of the public. The Regents, in accepting the deed in question, we think, accepted the trust, which acceptance, in our opinion, was sanctioned by the amendment Act providing the powers and duties of the Regents to accept grants, gifts, etc., as found at 1945 Statutes 449. As pointed out hereinbefore, the conditions subsequent followed the deed to the University. We think that the grantors of the property to the Art Gallery, their heirs, or legal representatives, did have in 1949 and do have now the right to seek the enforcement of such conditions against the Art Gallery and if successful, recover the property and end the trust now lodged with the Regents, but until such action is taken, the deed of June 10, 1949, constitutes a valid instrument. It is also to be noted in this connection that with respect to the binding effect of a condition subsequent, that it is attached to the title of the land and runs with it as against a subsequent grantee with actual or constructive notice. Indeed a condition affects the title in the lands of all subsequent grantees without regard to whether the condition was repeated in the deeds in the intervening chain of titles. 18 C.J. 366, sec. 386; 26 C.J.S. 485, sec. 150.

Answering query 2—It may be that a reasonable time for the construction of an art gallery building has expired. There is a conflict of authority upon what constitutes a reasonable time. In the final analysis the determination of such question rests primarily upon the terms of the condition imposing the provision of reasonable time and the construction placed thereon by the Courts. To settle such a question requires a judicial determination thereof. In view of the differences in the language used in the conditions subsequent in the various deeds creating such conditions in question here, we are inclined to the view that the term “reasonable time” requires the interpretation of a Court.

Conditions subsequent are construed strictly against the parties seeking to enforce them, and, in case of ambiguity, all doubts are resolved in favor of the free use of the property. 26 C.J.S. 513, sec. 163a; 18 C.J. 362, sec. 380. For the purpose of showing the diversity of the conditions subsequent as contained in the respective deeds of the properties to the Art Gallery, we quote:

Deed of James E. Church, Jr., October 13, 1931:

This land is hereby deeded to NEVADA ART GALLERY, INC. for the purposes outlined in the original Articles of Incorporation of said NEVADA ART GALLERY, INC.

In case of the abandonment of this property for the purposes mentioned, the title to the above-described property shall immediately revert to the original grantor of this deed, his heirs and assigns forever.

Deed of Latimer Art Club, October 22, 1931:

TO HAVE AND TO HOLD said premises with the apurtnenaces unto the party of the second part, its successors and assigns forever, but subject to the condition subsequent that if the property herein granted shall not, within a reasonable time after the date hereof, be continuously used for the purpose of an art center and for the further purposes set forth in the Articles of Incorporation of the party of the second part, or if the party of the second part shall fail to furnish the space to Latimer Art Club of Reno, Nevada, as specified in paragraph VIII, of said Articles of Incorporation, then the title to the above described property shall revert to and vest in Latimer Art Club of Reno, Nevada.

Deed of City of Reno, December 9, 1931:

To have and to hold the same subject to the following conditions:

1. That the said second party will construct an art gallery upon the said land herein described, and other land also conveyed to the said second party.
2. if the said land is not used for a site of an art gallery at any time that the said land shall revert to the first party therein.

Deeds of T.W. Sullivan, March 16, 1932; Sanford Dinsmore et al, February 8, 1933; Minnie Stanton, September 22, 1932; and Cassius Smith, September 1935, all contain the same conditions appearing in the Sullivan deed, reading as follows:

TO HAVE AND TO HOLD the same subject to the following stipulations:

- (1) The Nevada Art Gallery, Inc., stipulates in return that no fence or barrier shall ever be erected by it along the common property line of the Gallery and the individual donors.
- (2) That the donors shall have full access at all times to the Gallery Gardens in order that the latter may in fact and in spirit be an extension of their own yards.
- (3) That if the Gallery is abandoned, the land shall revert to the original donors.

We submit that from a reading of the foregoing conditions it is most clear that a judicial determination of the intent of each of the grantors must be had before an authoritative opinion thereon can well be rendered. For example, the conditions imposed in the Latimer Art Club deed apparently are in the alternative.

Such conditions provide, first, the use of the property continuously for the purpose of an art center and the purposes set forth in the articles of incorporation of the Nevada Art Gallery, or (second) the failure of the Art Gallery to furnish the space to the Latimer Art Club as specified in paragraph VIII of said articles. We think that a breach of both conditions could result in a reversion of the property—it is also apparent that a breach of either one could cause a reversion.

But in any event, when would the breach have to occur when not expressly set forth in the deed? We think no breach could be enforced until a proceeding therefor was or is instituted by the Latimer Club at a time such club shall feel that a reasonable time has elapsed. The same rule applies to each of the other deeds.

Answering query 3—In consideration of this question we must take cognizance of the fact that the first Cutts will of 1946 bequeathed the whole of the residue of his estate to the University as and for the such bequest and in turn left all of the estate, after payment of the testator's just debts, to the Nevada Art Gallery, Inc., to be held in trust by it for the purpose of the organization of a "Gallery and Art Museum, under the joint management and direction of the Nevada Art Gallery, Inc., and the Board of Regents of the University of Nevada." On May 26, 1949, a petition was filed in the District Court of Washoe County, having for its main purpose the determination of which of the two wills should be probated. Thereafter objects were filed by the heirs and legatees set forth in the second will of 1949 and the Board of Regents objecting to the probate thereof. Such objections being filed on or about June 10, 1949. After the filing of such objections which in turn provided for a contest of the will, it appears negotiations were entered into by the interested parties to the contest with the result that on the 16th day of September, 1949, a stipulation was signed by the attorneys of all the interested parties, and also signed by the attorney for the Nevada Art Gallery, Inc. This stipulation was approved in principal by the District Judge. The stipulation, after reciting and stipulating other bequests and payments, then provided for the disposition of the residue to the Nevada Art Gallery and the University as follows:

k. The distribution to the Nevada Art Gallery, Inc., shall be in trust for the objects and purposes set forth in said later will. The distribution to be made to the Board of Regents of the University of Nevada shall be for the purpose of establishing a scholarship fund to be known as the Charles Frances Cutts Scholarship Fund, the income from which annually shall be given to the student or students who in the judgment of the Board of Regents possesses the highest character and best scholarship record while attending the University.

The later will (1949 will) was thereupon admitted to probate on September 16, 1949, and the terms of the "Later Will" were then and there before the Court. On May 12, 1950, the Court entered its Order and Decree of Settlement of Account and Final Distribution of the Estate, and therein ordered and confirmed to the Nevada Art Gallery and to the University the residue of the estate, and then in conformity with the stipulation that the portion of the estate should be decreed to the Art Gallery in accordance with the terms of the later will, set forth verbatim the terms contained in such will as intended by the testator. Those terms provided, inter alia, (1) that the Art Gallery "shall apply the whole of the annual net income toward the organization of a Gallery and Art Museum, under the joint management and direction of the Nevada Art Gallery, Inc., and the Board of the Regents of the University," and (2) that the Art Gallery, later in connection with the University, was to further object by using the residence of the testator at 643 Ralston Street and all its contents in any manner they may see fit. The will, in this connection, inadvertently, we think, contained a statement that the Latimer Club and others had deeded to the University certain property for the furtherance of the program. However, one June 10, 1949, the Art Gallery did deed to the University the lots and parcels of land theretofore deeded to the Art Gallery for Art Gallery purposes, as we have shown hereinbefore, and which deed carried with it the conditions subsequent as there set forth, and the property therein conveyed being held thereafter and now by the Board of Regents in trust for a proposed art gallery building. From the foregoing factual situation we are constrained to conclude as follows:

That the University by reason of its sanction of the stipulation providing for the final distribution of the residue of the estate did agree:

1. That the distribution made to the Nevada Art Gallery, Inc., shall be in trust for the objects and purposes set forth in the later will, and

2. That the provisions of the later will provided for the joint management by the Art Gallery and the Board of Regents in the application of the whole of the annual net income distributed to the Art Gallery toward the organization of a gallery and art museum.

3. That such agreement was premised upon the proposition that the University participate in the division and distribution of the residue of the estate and thereby acquire a scholarship fund.

4. The acceptance of the deed of June 10, 1949, from the Art Gallery by the Board of Regents, carrying with it the conditions subsequent imposed by the original grantors of the Art Gallery, constitutes, in our opinion, an acceptance of a trust to be devoted to the objects and purposes of the organization of a gallery and art museum, and this, until such time as the trust may be dissolved by mutual consent of all interested parties and confirmed by the District Court wherein the decree of distribution was entered, or by the judgment of a court of competent jurisdiction in an action brought to set aside the trust.

Answering query 4—We find no mandatory provisions in the will in question, nor in the final decree of distribution entered in the District Court in the matter, that the Board of Regents shall approve all claims paid from the annual net income under the “joint management clause.” This is a matter, we think, wholly within the business judgment of the Board of Regents.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-82. SEAL—Use of Great Seal of the State of Nevada.

Carson City, July 19, 1951.

Hon. John Koontz, Secretary of State, Carson City, Nevada.

Dear Mr. Koontz:

This will acknowledge receipt of your letter of July 13, 1951, relating to the use of the Great Seal of the State of Nevada.

You request this office’s conclusions with respect to the question:

Whether or not the use of the State Seal is permissible when used as an emblem on clothing?

STATEMENT

The several statutes relating to the Great Seal of the State of Nevada provides that the Governor and the Secretary of State shall use such officially and for verification of official acts. Sections 7610, 7611, and 7612, N.C.L. 1929. Section 10372, N.C.L. 1929, provides a penalty of imprisonment for the counterfeiting of said seal.

The request presented asks only that a replica of the various State Seals be used on clothing. The granting of such a request seemingly would not result in misuse of said seal insofar as wrongful verification of documents are concerned. Such a request is clearly distinguishable from one asking for the imprint of the Great Seal on a gold sticker or wafer which could be used by other than authorized persons.

It is within the knowledge of this office that many manufacturers of clothing have in the past produced items bearing a replica or a map of the various states.

OPINION

If, therefore, the use is confined only to an imprint of a replica on clothing and the request is not for an actual imprint of the Great Seal, this office can find no statutory or case holding which would prohibit granting such a request, however such a holding is limited to the factual situation herein contained and should not be construed to apply to other uses of said seal.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-83. LAKE TAHOE—Prevention and abatement generally of water pollution of lake requires cooperation of public health service and interstate agencies.

Carson City, July 19, 1951.

Mr. W.W. White, Director of Public Health Engineering, 325 West Street, Reno, Nevada.

Dear Mr. White:

This will acknowledge receipt of your letter in this office July 11, 1951, requesting an opinion regarding the authority of the State Health Department in problems of sanitation on the waters of Lake Tahoe.

STATEMENT

There is a boat being built at Lake Tahoe, which will have a bar and dining facilities. There will be sink waste, toilet waste, and garbage waste. The boat will carry approximately 200 persons on lake cruises.

The question as to the possibility of regulating the discharge of such waste from the vessel into the lake waters has been discussed with the United States Coast Guard officers. The unofficial information is that the lake is under Federal control, and a doubt exists as to government regulation prohibiting the discharge of such waste from the vessel into the waters of the lake.

QUERY

The Food Establishment Act, Chapter 116, Statutes of Nevada 1943, includes within the definition of food establishments the term "vessel."

Chapter 306, Statutes of 1949, is an Act to protect public health; to preserve from contamination the waters of Lake Tahoe watershed; requiring a permit for the construction of a dwelling or building; and authorizing the State Board of Health to make rules and regulations governing the lake watershed area for the disposal of sewage or other waste.

Does the State Health Department have authority under either of these statutes to control and enforce regulations as to the discharge of such waste from a vessel operating on Lake Tahoe?

OPINION

Lake Tahoe is navigable water which lies within the boundaries of Nevada and California. Title 46 U.S.C.A., section 526, provides for the regulation of motor boats carrying passengers for hire on navigable waters, and places general jurisdiction in the Coast Guard. There is no specific Act, that we have discovered, which controls discharge of waste from a boat on Lake Tahoe which might cause pollution. Congress has enacted such Acts relating to the waters of the Potomac River, Lake Michigan, New York Harbor, and other named waters.

Chapter 116, Statutes of Nevada 1943, section 1, which defines food establishments, provides that the term "food establishment" shall mean any place, structure, premises, vehicle, or vessel in which food products as defined in the Act are sold or offered for sale.

This section also provides that the definition should not be construed to include vehicles operating as common carriers engaged in interstate commerce.

Title 49 U.S.C.A., sections 902-909, defines water carriers and includes any person which holds itself out to the general public to engage in the transportation by water in interstate commerce of passengers or property for compensation. Such transportation must have a certificate of public convenience and necessity issued by the interstate commission.

The vessel in question may come within the provisions of the above sections and secure such a certificate. This would except the "vehicle" or "vessel" from the operation of the Food Establishment Act of this State.

Violations of the Act are punishable as a misdemeanor. The violation must occur in Nevada to give the Court jurisdiction.

The enforcement of the Act would therefore seem unmanageable as the boat operates within two States on navigable waters.

Chapter 306, Statutes of Nevada 1949, deals with the construction of building in any of that portion of Nevada from which water drains into Lake Tahoe. It does not appear that the provisions of this Act are broad enough to embrace the conditions sought to be controlled in the operation of the boat in question. However, there appears to be a solution of the problem through the Surgeon General of the Public Health Service.

The comparatively new Act of Congress, popularly known as the "Water Pollution Control Act," Title 33 U.S.C.A., Cumulative Supplement, section 466(a), provides that the Surgeon General shall, after careful investigation, and in cooperation with other Federal agencies with State water pollution agencies and interstate agencies, prepare or adopt comprehensive programs for eliminating or reducing the pollution of interstate waters. Regard shall be given to conserve such waters for public water supplies, recreational and other legitimate uses. The Surgeon General is authorized to make joint investigations with the various agencies of any waters in any State or States as to any substances which may deleteriously affect such waters.

Section 466(b) provides for encouragement of cooperative activities by the States for the abatement and prevention of water pollution.

Section 466(c) provides for two or more States to enter into agreements for the prevention of pollution of such waters and the enforcement of their laws by enactment of uniform Acts.

Such agreements and compacts shall not be binding upon any State a party thereto, until it has been approved by Congress.

This Act would be in harmony with section 8239, N.C.L. 1929, which gives consent to the use by the United States of Lake Tahoe for reservoir purposes, in such manner and to such extent as the United States through its lawful agencies shall think proper for such purposes, as fully as the State of Nevada could use the same.

Chapter 79, Statutes of 1951, provides for the joint exercise of powers by public agencies within or without the State and the Federal Government upon agreements stating the purpose and the power to be exercised.

In view of the foregoing statutes, we are of the opinion that present problems and others of like nature could be solved by submitting the matter to the Surgeon General of the Public Health Service.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-84. STATE PURCHASING ACT—Governor empowered to create central purchasing agency within state departments.

Carson City, July 25, 1951.

Hon. Kenneth S. Easton, Purchasing Director, Executive Chamber, Carson City, Nevada.

Dear Mr. Eaton:

Reference is hereby made to your letter of July 19, 1951, wherein you submit the following matter and inquiry:

The subject of the operation of the State Purchasing Department under terms of Chapter 333, Statutes of Nevada, 1951, is causing some concern with reference to interim purchases by the various State agencies during the period from the effective date of the Act until such time as harmonious purchasing rules and regulations can be laid down by the director.

Therefore, may I have your opinion on the following question:

Does the Governor, upon recommendation of the purchasing director, have authority to authorize departments to continue to make purchases in the interest of continued efficient purchasing plans are formulated and placed into effect by the purchasing department?

OPINION

Chapter 333, page 564, Statutes of 1951, creating the State Department of Purchasing, did not become effective until July 1, 1951. This statute provides a very comprehensive and voluminous plan for a central purchasing agency with the power vested in the director thereof to in effect govern the purchasing of all manner of supplies and equipment for the respective State departments. The plan set up in the statute undoubtedly requires most extensive preparations before each and every section of the law can be become effective with respect to strict enforcement thereof. This will require time in order to perfect the proper organization of the purchasing department.

During the intervening time in which ample provision can be made for the handling of all methods of purchasing, it is certain that State departments will be required to cause the purchase of necessary equipment in order to properly function, and the purchase of such equipment cannot be reasonably continued over until the statutory plan is made wholly effective.

Section 39 of the Act provides as follows:

The governor may prescribe, on the recommendation of the director, for the providing of materials, supplies, and equipment, by a central purchasing agency in

any department or agency in which the volume of transactions is sufficient to justify such action, and in any departments or agencies with respect to scientific apparatus, materials of instructions, textbooks, and other articles and equipment as to which the needs are highly specialized and peculiar to that department. Such department purchasing agencies shall operate under procedures and standards prescribed by the director or his designated agent and subject to his supervision and control.

One of the purposes of section 39, in our opinion, was to provide a means whereby State departments could purchase necessary supplies, materials and equipment pending the complete organization under the purchasing agency Act.

It is therefore, the opinion of this office that the Governor now possesses the power, upon the recommendation of the purchasing director, to provide a central purchasing agency in any particular State department where the necessity therefor at this time arises with respect to the purchasing of necessary materials and equipment. Pursuant to this section, the director has the power to provide the procedure and the standards to be observed in the purchase of the materials and supplies.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-85. CONSTITUTIONAL LAW—A senate joint resolution is not a law within the meaning of the Constitution.

Carson City, July 25, 1951.

Hon. Huston Mills, State Highway Engineer, Carson City, Nevada.

Dear Mr. Mills:

Reference is hereby made to your letter of July 19, 1951, wherein you state the following matter and propounded an inquiry thereon:

The 45th Nevada Legislature, during its session, passed Senate Joint Resolution No. 7, which provides for the appointment of a three-man board consisting of one legislative representative from each legislative house, and one highway technician, to become a part of the Western Interstate Committee on Highway Policy Problems to study and make recommendations concerning uniform action on matters affecting highway safety, etc.

The resolution provides that such members shall be allowed per diem and traveling expenses, not to exceed \$500 for each member in any one 12-month period, and that the per diem and traveling expenses shall be paid from the State Highway Fund.

We request your opinion as to the constitutionality of the Act. Can the Legislature appropriate money from the State Highway Fund by resolution?

OPINION

An examination of Senate Joint Resolution No. 7 discloses that in the closing paragraph thereof it was sought to make an appropriation of \$500 for each member of the board provided for in the resolution in any one 12-month period and which appropriation was made from the State Highway Fund. The question is, was a constitutional appropriation of public moneys made by such provision in the resolution?

Section 19, Article IV, of the Constitution provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

Section 23, Article IV, provides: "The enacting clause of every law shall be as follows: 'The People of the State of Nevada, represented in Senate and Assembly, do enact as follows,' and no law shall be enacted except by bill."

Section 35, Article IV, provides, inter alia: "Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve [s] it, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated." The Legislature then, under such constitutional provision, may pass the bill over the Governor's veto. This section contains other provisions not material here.

An examination of the record discloses that Senate Joint Resolution No. 7 was never represented to the Governor for his signature. It simply became an adopted resolution of the two houses of the Legislature and in this respect does not constitute a law.

Further, even if such joint resolution could be deemed a law, yet, there is a fatal defect which prevents it from being a law as intended by the Constitution and that is the fact that such joint resolution does not contain the enacting clause required on every law, as above pointed out. The Supreme Court in *State v. Rogers*, [10 Nev. 250](#), held that the omission of the words "senate and" from the enacting clause of an Act of the Legislature rendered the Act unconstitutional and void.

The Court in passing upon the matter said:

Our Constitution expressly provides that the enacting clause of every law shall be "The people of the State of Nevada, represented in senate and assembly, do enact as follows." This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people in their sovereign capacity to the legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and as this act comes to us without such authority appearing upon its face, it is not a law.

The Constitution requiring that no money shall be drawn from the treasury but in consequence of appropriations made by law and Senate Joint Resolution No. 7 not being a law within the meaning of the Constitution, it is our opinion that no valid appropriation of money has been made by the adoption of such resolution.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-86. PUBLIC EMPLOYEES RETIREMENT ACT as to continuous service construed in a particular case.

Carson City, July 25, 1951.

Mr. Kenneth Buck, Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.

Dear Mr. Buck:

This will acknowledge receipt of your letter in this office July 24, 1951, as to the interpretation of continuous service for purposes of retirement under the Public Employees Retirement Act in the case of a certain employee of the State Department of Agriculture. The correspondence relative to this matter which was submitted with your letter is returned herewith.

STATEMENT

As shown by the correspondence submitted, an employee of the Nevada State Department of Agriculture has been in such employ for a number of years and you wish assistance in determining his retirement status at this time. It appears that for certain periods this employee had been paid from Federal funds while working under the Department of Agriculture on insect control problems and particularly during the prevalence of the Mormon crickets within the State. Since 1929 the employee was assigned to duties involving noxious weeds, but during the outbreak of the Mormon cricket invasion it was necessary for the department to transfer certain employees to work involving cricket control. There was not sufficient money available in the State funds to carry on these essential activities and arrangements were made to pay such employees from available Federal funds while such employees were still under supervision and direction of the State Department of Agriculture. The employee in question was one of such employees.

QUERY

This employee of the Department of Agriculture was transferred during certain periods to the payroll of the Federal Government, during which time he performed various agricultural duties within the State of Nevada. The question at issue is the accreditation of such employment as service toward retirement under Public Employees Retirement Act and, more particularly, under section 2(7) of the said Act as amended by Chapter 217, Statutes of 1951?

OPINION

Section 2, paragraph 7, of the Public Employees Retirement Act of 1947, before amendment, read as follows: "The term 'continuous service' means service in public employment of the state and for its political subdivisions not interrupted for five years or more."

Paragraph 7 of this section was amended by Chapter 182, Statutes of 1951, to read as follows: "The term 'continuous service' means service in public employment of the state and for its political subdivisions participating in the system, in positions subject to the provisions of this act or in positions which would have been subject to this act, not interrupted for five years or more."

Approved March 20, 1951.

Chapter 217, Statutes of 1951, amended the same paragraph 7 by adding the following language: "provided, the time spent by persons employed in the service of federal agencies prior to the creation of the retirement system, when such service constituted an uninterrupted continuation of duties there being performed for the State of Nevada or an eligible participating political subdivision of the State of Nevada, shall not be considered an interruption of service."

Approved March 21, 1951.

Each amendment relates to the subject of "continuous service." There is no conflict, and it will be presumed that the Legislature in enacting a statute acted with full knowledge of statutes already existing and relating to the same subject. *Ronnow v. City of Las Vegas*, [57 Nev. 332](#).

The Legislature in 1941 enacted an Act to provide for the control of injurious insect pests. Section 1, section 373.01, 1929 N.C.L., 1941 Supp., authorized the State Quarantine Officer to investigate the prevalence of Mormon crickets and other insect pests. For the more efficient and

economical measures for their control the State was authorized to cooperate with any agency of the Federal Government.

The employee of the Department of Agriculture was not transferred to Federal employment. He was paid out of the Federal funds, but the duties performed, whether for the control of weeds or control of insects, was a continuation of the service for the Department of Agriculture acting for the State of Nevada. If his services could be construed as employment in service of the Federal Government, such service would have been prior to creation of the retirement system in 1947 and he would come within the amendment.

We are, therefore, of the opinion that the employee in question is entitled to have the time of such service for which he was paid out of Federal funds accredited to his continuous service as defined by statute.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-87. FOOD AND DRUG ACT—Buttermilk made from processed skimmed milk and labeled “churned buttermilk” is misleading in that it indicates that the product is the result of churning butter.

Carson City, August 1, 1951.

Mr. Wayne B. Adams, Commissioner, Department of Food and Drugs, P.O. Box 719, Reno, Nevada.

Dear Mr. Adams:

This will acknowledge receipt of your letter in this office July 30, 1951, requesting an opinion as to whether a product labeled as churned buttermilk would be construed as misleading under the provision of the Nevada State Food, Drug and Cosmetic Law.

STATEMENT

The Commissioner of Food and Drugs has been recently confronted with a product labeled in part “Churned Buttermilk,” which product is actually pasteurized skimmed milk to which a culture or starter has been added to convert it into a product resembling natural churned buttermilk. To this cultured buttermilk is added about two pounds of granules of butterfat to 300 gallons of the skimmed milk to make it resemble the churned product.

QUERY

You desire an opinion as to whether this product, labeled as churned buttermilk, is misbranded in that its label is false or misleading in some particular.

OPINION

Section 1 of the Nevada Food, Drug and Cosmetic Act (Section 6206.01, 1929 N.C.L., 1941 Supp.) defines the terms used in the Act.

Paragraph (k) of this section, quoting that part deemed relevant to the present question, contains the following language: "If an article is alleged to be misbranded because the labeling is misleading * * * then in determining whether the labeling * * * is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, * * * but also the extent to which the labeling * * * fails to reveal facts material in the light of such representations or material * * *."

Section 7 (Section 6206.06, 1929 N.C.L., 1941 Supp.), provides a food shall be deemed misbranded (a). "If its labeling is false or misleading in any particular."

The label in question contains the words "Churned Buttermilk." Churn, churned and churning are not confined to dairy processes, but when used with the word buttermilk relates to the process of making or preparing butter.

The word buttermilk according to Webster's Dictionary means: "The liquid remaining after churning out butter."

Skimmed milk is not the product remaining after the butter is churned.

Section 10221, 1929 N.C.L., provides that nothing in the section relating to adulteration and quality of milk shall be construed to prevent the sale of skimmed milk, provided the person or persons selling the same shall first make known the fact that it is skimmed milk.

Technically the word "churned" on the label could mean the brand of the product, or the process of stirring, beating, agitating, or churning the skimmed milk with the culture and addition of butterfat to produce the required result. The result, however, would not be buttermilk, as that term is generally understood.

The modern process of making butter may result in a liquid remaining that is not acceptable to the consumer.

It is a common practice to make buttermilk from skimmed milk as indicated in cases involving the classification of milk under the Federal Agricultural Adjustment Act. *Waddington Milk Co. v. Wickard*, 140 F(2) 97. This case does not consider the question of labeling however.

Buttermilk may be a composition or combination of parts of milk which results in a synthetic product. The label "Churned Buttermilk," without a statement to the effect that it is processed skimmed milk is misleading in the particular that it is not the result of churned butter.

The construction of "churn" as determined by the Court in the case of *People v. Griffin et al.*, 128 N.Y.S. 946, when used as a label on oleomargarine cartons violated the statute which prohibited the sale of oleaginous substances not made from pure milk or cream, as a substitute for butter under any brand, device or label bearing words indicative of processes in a dairy in the making of or preparing butter.

The Court held that the sale of such product bearing the label containing such words as "Purity Oleomargarine, churned by the Capitol Dairy Co." "We are the only exclusive first quality 'churners' in the U.S. etc.," violated the statute; the word churn in its primary ordinary meaning conveying to the mind one of the processes of making butter, and being a term indicative of processes in the dairy, in making or preparing butter.

We are therefore of the opinion that the label in question without an additional statement, material in the light of the represented product is misleading in this particular.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-88. COUNTY OFFICERS AS EX OFFICIO OFFICERS OF INCORPORATED CITY—TERM “EX OFFICIO RECORDER AND EX OFFICIO AUDITOR OF CARSON CITY” INTERPRETED—Term “City Recorder” in Carson City Charter means a judicial office.

Carson City, August 1, 1951.

Hon. Paul D. Laxalt, District Attorney, Ormsby County, Carson City, Nevada.

Dear Mr. Laxalt:

This will acknowledge receipt of your letter of July 30, 1951, requesting the opinion of this office with respect to the power of the County Recorder and Auditor as ex officio Recorder and Auditor of the city of Carson to appoint a deputy in view of the language contained in section 2(b), Chapter 319, page 526 Statutes of Nevada, 1951, reading as follows:

The county recorder and ex officio county auditor shall be ex officio recorder and ex officio auditor of said Carson City.

You propound the following inquiries:

1. Is the ex officio City Recorder of Carson City authorized to appoint a deputy to assist her in her duties as such City Recorder?
2. If she isn't so authorized, may she as County Recorder appoint a Deputy County Recorder, who would have the power to perform the functions of ex officio City Recorder?

OPINION

At the threshold of this opinion we think it advisable to point out that in our opinion the designation in section 2(b) of the 1951 Act reading, “The county recorder and ex officio county auditor shall be ex officio recorder and ex officio auditor of said Carson City,” is to be read and construed in the light that such language relates to the County Recorder and Auditor of Ormsby

County as such terms relate to the duties of that officer, as provided in the State law for such officers as county officers. Further, in our opinion, the term “ex officio Recorder” of said Carson City was used in connection with the term “Recorder” as above pointed out with its relation to the duties of the County Recorder, and while the term “ex officio Recorder” of said Carson City was used in connection with the term “recorder” as above pointed out with its relation to the duties of the County Recorder, and while the term “ex officio Recorder” was used by the Legislature, we think it was not with the intent of providing the County Recorder to then become a judicial officer within the meaning of the term “City Recorder” as theretofore and now used in the Carson City charter, but was so used as relating to the duties of a recorder in the recording of documents.

Section 16 of the original charter for Carson City, enacted in 1875, the same being Chapter 43, Statutes of 1875, provided as follows:

The Justice of the Peace of Carson Township, Ormsby County, shall, in addition to the duties now imposed upon him by law, act as Recorder of Carson City, and shall be ex officio the City Recorder, with the like jurisdiction as commonly conferred upon Recorders' Courts in municipal corporations, subject to appeals taken to the District Court as from Justices of the Peace.

This section provided a judicial office pursuant to sections 1 and 9, Article VI, of the Constitution. The term "Recorder" in section 16 is the term commonly used in many States for municipal courts and undoubtedly so used by the Legislature in 1875. In 1929 said section 16 was amended. Such amendment still continued the use of the term "Recorder" as applied to the municipal court for Carson City and continued the Justice of the Peace of Carson Township as ex officio City Recorder and in such amendment explicitly provided his jurisdiction. 1929 Stats., p. 370.

Section 16, as amended in 1929, has not been amended or changed in any way since that time and we are of the opinion that section 2(b) of the 1951 Act does not operate as a repeal of section 16 and that section 16 is still effective insofar as it relates to a judicial office.

Section 26 of the Carson City charter provides that, "All county officers acting ex officio as officers of the city may act as city officers through their legally appointed deputies, when authorized by law to appoint such deputies."

Chapter 97, page 117, Statutes of 1945, provides in section 2 as follows:

The county recorder of Ormsby County, Nevada, is authorized to appoint such number of clerks and stenographers as the board of county commissioners shall from time to time deem necessary.

While this section of the law does not expressly provide for a deputy for the County Recorder, still it does provide that if the business of the office so increases, the Board of County Commissioners may then authorize the County Recorder to appoint an additional clerk or stenographer.

Section 2107, N.C.L. 1929, provides that the Recorder of each county may appoint a deputy. So, while there may not be any express authority contained in the Carson City charter or the 1951 Act for the ex officio City Recorder to appoint a deputy, still, under the State law there is authority for the appointment of a deputy by the County Recorder and Auditor, subject, of course, to whatever means may be devised for the payment of such deputy. It is to be noted that the only provision for payment of salary under the 1951 Act is that each ex officio officer, except the City Surveyor and Engineer, shall receive a salary at the rate of \$600 per year payable in equal monthly installments.

It is noted from your statement, wherein the request for this opinion is made, that it is the thought that while the legality of the appointment of a deputy by the ex officio City Recorder is questionable, the same result could be reached by the appointment by the County Recorder of the Justice of the Peace as her deputy. This office is not in accord with that view for the reason that the Justice of the Peace is a judicial officer. Section 1 of Article III of the Constitution provides:

The powers of the government of the State of Nevada shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Section 1 of Article VI of the Constitution provides:

The judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace. The legislature may also establish courts, for municipal purposes only, in incorporated cities and towns.

Entertaining the views above set forth as to the intent of the Legislature with respect to the creation of the ex officio City Recorder, and ex officio Auditor to mean ministerial offices, it follows, we think, that such offices belong to the executive or administrative arm of the government and by reason of the separation of the powers of government, as above set forth, the Justice of the Peace could not constitutionally be appointed to a ministerial office. This office so

held in a somewhat analogous case in opinion No. 635, dated June 23, 1948, and reported in the Biennial Report of the Attorney General for the biennium July 1, 1946 through June 30, 1948. Upon this phase of the case we are of the opinion that the present Justice of the Peace of Carson township is the City Recorder in a judicial sense as provided in section 16 of the city charter, as amended in 1929, and holding the judicial office his appointment as deputy ex officio City Recorder, as that term is used in section 2(b) of the 1951 Act, would not be in accord with the constitutional provision separating the powers of government.

Answering query number 1—The ex officio City Recorder of Carson City is not expressly authorized by the city charter to appoint a deputy to assist her in duties as City Recorder.

Answering query number 2—As County Recorder, empowered by State law to appoint a Deputy County Recorder, she may appoint such deputy. Pursuant to section 26 of the Carson City charter, the County Recorder's duly appointed deputy would have the power to perform the functions of the ex officio City Recorder as such term is used in the 1951 Act, but such deputy would not have the power to perform judicial duties.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-89. HIGH SCHOOLS—Offering courses beyond 12th grade, and requiring students to pay fees to board of education for services rendered is unconstitutional.

Carson City, August 6, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office July 30, 1951, requesting an opinion as to the constitutionality of the amendments to the school statutes by Chapter 76, Statutes of 1951.

QUERY

1. In your opinion does the provision contained in this amendment, to-wit: "and further provided that no such courses be given unless fees, for services rendered, equal to those charged at the university of Nevada, for both resident and non-resident students, are paid by the students to the board of education offering said courses," make this law unconstitutional?

2. If the section of the law hereinbefore quoted in query number one had been omitted from the statute, then in that event, could a Nevada high school offer courses for which college credit would be given at the University of Nevada, and said high school receive and expend public moneys therefor which are appropriated or levied for high school purposes only?

OPINION

Chapter 76, Statutes of Nevada 1951, amends section 120, 128, and 147 of the 1947 School Code.

Section 120 defines the district high schools in a county which has a duly established county high school.

Section 128 defines district high schools in a county which has no duly established high school.

Each of these sections describes such district high school to be a school in which subjects above the eighth grade are taught.

Section 147 defines pupils eligible to enter high school. It provides that all county high schools shall be open for admission of graduates holding diplomas from the eighth grade of the elementary schools of the State.

The amendment supplied to each of these sections reads as follows: “* * * provided, that no high school may offer courses normally accredited as being beyond the level of 12th grade, without authority from the state board of education; provided further, that no such courses shall be started with less than fifteen pupils nor continued with less than an average daily attendance of ten pupils, and further provided that no such courses be given unless fees, for services rendered, equal to those charged at the university of Nevada, for both resident and nonresident students, are paid by the students to the board of education offering said courses.”

The amendment to section 147 differs only in the addition of the word “county” before the words “high school.” This section also provides that it shall not be construed to compel a high school district to accept pupils outside the boundaries of the county without legal compensation. The average per capita cost of pupils in the county in which the high school is situated shall be deemed a legal compensation.

This compensation is governed by the transfer of school funds from one district to another as provided in the School Code.

The question presented relates to the power of the Legislature, under the Constitution of the State to enact a law requiring the payment of fees by students for services rendered in educational courses, beyond the level of the 12th grade in such high schools.

Article XI, section 2 of the Constitution of Nevada, contains the following language: “The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year. * * *.”

Section 4 provides that the Legislature shall provide for the establishment of a State University be controlled by a Board of Regents.

Section 5 contains in part this language: “The legislature shall have power to establish normal schools, and such different grades of schools, from the primary department to the university, as in their discretion they may deem necessary, * * *.”

It was held by the Court in *Lewis v. Doron*, 5 Nevada 399, that in the examination of constitutional questions, the debates of the constitutional convention may be consulted, as throwing light upon the subject; but they are not authoritative nor of any binding effect—it having been the text only that was adopted.

It appears from the record of the Nevada Constitutional Convention that the article on education was debated section by section before its adoption.

The general drift of thought expressed was that the State owes the children thereof tuition facilities for substantial education. The old constitution contained a provision for the establishment of a University which would be free to all white pupils possessing the qualifications. After a number of changes were proposed it was finally decided that the University should be placed under the care and direction of a Board of Regents, the members of which board it was declared would feel a strong interest in its prosperity and it would hardly be supposed that the board would call in strangers to enjoy its facilities unless the institution is to derive some benefit from them in return.

The result was the adoption of section 4, Article XI as it now appears in the Constitution.

The general trend of the debates was in the direction of the establishment of free educational facilities in the public schools of the State. Nevada Constitutional Debates and Proceedings, beginning on page 447.

The Constitution uses the term “common schools.” The Courts have generally held that under a constitution providing for the establishment of common schools it is not limited to primary or

intermediate grades, but may be extended to high school education. High schools are common or public schools within constitutional and statutory provisions. Anno. 113, A.L.R. 702.

Common schools mean ordinarily free common schools, the phrase common schools being synonymous with public school. Both have been defined by lexicographers and by judicial interpretation to mean free schools.

In 25 A. & E. Enc. Law it is said:

Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainment, free of expense, and under the control of agents appointed by the voters.

In Black's Law Dictionary, common schools are defined to be:

School maintained at the public expense, and administered by a bureau of the state, district or municipal government, for the graded education of the children of all citizens without distinction.

Mr. Anderson, in his Law Dictionary, says:

Common or public schools are schools supported by general taxation, open to all, free of expense, and under the control of agents appointed by the voters.

Bouvier, in his Law Dictionary, says that "common schools" are schools for general elementary instruction, free to all the public. Rapalje & Lawrence defined "common schools" to be public or free schools maintained at public expense, for the elementary education of children of all classes.

Board of Education v. Corey, 163 P. 949.

A common school within the meaning of a constitutional provision requiring the school funds to be applied exclusively to such schools, is one which is common to all children of proper age and capacity, free and subject to, and under the control of, the qualified voters of the district. *School District No. 20 v. Bryan*, 99 P. 28; 20 L.R.A. (NS) 1033, 113 A.L.R. 721.

Under an Act of the Legislature empowering a special district to charge tuition at the discretion of the board, the district established a high school and attempted to charge for tuition.

The Court held: "The term public schools or common schools are used in the Constitution to denote that such schools are open to all persons within the approved ages rather than to indicate the grade of persons within the approved ages rather than to indicate the grade of a school, or what may or may not be taught therein.

"In this state a high school is one in which higher branches of learning are taught than one that is usually called a common school; but the term 'common school' as used in our Constitution, denotes a high school as well as one in which the lower grades are taught.

"We have been cited to no case in which, under a Constitution like ours, it has been held that the Legislature might give the directors of the public schools the discretion to charge tuition either in the high school or the lower grades."

Special School District No. 65 Logan County v. Bangs, 221 S.W. 1060, 113 A.L.R. 702-721.

Under an Act providing for the management of a school district by a board of trustees, giving them authority to provide suitable schoolhouses, capable teachers and manage and control the school property of the district, the trustees had no authority to charge the pupils incidental fees.

The Court held the school Act allows the people, in certain specific instances, to have imposed upon them an additional tax to support the schools. These sums of money are to be

disbursed by the County Treasurer upon the order of the board of school trustees, approved by the county superintendent of education.

Young et al. v. Trustees of Fountain Inn Graded School, 41 S.E. 824, Ann. Cas. 1914 B, 406. Cited in 182 So. 268.

Chapter 76, Statutes of Nevada 1951, in the amendment to the sections defining high schools, provides that the fees are paid by the students to the board of education offering said courses.

The school laws of Nevada provide for the levy of general and special taxes for the support of the public schools. The statutes provide that boards of education have control of the fiscal policy of the schools, but there is no authority vested in such boards to receive school moneys. All State money for schools is received by the State Treasurer and paid out on warrants by the State Controller. County school money is paid into the County Treasury and paid on warrants by the County Auditor.

We are, therefore, after a careful research into the law on the subject, of the opinion that the amendments to the sections in question infringe the provision of the Nevada Constitution which requires the Legislature to provide a uniform system of common schools, and are therefore unconstitutional.

Your second question, in view of the foregoing conclusion, appears as a hypothesis. However, the Constitution in section 5, Article XI, which gives the Legislature power to establish normal schools and such different grades from the primary department *to* the University (emphasis supplied) indicates approach and arrival. Its governed word “university” denotes the terminus, thus leaving the Legislature without authority to establish grades within departments embraced by the University.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-90. BASIC SCIENCES—Board of Examiners has discretionary powers to waive examination in certain cases.

Carson City, August 9, 1951.

State Board of Examiners in the Basic Sciences, University of Nevada, Reno, Nevada.

Attention: Frank Richardson, Secretary-Treasurer.

Gentlemen:

This will acknowledge receipt of your letter in this office August 8, 1951, requesting an opinion as to the interpretation of section 9 (3) of the Basic Science Act of 1951.

QUERY

Has the Board of Examiners in the Basic Sciences, under the provisions of section 9 (3) of the Basic Science Act, power to exempt from examination a person with a basic science certificate

from another State which has not granted Nevada reciprocity, but which gives examinations in which the requirements are more than the equivalent of those of Nevada?

OPINION

Section 9, Chapter 332, Statutes of Nevada 1951, provides as follows:

The board of examiners may in its discretion waive the examination required by section 7, when proof satisfactory to the board is submitted, showing (1) that the applicant has passed in another State an examination in the basic sciences; (2) that the requirements of that State are not less than those required by this State as a condition precedent to the issuance of a certificate; and (3) that the board of examiners in the basic sciences to persons holding certificates from the State board of examiners in the basic sciences of Nevada.

The section should be read in connection with the entire Act to ascertain the intention of the Legislature and the objective sought to be secured.

It is evident that the purpose and substance of the Act is to require that a person who may be eligible to apply for an examination in order to secure a license to practice the healing art or any branch thereof, except in the Act provided, shall first qualify in what is classified as the basic sciences. That such is the intent is strengthened by the provision in section 18 of the Act, in the following language: "But any board authorized to issue licenses to practice the healing art or any branch thereof may in its discretion either accept certificates issued by the Nevada board of examiners in the basic sciences in lieu of examining the certificants in such sciences or it may examine such certificants in such sciences."

The essence of the thing to be done, as shown by the reading of section 9 is that when satisfactory proof has been submitted to the board that the applicant has passed in another State an examination in the basic sciences, and that the requirements of that State for such examination are not less than those required by the Nevada Act, then the board may in its discretion waive the examination required in the Act.

To hold that although the conditions mentioned under (1) and (2) in the section had been established to the satisfaction of the board, that reciprocity as indicated in condition (3) must also be established, would cause the first two conditions to be worthless. "No part of a statute should be rendered nugatory, nor any language be turned to mere surplus, if such consequences can properly be avoided." *Torreyson v. Board of Examiners*, [7 Nev. 19](#).

The word "and" before (3) should be interpreted to mean, in a similar manner, the board may waive the examination if there is a reciprocal agreement with another State. The ultimate and general purpose of the Act is to establish the efficiency of the applicant as to his ability in the basic sciences, and such purpose should not be defeated by a single phrase in a section.

We are, therefore, of the opinion that in the event the Board of Examiners in the Basic Sciences receives satisfactory proof that the applicant has, in another State, passed an examination in the basic sciences, and that the requirements in like examinations in such State are not less than those required in the Nevada Act, the board in its discretion may waive the examination in this State.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-91. COUNTIES—Tax lien unenforceable after three years.

Carson City, August 10, 1951.

Hon. L.E. Blaisdell, District Attorney, Mineral County, Hawthorne, Nevada.

Dear Mr. Blaisdell:

I have your letter of August 8, 1951, wherein you request an opinion for J.J. Connelly, County Recorder, with respect to the delinquent tax on a certain lot in the town of Hawthorne for the year 1932.

It appears from your letter that the lot became delinquent in 1932 and a Treasurer's certificate of sale for delinquent taxes was filed in the office of the Recorder on September 11, 1933. Thereafter no Treasurer's deed was ever issued to Mineral County. The delinquent taxpayer conveyed the lot to another person in 1933 and a succession of conveyances followed with all taxes being paid thereafter to and including, I assume, the year 1950.

You inquire whether the treasurer's certificate of sale issued in 1933 has now any legal effect.

OPINION

There is no question but what there was a failure on the part of Mineral County to issue a treasurer's deed upon the expiration of the period of redemption. However, we think this is of no moment at this time for the reason that even if such deed had been issued, any attempt on the part of Mineral County to enforce collection of the 1932 taxes would be prevented by reason of the statute of limitation and no recovery could be made thereon. In section 8524, N.C.L. 1929, it is provided: "Actions other than those for the recovery of real property can only be commenced as follows: * * * Within three years: 1. An action upon a liability created by a statute, other than a penalty or forfeiture" This particular statute was held to establish a limitation beyond which delinquent taxes could not be collected. *See, State v. Yellow Jacket Silver Mining Co.*, [14 Nev. 220](#). Also, Attorney General's Opinion No. 115, dated March 1, 1944, found in the Biennial Report of the Attorney General for the period July 1, 1942, to June 30, 1944.

Respectfully submitted,

W.T. MATHEWS
Attorney General

[Card attached to first page of AGO with list of cases:

State ex rel. Hess v. County Commissioners of Washoe Co., [6 Nev. 104](#)

Sadler v. County Commissioners of Eureka County, [15 Nev. 39](#)

State v. Central Pacific Railroad Co., [9 Nev. 79](#)

Godchaux v. Carpenter, County Commissioner of Humboldt County, [19 Nev. 415](#)

State ex rel. Beck v. Board of County Commissioners Washoe County, [22 Nev. 15](#)

Lyon Co. v. Ross, [24 Nev. 102](#)

Second Page Card: *Waitz v. Ormsby County*, [1 Nev. 370](#)]

OPINION NO. 51-92. CIVILIAN DEFENSE—Authority of County Commissioners.

Carson City, August 21, 1951.

Mr. C.A. Carlson, Jr., Director of State Defense, State Council of Defense, Carson City, Nevada.

Dear Mr. Carlson:

This will acknowledge receipt of your letter of August 15, 1951, requesting the opinion of this office as follows:

1. Has the Board of County Commissioners authority to appropriate moneys for Civil Defense activities?
2. Does the Civilian Defense Act of 1943 grant such authority?
3. Does the Civilian Defense Act of 1943 prohibit such action?
4. Has the Board of County Commissioners authority to appoint a Civil Defense coordinator or director?
5. Does the Civilian Defense Act of 1943 grant such authority.
6. Does the Civilian Defense Act of 1943 prohibit such appointment?

Attached is a suggested form of county or city ordinance to set up a Civil Defense plan in the city or county.

Would such an ordinance conform with State law—if not what changes would you suggest.

7. In the passage of such suggested ordinance would authority be granted to the Board of County Commissioners to appropriate money for Civil Defense activities.

OPINION

Answering questions 1, 2, and 3—After a thorough consideration of the Civilian Defense Act of 1943 and amendments thereto (1951 Stats. 463) and section 1942, 1929 N.C.L., 1941 Supp., “Powers Granted County Commissioners In Their Respective Counties,” this office is of the opinion that there is not specific statutory authority whereby the County Commissioners may appropriate moneys for Civil Defense activities. There is grave doubt, unless the United States be in a state of war and an emergency therefor declared, that power to appropriate moneys can be said to be necessarily implied for the purpose of carrying the commissioners’ powers into effect.

The 1943 Act provides the State Council of defense and its director with the power with respect to the organization and direction of county and community councils of defense, but this Act fails to authorize or empower the County Commissioners to appropriate moneys. It is a recognized premise in law that the County Commissioners of the respective counties of this State are creatures of the statute, and are invested with none but special powers, and can only exercise such powers as are especially granted, or as may be necessarily implied for the purpose of carrying such powers into effect. It is, therefore, necessary that their actions be in conformity with some provision of law giving them power, or they will be without authority. Authority cannot be imputed merely because the law lacks a prohibition against certain acts. [6 Nev. 104](#), [15 Nev. 39](#), [9 Nev. 79](#), [19 Nev. 415](#), [22 Nev. 15](#), [24 Nev. 102](#).

Answering questions 4, 5, and 6—This question imparts, in addition to whether or not the County Commissioners may appoint a civil defense coordinator or director, also whether or not the commissioners may provide a salary therefor. To these questions this office is constrained to answer in the negative. Quoted below are the pertinent parts of a letter of this office dated January 11, 1951, addressed to the District Attorney of White Pine County to this question:

A perusal of the Civilian Defense Act indicates that the county commissioners are not *specialty empowered* to appoint a Director of Civilian Defense. Section 6917.02-.05-.06, 1929 N.C.L., 1941 Supp.

Section 1942, 1929 N.C.L., 1941 Supp., relating to powers of county commissioners, wherein it will be noted that the county commissioners are not *specialy granted* any powers relative to the appointment of a full time director of defense, however, the following provision of the above mentioned section may be considered of importance, "Thirteenth—To do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board."

General case law discloses that there is a long line of authority uniformly holding substantially as follows:

County commissioners can only exercise such powers as are *specialy granted*, or as may be necessary incidental for the purpose of carrying such powers into effect; and when the law prescribes the mode which they must pursue in the exercise of these powers, it excludes all other modes of procedure. [1 Nev. 370](#), [6 Nev. 104](#), [9 Nev. 79](#), [15 Nev. 39](#), [19 Nev. 415](#), [22 Nev. 15](#), [24 Nev. 102](#), etc.

In view of the foregoing it is indicated that the county commissioners do not have such power, either to appoint nor provide salary for said directors.

This office is in receipt of information that during World War II active directors of defense were appointed and for the most part were compensated by city funds.

Therefore, if it is deemed desirable or necessary that a county director of defense be appointed, the moment is opportune with the 1951 Legislature about to convene to so amend the Civilian Defense Act, authorizing the county commissioners to so appoint.

Further study and consideration of this question prompts this office to reaffirm the views expressed above. During the 1951 Legislature the Civilian Defense Act of 1943 was amended, but such amendments did not confer authority upon the County Commissioners to appoint and provide a salary for a county defense coordinator or director.

The suggested county and community ordinance insofar as a county is concerned would not be valid. As pointed out above, a county cannot create an office unless authority therefore can be found in law. The Legislature has provided and prescribed the mode of organization and the powers of the county councils of defense. Section 2 of the 1943 Act places said councils under the control of the State Director of Defense. (See 11. Am. Jur. 953, section 238.) Further, the County Commissioners do not have authority, in this instance, to declare what acts shall constitute a crime, hence the penalty clause would be unconstitutional. (See 11 Am. Jur. 965, sec. 244.)

The suggested ordinance insofar as incorporated cities are concerned may be valid since the charters and the general Acts are comprehensive and confer considerable legislative power upon said city authorities, a determination of its validity in this respect necessitates a consideration of each city's governmental powers.

Holding invalid the ordinance, insofar as counties are concerned precludes the necessity of answering question 7.

In complying with your request for a prompt reply, full citation of authority has been omitted.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-93. 1. ADOPTION—Section 9484, N.C.L. 1929, governs with respect to adoption by mongolians. **2. ADOPTION**—Evidence with respect to legitimacy of child must be determined by the court.

Carson City, August 21, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

Reference is hereby made to your letter of August 14, 1951, wherein you request the opinion of this office upon the following questions:

1. Whether section 9484, N.C.L. 1929, reading, "The provisions of this act shall not apply to any Mongolian, except in the case of an adult Mongolian seeking to adopt a Mongolian child," has been repealed by subsequent provisions dealing with the adoption of children, to wit, Chapter 152, 1941 Statutes, and Chapter 246, 1947 Statutes of Nevada. Section 9484 being section 10 of the Act to provide for the adoption of children, approved February 20, 1885.
2. What is considered acceptable evidence to controvert the presumption that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate?

OPINION

Answering query No. 1—Section 9475, N.C.L. 1929, being section 1 of the 1885 Act providing for the adoption of children, provides, "Any minor child may be adopted by any adult person or by any husband and wife, in the cases and subject to the provisions prescribed in this act." Section 9484, N.C.L. 1929, as above quoted, prohibits the adoption of a child by any Mongolian, save and except in the case of an adult Mongolian seeking to adopt a Mongolian child. Thus, this provision of the 1885 law prohibits and, if effective, still prohibits the adoption of a Caucasian child by a Mongolian.

An examination of Chapter 152, 1941 Statutes, and Chapter 246, 1947 Statutes, discloses that neither chapter, the same chapters being amendments and new Acts relating to the adoption of minor children by Mongolians. However, such chapters do not contain express repeal of the 1885 Act nor any provision therein contained. Neither is there any provision in the 1941 and 1947 Acts in conflict with section 9484.

The rule of statutory construction long adopted by the Supreme Court of this State is that repeals by implication were not favored, and further, that where two statutes deal with the same subject matter and they are not in irreconcilable conflict with each other, then both statutes are to be construed together and both permitted to stand, save and except in the event of an irreconcilable conflict.

The 1941 and 1947 Statutes relative to the adoption of minor children containing no repealing clause of the earlier statute, nor any provision therein direct conflict with section 9484, it is therefore the opinion of this office that section 9484, N.C.L. 1929, is still effective for the purposes therein stated.

Answering query No. 2—The placing or intimation of illegitimacy is not to be lightly cast upon any child. Such has been the law for many, many years. The general rule is that a child born in lawful wedlock is presumed to be legitimate and that neither the husband nor the wife, joined together in lawful wedlock, may so testify as to cast the stigma of illegitimacy on their offspring without the most compelling reasons and the most pertinent evidence of nonaccess. The evidence submitted in any case with respect to the legitimacy or illegitimacy of a child will no doubt be most carefully scrutinized by the Court. Each case must stand upon its own set of facts and the evidence submitted with respect to the matter must in each case be admitted or rejected by the Court in which the matter is submitted. No definite rule can be laid down with respect to what is acceptable evidence in every case.

The statutory law with respect to the presumption of legitimacy in this State is:

1. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate. Section 9047.06, 1929 N.C.L., 1941 Supp. This presumption is conclusive.
2. A rebuttable presumption is that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate. Section 9047.07, 1929 N.C.L., 1941 Supp.

This rebuttable presumption calls into play the sufficiency of the evidence with respect to legitimacy. The general rule of law is that, unless otherwise provided by statute, neither husband nor wife may testify as to nonaccess between them in any case where the question of the legitimacy of a child born in wedlock is in issue. 7 Am. Jur. 641, sec. 21.

It is, therefore, the opinion of this office that no general or blanket rule can be stated as to what is acceptable evidence to controvert the presumption that a child born in lawful wedlock is legitimate. Each case must stand upon its own set of facts and rest upon the decision of the Judge to whom the question is submitted.

This office is further of the opinion that the form of affidavit submitted with your letter requesting the opinion would not constitute acceptable evidence with respect to the legitimacy or illegitimacy of a minor child.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-94. CONSOLIDATED SCHOOL DISTRICTS—An annexed district becomes part of the consolidated district for purposes of apportionment.

Carson City, August 22, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

Reference is hereby made to your letter of August 13, 1951, requesting the opinion of this office upon the question propounded to you by the principal of Consolidated School District No. 1, Douglas County, which question is as follows:

The Dresslerville District was annexed to the Consolidated School District No. 1, Douglas County under Chapter 6, Secs. 39-42 of the 1947 School Code. All steps were taken in accordance to the law. Will the consolidated district retain the annexed district within the consolidation for apportionment like the several other districts making up the consolidation or will the children of the annexed district be counted in with the children of one of the original districts of the consolidation?

OPINION

Section 31 (4) of the School Code defines a consolidated school district: "A combination of two (2) or more school districts wherein the component school districts completely lose their

separate identities, except for apportionment purposes and merge into one (1) enlarged district with a single board of trustees.”

Section 42 of the Code provides, upon the annexation of one school district by another district, the petitioning district shall cease to exist as a separate district and shall become part and parcel of the accepting district, all of its assets and property as well as its liabilities shall accrue to the accepting district, and its board of trustees abolished. It is clear that the Dresslerville District became part and parcel of Consolidated School District No. 1 upon the annexation being fully accomplished. Such district was not annexed to any one component district theretofore consolidated with other districts making up the consolidated district, but was annexed to the consolidated district as then composing one enlarged district and thus became to all intents and purposes a component part thereof.

It is, therefore, the opinion of this office that for apportionment purposes the annexed school district is to be considered as retained within the consolidated district on a like footing with all other districts making up the consolidated district, and not as an annexed district of any one of the original consolidating districts.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-95. INSURANCE—Agent’s license under multiple line insurance.

Carson City, August 29, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

This will acknowledge receipt of your letter of August 20, 1951, requesting the opinion of this office as follows:

1. Whether or not a person to be licensed as an agent for an insurance company must prove himself qualified to write all the kinds of insurance that the company is authorized by its license to write in Nevada.
2. Whether or not the Commissioner is authorized to revoke the license of an agent who previously qualified himself to write the kinds of insurance that the company he represents was previously licensed to write in Nevada but this company has changed its license to multiple line authority and the agent now refuses to qualify himself according to the expanded authority of the company.
3. Whether or not subparagraph (e) of section 147 authorizes an individual licensed as an agent for a company who is licensed to issue Class 1 insurance in Nevada, as defined in section 5, to request, and the Commissioner be required to issue, a license to the agent to represent a Class 2 company, as defined in section 5 of the Nevada Insurance Act, without the agent proving to the satisfaction of the Commissioner that he is qualified to write Class 2 insurance.

STATEMENT

Your inquiry necessitates a brief statement as to the effect and a construction of section 6 of the Insurance Act as amended, 1951 Stats. 74.

Section 6, being sections 3656.05, 1929 N.C.L., 1941 Supp., was amended by adding the following:

A company not authorized nor seeking to be authorized to transact life insurance *may be* authorized to transact any or all the kinds of business enumerated under classes 2 and 3 of section 5 of this act. (Emphasis added.)

In view of the above, the privilege of doing a “multiple line” of insurance business is clearly discretionary with the Insurance Commissioner.

OPINION

Your attention is directed to Opinion No. 23 of this office, dated March 1, 1951, relating to the examination of agents with respect to the *kind* of insurance business for which the license is sought. It will be remembered that section 147(e) reads “* * * to the *kind* of business for which the license is being sought * * *.” This office under such condition of the law held that agents need only be examined as to their qualifications to sell a specific *kind* of insurance as distinguished from *class*. This section was amended, 1951 Stats. 504, by changing the word “*kind*” to “*class*,” hence following the reasoning of the above-mentioned opinion an agent now must be examined as to his qualifications to sell the “*class*” of insurance for which the license is sought. It is, therefore, the opinion of this office that an agent having been qualified and licensed for all the kinds of insurance business in Class 2, need not qualify for the kinds of insurance business in Class 2, need not qualify for the kinds under Class 3 should the company he represents subsequently be granted the multiple line authority; provided, however, that said agent is not seeking to sell the kinds of insurance under said Class 3, but is to continue the sale of insurance as previously qualified to so transact.

Since the granting of the multiple line authority is within the sound discretion of the Insurance Commissioner, the above ruling does not apply to an agent not previously qualified under Class 2 or 3. The Commissioner may by rules and regulations require any reasonable qualifications of both insurance companies and their agents.

Question No. 2 can be answered following the reasoning set forth in No. 1 above to the effect that the Insurance commissioner cannot revoke the license of an agent previously qualified under Class 2 or 3 of section 5, Nevada Insurance Act.

Answering question No. 3—Renewal, without alluding to the numerous authorities, means to grant or obtain an extension of the same, once more, over again, as much again, etc. Section 147 (e) (1) permits a reissuance of the same license possessed by the applicant, hence an agent licensed as being qualified to write insurance under Class 1 of section 5 may be relicensed in Class 1 of section 5 at the expiration of the license presently held and the renewed license cannot extend his authority beyond what the old authorized unless said agent is examined and qualifies for other kinds or classes of insurance.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-96. WELFARE—PUBLIC ASSISTANCE—CONSTRUCTION OF CHAPTER 197, STATS. 1951—Liability of relatives.

Carson City, September 5, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to the following questions.

(1) Is a stepchild or stepparent liable for the support of an applicant for or recipient of public assistance as defined under Chapter 197, 1951 Statutes of Nevada?

Chapter 197, Statutes of Nevada 1951, page 296, provides as follows:

The husband, wife, father, mother, and children of an applicant for or recipient of public assistance if of sufficient financial ability so to do are liable for the support of such applicant or recipient. "Public assistance," for the purposes of this act, shall include old-age assistance, child welfare services and Nevada state children's home, on the state and county level. The state welfare department shall investigate the ability of responsible relatives to contribute to the support of an applicant for or recipient of public assistance and shall determine the amount of such support for which such relative is responsible. In determining the amount of support for which such relative is responsible his or her financial circumstances shall be given due consideration. In no case shall a relative be required to make contributions greater than the amount fixed by the relative responsibility scale set forth below. A married daughter of the applicant shall not be required to make contributions unless she has income constituting her separate property. * * *

The county commissioners shall advise the district attorney of the county in which such relatives reside of failures to reimburse the county and the circumstances incidental thereto and the district attorney shall cause appropriate legal action to be taken to enforce such support, and in addition may collect a reasonable fee which shall be added to the costs of the action in any justice court of the state, expense of such fee and costs to be borne by the relative.

The liability of a relative to contribute to the support of a recipient of public assistance established by this act shall not be grounds for denying or discontinuing public assistance to any person; provided, however, that by accepting such public assistance the recipient thereof shall be deemed to consent to suit in his name by the county against such public assistance the recipient thereof shall be deemed to consent to suit in his name by the county against such responsible living relative or relatives and to secure an order for his support.

As the Nevada Act is silent regarding the liability of a stepchild or stepparent for the support of a person receiving public assistance, it is essential that we look to the general law regarding this particular subject. In 39 Am. Jur., page 699, section 62, we find the following statement:

It is practically the universal rule that a stepfather, as such, is under no obligation to support the children of his wife by a former husband, but that if he takes the children into his family or under his care in such a way that he places himself in loco parentis, he assumes an obligation to support them, and acquires a correlative

right to their services. It is said that the relation of stepfather and stepchild does not, of itself, impose any duty upon one to the other or create any right assertible by one against the other. Especially is the stepfather relieved of any duty of support where the children have an income of their own. And the stepfather of an illegitimate child is under no obligation to support it. Neither are stepmothers liable for the support of their stepchildren. However, the voluntary assumption of the obligations of parenthood toward the children of a spouse by another marriage is favored by the law, although, of course, whether there has been such an assumption depends upon the facts of the particular case.

Therefore, it is our opinion that in each case wherein a stepchild or stepparent is involved, it would be necessary for the District Attorney to institute an action and have the Court determine whether or not there was any liability.

(2) What is the liability of a spouse for the support of an applicant for or recipient of public assistance, where the couple live separate and apart from each other but have not been legally divorced?

The Act does not make any provision for persons who are separated, but who have not been divorced. Therefore, the liability would be identical to that of any other husband or wife who are not living separate and apart.

(3) What are the criteria for determining when the earnings of an employed married daughter are deemed to constitute her separate property?

Sections 3355 and 3356, N.C.L. 1929, provide as follows:

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

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.

Sections 3368 and 3369, N.C.L. 1929, provide as follows:

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.

When the husband has allowed the wife to appropriate to her own use her 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.

The above-quoted sections are the only criteria for determining when the earnings of a married person are deemed to constitute separate property.

(4) What is the effect of the provisions of Chapter 197, 1951 Statutes of Nevada, in situations where the court order committing a child to the State Children's Home specified that the county, rather than the parent, shall be financially liable for the child's care at the Home?

In the event the Court orders that the county rather than the parent shall be financially liable for the child's care at the State Children's Home, it is our opinion that the order is binding and it would be mandatory that it be carried out.

(5) What is the financial liability of a parent for support of a child under the provisions of Chapter 197, 1951 Statutes of Nevada, when the parental rights of such parent have been legally terminated by court order?

The Court order in such case would be binding. In the event the parental rights were legally terminated by Court order and there was no provision made for the support of the child, the parents would have no legal obligation to support the said child.

(6) Under the provisions of Chapter 197, 1951 Statutes of Nevada, does the parent of a child in the State Children's Home pay the amount he is liable for under the Relatives Contribution Scale to the county from which the child was committed, or is part of the contribution paid to the state?

It is our opinion that since the statute refers on to reimbursement to the county, paid goes to the State.

(7) At what age does a child become financially liable for the support of a parent who is an applicant for or recipient of public assistance, under the provisions of Chapter 197, 1951 Statutes of Nevada? For instance, would an employed son, nineteen years of age, be liable for the support of his parents? Is the age of liability different for a son and daughter?

There is no age limitations provided in the statute. It is our opinion, therefore, that if a child, either male or female, is able to support a parent, he is liable for such a support regardless of age.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-97. COUNTY COMMISSIONERS-ADMINISTRATION OF UNINCORPORATED TOWNS—Qualification of signers to petition.

Carson City, September 7, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter in this office August 22, 1951, requesting a construction of section 1246, N.C.L. 1929.

QUERY

Does the language in section 1246 N.C.L. 1929, “representing at least three-fifths of its taxable property” mean three-fifths of the value of the taxable property or three-fifths of the taxable property in area?

Whether or not the majority of the actual residents must either hold or acting as agents represent three-fifths of the total taxable property in the proposed unincorporated town or just three-fifths of the total assessed valuation?

OPINION

Section 1231, N.C.L., 1929, is section 1 of the Act granting additional powers to Boards of County Commissioners with regard to the management of unincorporated towns or cities within their respective counties. The first subdivision of this section provides that the County Commissioners fix and define the boundaries of such town or city within which the jurisdiction conferred shall be exercised.

Section 16 of the Act, section 1246, N.C.L. 1929, quoting that part deemed relevant, reads as follows: “None of the powers or jurisdiction in this act authorized or required, shall be exercised in any city or town until there shall be filed in the clerk’s office of the county in which the same is situated, a written petition for the application of the provisions of this act to said city or town, signed by a majority of the actual residents thereof, representing at least three-fifths of its taxable property * * *.”

The section uses the words “actual residents,” “representing” and “taxable property.” Actual residents generally means those actually dwelling in the town. Representing is standing for or is an obligation. Taxable property means property subject to taxation.

The conditions precedent to the exercise of the powers and jurisdiction to be assumed by the County Commissioners are that a majority of such residents must sign the petition, and that within such majority must be those standing for at least three-fifths of the taxable property within the boundaries of the town.

Section 5 of the Act to provide revenue for the support of the government, as amended by Chapter 200, Statutes of 1951, provides that all property of every kind and nature whatsoever within the State shall be subject to taxation, except such property as defined in the section to be exempt. This would include real and personal property. While real property could be determined by area, this would not be practical in the case of personal property. Taxable property as used in the section is an indefinite expression and other statutes bearing on property owners qualifying to initiate administrative measures should be considered to determine the intent of the Legislature.

The bond election statute refers to property assessed on the assessment roll.

The Act providing for the removal of county seats, section 1924, N.C.L. 1929, provides for the calling of an election when three-fifths of the qualified electors, each elector being a taxpayer as appears by the assessment roll has been construed a number of times by our Supreme Court.

In the case of *State v. Martin*, [32 Nev. 205](#), the Court said: “The question has been raised regarding the forty-two persons who appear on the tax roll as paying taxes only in a partnership capacity. Under the language of the statute their names should be included, or it provides for all tax paying electors whose names appear on the last assessment or as partners. In either instance their names appear, and we see no good reason why one whose name appears as a member of a large merchandising, farming, stock raising or other business firm should not be considered and included as well as one who may be taxed on a town lot valued at a trifling amount.”

A rule of construction as approved in *In Re Lavendal’s Estate*, [46 Nev. 188](#), is that it is incumbent upon courts, if there be any ambiguity or indefinite expressions found in the statutes, to adopt that construction which best accords with the true intent and meaning of all statutes touching the subject under consideration.

The practical method to determine the taxable property in the town and those representing such property is by reference to the assessment roll.

We are, therefore, of the opinion that a reasonable construction from the phraseology of the section is that the subscribers to the petition should be a majority of the actual residents within

the boundaries of such town, and that within such majority should be taxpayers representing three-fifths of the assessed taxable property therein.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-98. STATE HIGHWAY—Easements and rights of way for drain ditches in Sparks-Vista area in continuous existence since 1881.

Carson City, September 7, 1951.

Hon. H.D. Mills, State Highway Engineer, Carson City, Nevada.

Dear Sir:

Reference is hereby made to your letter of August 31, 1951, requesting the opinion of this office as follows:

Reference is made to the proposed reconstruction of a portion of State Route No. 1 (U.S. 40), Washoe 1-B4 (WA-02) from the easterly city limits of Sparks to Vista.

At the present the drain waters developed on the ranches to the north and sought of the highway, a Sparks storm drain and the effluent from the Sparks sewer plant flow easterly in ditches contained within the highway right of way and immediately adjacent to the highway shoulder. It is proposed under the above-mentioned reconstruction to eliminate all drains and ditches from the right of way. To accomplish this the Highway Department has secured the necessary right of way easements to provide for the construction of a system of drains outside the right of way from Sparks to a junction with the Truckee River at Vista.

To justify the expenditure of Federal Funds for the construction of said drains the Bureau of Public Roads has requested an opinion setting forth the fact that the various drain companies had and have easements or rights of way for said drains which are prior in date to the highway right of way easements.

You have submitted with your letter a transcript of recorded conveyances of title to easements heretofore granted concerning certain drain ditch companies and persons who in past years constructed or controlled a drain ditch or ditches in the area and draining the lands through which the present highway and its new alignment passes, and over which the Highway Department has acquired rights of way for the changing of the alignment of the presently constructed drain ditches.

OPINION

The record discloses that the easement for and the construction of a drain ditch or ditches was confined to the following briefly described land or area, i.e., NE3, sec. 4, T. 19 N.C.L., R. 20 E.; point of beginning thence crossing over or along boundary lines of SE3, sec. 4; NW3 and NE3,

sec. 10; SW3, SE3, sec. 11 and SW3, sec. 12, in said Township 19 and Range 20, to the Truckee River.

The first recorded conveyance of a right of way for a drain ditch was that of O.C. Ross and 10 other land owners to the Central Drain Ditch Company, dated March 25, 1881, which conveyance granted an easement over their lands in the area above described, terminating the right of way "near the lands and premises of D.W. O'Connor." The O'Connor lands, according to a plat submitted to this office, being situate in the SE3 of sec. 11 and SW3 of sec. 12

Thereafter on March 16, 1883, D.W. O'Connor and Julia A. Blasdell conveyed by deed a "perpetual" right of way to the Central Ditch Company for a drain ditch through SE3, sec. 11 and into SW3, sec. 12, in Township 19.

Between March 16, 1883, and May 8, 1885, apparently the Central Drain Ditch Company became defunct or lost its property by reason of delinquent taxes. On March 8, 1885, the Sheriff of Washoe County executed a deed to D.W. O'Connor who acquired title to the Central Drain Ditch and its right of way in its entirety. Thereafter on September 6, 1887, D.W. O'Connor conveyed to the Union Ditch Company certain described lands in sections 11 and 12 of Township 19, together with "the Central Drain Ditch and its appurtenances and franchise as conveyed by the Sheriff of Washoe County, Nevada, to said first party by deed recorded page 115, book 11 of Deeds."

On February 25, 1892, the Union Ditch Company conveyed by deed to one John Divine the land it acquired from D.W. O'Connor in section 11 above mentioned. The company, however, reserved all its right of way and easements in the former Central Drain Ditch.

Thereafter, it is apparent the Union Ditch Company became involved financially for the reason the record shows that on October 6, 1899, the Sheriff of Washoe County sold to one R.H. Kinney all right, title and interest in the former Central Drain Ditch including its rights of way in its entirety.

On October 4, 1899, the Peoples Drain Ditch Company was incorporated under the laws of Nevada, its articles being filed with the Secretary of State on October 7, 1899. The life of this corporation was renewed and extended by the filing with the secretary of State its certificate of revival, July 21, 1950.

R.H. Kinney, on October 14, 1899, conveyed by deed to the Peoples Drain Ditch Company all right, title and interest in and to the former Central Drain Ditch and its rights of way as conveyed to him by the Sheriff's deed above mentioned. The Peoples Drain Ditch Company has remained in ownership of the former Central Drain Ditch and its rights of way and easements to and including the present time.

It is the opinion of this office (1) that an easement by grant for a right of way for a drain ditch or ditches within the area presently in question was created by the deed of O.C. Ross and 10 other property owners to the Central Drain Ditch Company, dated May 25, 1881, and which easement and right of way was extended to include a right of way over lands of D.W. O'Connor, in sections 11 and 12 of Township 19, as conveyed by the deed of D.W. O'Connor and Julia A. Blasdell to the Central Drain Ditch Company, dated March 16, 1883, (2) that such easements and rights of way at no time since 1881 have reverted and thereby have been vacated or abolished, but have been in effect continuously from such year, and (3) that the various drain ditch companies and/or intervening successors in interest have had title to such easements and rights of way for the drain ditch or ditches constructed in the area of question.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-99. INSURANCE—Fees for examinations not returnable but deposited in General Fund of State.

Carson City, September 14, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City.

Dear Mr. Hammel:

This will acknowledge receipt of your letter in this office September 7, 1951, requesting an opinion as to the disposition of fees collected from applicants required to take an examination for issuance of insurance agent's license.

QUERY

The last biennium this money was deposited in a separate fund and was expended for salaries and other expenses incurred in holding hearings. Are there now any restrictions as to how this fund may be expended this biennium?

OPINION

Chapter 108, Statutes of 1951, amends section 147 of the Insurance Act, section 3656.147, 1929 N.C.L., 1949 Supp. Subparagraph (i) provides as follows:

In case of applicants required to take an examination, as in this section provided, the application shall be accompanied by an examination fee in the amount of ten (\$10) dollars, in addition to the license fee required under section 60. In the event an applicant fails to qualify for, or is refused a license, the license fee shall be returned; the examination fee shall not be returned for any reason, and shall be deposited in the general fund.

Section 149, providing the procedure for issuing nonresident brokers' licenses, was also amended. Subparagraph (4) reads the same as the above-quoted subparagraph.

Chapter 310, Statutes of 1951, section 147B, defines the procedure for issuing nonresident agents' licenses. Subparagraph (4) reads the same as section 147(i), quoted above, down through the word "reason," after which it reads as follows:

* * * but shall be deposited and handled in a like fashion as are examination fees for agents generally.

Statutes which relate to the same subject matter are in *pari materia* and should be read together. *State v. Esser*, [35 Nev. 429](#).

The Legislature is presumed to have knowledge of the state of the law upon the subject upon which it legislates. *Clover Valley Land & S. Co. v. Lamb*, [43 Nev. 375](#).

We are, therefore, of the opinion that the fees for an examination which shall not be returned to the applicant shall be deposited in the General Fund of the State, and cannot be expended as before the present amendments.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand

Deputy Attorney General

OPINION NO. 51-100. PUBLIC SERVICE COMMISSION—HIGHWAY PATROL—
Expenditures for Highway Patrol should be within appropriation, notwithstanding authorized increase in maximum number of patrolmen.

Carson City, September 14, 1951.

Hon. Chester H. Smith, Budget Director, Office of the Governor, Carson City, Nevada.

Dear Mr. Smith:

This will acknowledge receipt of your letter in this office September 4, 1951, presenting a question concerning the salary payments of Nevada State Highway Patrolmen.

STATEMENT

Chapter 232, Statutes of 1951, authorized that the Nevada Highway Patrol shall be composed of not more than 31 patrolmen, thus increasing the number from 25 as provided in section 4435.50, N.C.L. 1943-1949 Supplement.

Under section 18 of the General Appropriation Act, Chapter 279, Statutes of 1951, the total sum designated for the Highway Patrol is \$344,060.

The chairman of the Nevada Public Service Commission informs your office that the 1952-1953 fiscal years were provided allocations for the Highway Patrol computed on the basis of 25 patrolmen as authorized under section 4435.50, N.C.L., 1943-1949 Supp., and the Legislature at the 1951 session failed to appropriate sufficient funds for the employment of any of the six additional patrolmen authorized. The chairman contends there is insufficient funds as earmarked to employ 31 patrolmen for the biennium.

QUERY

If the Public Service Commission is empowered to employ the 31 patrolmen, from what source will funds be secured to provide to the patrolmen their compensation.

OPINION

The Legislature in 1951 made two amendments to section 5 of chapter 133, Statutes of 1949, the Act relating to the administration of State Highway Patrol under the Public Service Commission.

One of the amendments to this section was made by chapter 32, Statutes of 1951, which was approved February 26, 1951. This amendment did not change the number of patrolmen, "not more than twenty-five (25)," as provided in the original Act, nor change the provisions relating to salary. The only change made was in the language contained in the original Act, that is, "two of whom shall be the chief and assistant chief patrolmen," to the language, "two of whom shall be the superintendent and assistant superintendent."

Chapter 232, Statutes of 1951, section 1, amended section 5 of the above-entitled Act, being Chapter 32, Statutes of Nevada 1951, which amendment was approved March 21, 1951. The only change made was to increase the number of patrolmen from 25 to 31. This section reads as follows:

There is hereby created within the public service commission of Nevada a division to be known as the Nevada highway patrol, which shall be composed of not more than thirty-one (31) patrolmen appointed by the commission, two of whom shall be superintendent and assistant superintendent. The appointed patrolmen shall be men qualified at the time of their appointment with the knowledge of all traffic laws of this state, the motor vehicle registration and licensing acts, the chauffeurs' and drivers' licensing acts, the motor vehicle carrier licensing and regulation act, and the law with respect to the imposition and collection of gasoline taxes and use fuel taxes. The said patrolmen shall be versed in the laws respecting the powers of police officers as to traffic law violations and other offenses committed over and along the highways of this state, and as to such violations and offense they shall have the powers of police officers. The superintendent shall receive a salary not to exceed the sum of three hundred fifty dollars (\$350) per month, the assistant chief patrolman shall receive a salary not to exceed the sum of three hundred forty dollars (\$340) per month, and each patrolman shall receive a salary of two hundred fifty dollars (\$250) per month, and the commission may fix the salary of each patrolman after six months continuous employment at any such sum in excess thereof, not to exceed, however, the sum of three hundred twenty-five dollars (\$325) per month, and all salaries payable hereunder shall be paid as other state officers are paid. Travel and subsistence payments shall be paid all patrolmen as is now or hereafter may be provided by law.

We are informed that the appropriation by the Legislature was the amount budgeted for the payment of 25 patrolmen, and no appropriation was made to provide compensation for the extra patrolmen authorized in the amendment. The Act making the general appropriation was approved March 22, 1951.

Article IV, section 19 of the Constitution of Nevada provides that no money shall be drawn from the treasury but in consequence of appropriations made by law. Section 6932, N.C.L. 1929, provides it shall be unlawful for any State official or any institution of the State to incur any outlay or expenditure in excess of the appropriation made by the Legislature for the support or use of such department, except in cases of extreme emergency, and then only by unanimous vote of the State Board of Examiners.

Chapter 167, Statutes of 1943, defines an emergency for which there is no sufficient appropriation and sets aside a certain amount which shall not exceeded, when such emergency is declared, to pay for such necessary costs.

The amendment to section 5 of the Act quoted above does not fix a definite number of highway patrolmen. It fixes a definite salary of \$250 per month for patrolmen, with a maximum salary that can be paid such patrolmen and the superintendent and assistant.

Section 7559, N.C.L. 1929, as amended, provides that all State officers whose salaries are fixed by law shall be entitled to receive the same in two equal semimonthly payments. The salaries fixed in the amendments are the salaries of the patrolmen. Other and additional salaries and the number of patrolmen are fixed by the commission within a maximum amount.

The Legislature has authorized the commission to fix the number and salaries within such maximum and it is doubtful if an increase in the number and the money to pay such salaries beyond the appropriation made by the Legislature can be construed as a salary fixed by law to show that the Legislature intended to authorize the additional expenditure without an appropriation.

A similar question was raised in *Michels v. Eggers*, [36 Nev. 362](#), but not decided. The Court on page 368 said: "It may be conceded that the legislature could authorize the commission to fix the salary, and still be claimed that, although it was fixed by a commission authorized by law to fix it, nevertheless it was not fixed by law or act of the legislature, but only by a commission whose act in fixing it did not amount to law." The Court held that it was unnecessary to decide this phase of the case owing to the conclusions reached regarding the other contentions.

Section 5 of the amendment under consideration provides that the salaries payable shall be paid as other State officers are paid.

The Legislature has adopted the policy of making specific appropriations under a general appropriation bill for the support of the civil government of the State. The appropriation by the 1951 Legislature recited in section 1 of the Act that the sums appropriated from the General Fund, except as otherwise specified, are for purposes hereinafter expressed.

Assembly Bill No. 297, which became Chapter 232, as shown by the *Assembly History*, was passed by the Legislature on March 15, 1951, and approved by the Governor on March 21, 1951. Assembly Bill No. 348, the General Appropriation Act, was passed March 15 and approved by the Governor March 22, 1951.

This is not a situation where the amendment was made to an Act after the General Appropriation Act was passed. There is nothing to indicate that the intent of the Legislature was to authorize the additional expenditure beyond the specific appropriation made for Highway Patrol. The conditions presented by the question involved do not appear to come within the rule of construction adopted in Attorney General's Opinion No. 760, 1948-1950 Biennial Report, and the decisions of our Supreme Court cited therein.

The Supreme Court in *Clover Valley Land & S. Co. v. Lamb*, [43 Nev. 375](#), said: "The legislature is presumed to have a knowledge of the state of the law upon the subject upon which it legislates."

State v. LaGrave, [23 Nev. 25](#), is a case wherein the question presented was whether an appropriation of public funds had been made by a statute which provided that a suitable armory should be provided for organized military companies within a county. All claims should be presented to the State Controller who was directed to draw his warrant on the State Treasurer for the amount approved and the Treasurer was directed to pay the same out of the General Fund. Such expenses should not exceed \$75 per month for any company, except that each company drilling with field pieces should be allowed an additional \$12.50 per month for each gun. It was claimed that fixing the maximum amount to be paid each company and directing the Controller to draw his warrant and the Treasurer to pay the same constitutes an appropriation.

The Court said that no particular form of words is necessary for an appropriation, if the intention to appropriate is plainly manifested. The Act permitted one company in each of the 14 counties. There were at the time eight companies, but the Court said that number may be increased up to the maximum at any time.

The Court said: "If an appropriation had been intended the act would conflict with the provisions of the law of 1866 defining the duties of the state controller. Among these duties he is forbidden to draw any warrant on the treasury except when there is an unexhausted specific appropriation to meet the same. And it is made his duty, among other things, to keep an account of all warrants drawn on the treasury, and a separate account under the head of each specific appropriation in such form and manner as at all times to show the unexpended balance of each appropriation." The Act referred to is in substance the same as Section 7351, 1929 N.C.L. 1941 Supplement. It also contains a provision "* * * and no warrant shall be drawn on the treasury except there be an unexhausted specific appropriation, by law, to meet the same * * *."

Section 7362, N.C.L. 1929, makes it a misdemeanor for the Controller to knowingly do any act not authorized by law, or in any manner other than is authorized by law.

On page 28 of the LaGrave case, the Court said: "As all laws are presumed to be passed with deliberation, and with full knowledge of existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnance between the two is irreconcilable."

The conditions existing in the present question are that the Legislature, on the same day, passed the bill making the later amendment to section 5, and the bill which appropriated \$344,060 to the Highway Patrol.

Chapter 232, which amends section 5, fixes a definite salary of \$250 a month for each patrolman. The salary of the superintendent and assistant as well as increase in the salary of the patrolman must be within the maximum fixed in the section.

The Legislature, by law, made a specific appropriation. It must be presumed that the same was made with deliberation, and with a full knowledge of the amendment as well as the law under which the Controller is bound to act.

Therefore, it is the opinion of this office that the only source from which funds may be secured to provide compensation for the additional patrolmen must be within the appropriation made for the Highway Patrol. We are unable to find in this particular case anything to indicate that it was the manifest intention of the Legislature that any deficiency in the appropriation would be a liability of the State and payable out of the General Fund to meet such deficiency during the biennium for which the appropriation was made.

This opinion is issued in advance of any deficiency showing in the amount of the appropriation, and it appears that the burden is upon the Commission to keep expenditures for Highway Patrol within the appropriation.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-101. STATE FUNDS—Unexpended moneys in appropriations revert to General Fund at end of biennium, unless otherwise provided by Constitution or Statute.

Carson City, September 14, 1951.

Mr. Chester H. Smith, Budget Director and Clerk of State Board of Examiners, Carson City, Nevada.

Dear Mr. Smith:

The following is in reply to the second inquiry contained in your letter received in this office September 4, 1951.

STATEMENT

Ten Ford cars were purchased by the Public Service Commission for the use of the State Highway Patrol, which purchase was authorized by the Board of Examiners, May 25, 1951. Because of the time element involved the turn-in appraisals could not be computed before the biennium ending June 30, 1951. The cars were purchased from the appropriation ending June 30, 1951, paying a full purchase price, and without consideration given the turn-in appraisals, amounting to about \$5,000 which was made after the beginning of the July 1, 1951, biennium.

QUERY

Will the turn-in appraisals on the cars purchased out of the last biennium's Public Service Commission appropriation for the Highway Patrol be permissible to use in the present biennium for assistance in employing the additional patrolmen?

OPINION

Section 7351, 1929 N.C.L., 1941 Supp., defines the procedure of the State Controller in drawing warrants, keeping account thereof and of all appropriations. The following language is contained in the section:

He shall keep a record of all appropriations in a book provided for that purpose, in which he shall enter the nature of the appropriation, referring to the statute authorizing the same, the amount appropriated, amounts credited by law, accounting debits and credits, the amount paid therefrom each month, showing assets and expenses, and posting the same to proper ledger accounts, with a yearly total of payments and the balance remaining, and the amount, if any, reverting.

Unless otherwise provided by the Legislature, all balances remaining in an appropriation at the close of the biennium for which made revert to the General Fund.

In the question presented there must have been a balance in the appropriated fund which would have reverted unless expended within the time when such balance would revert. As the full price was paid before the turn-in allowance on the cars was determined, there was evidently a sufficient balance in the fund. If the refund had been made before the close of the biennium, and not expended, it would revert to the fund from which appropriated at the close of the biennium.

As stated by the Supreme Court in *State v. McMillan*, [34 Nev. 264](#), "it may be stated as a general proposition of law that all moneys coming into the state treasury constitutes a part of the general fund, unless by provisions of the constitution or some statutory enactment they are placed in a special fund."

Attorney General's Opinion A-15, May 4, 1939, held that generally appropriations made by the Legislature are made to carry on the business of the State for a period of two years and by reason of long-continued custom the State Controller causes unexpended moneys in appropriations to revert to the General Fund at the end of the biennium.

It is, therefore, the opinion of this office that the money in question reverts to the State Highway Fund from which it was appropriated and cannot be used in employing the additional patrolmen in the present biennium.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-102. BONDS.—No authority in County Commissioners to cancel bond issue authorized at a bond election. fund from bond issue to be used for particular purpose authorized.

Carson City, September 26, 1951.

Hon. Wm. J. Crowell, District Attorney, Tonopah, Nevada.

Dear Mr. Crowell:

The following is in reply to your letters of September 14 and 19, 1951, requesting an opinion relative to Nye County Hospital Bonds.

STATEMENT

At the general election held in 1950, the property owners and nonproperty owners of Nye County approved a bond issue in the sum of \$65,000 for the construction and establishment of a new county hospital. When the budget was prepared in the early part of 1951 it was found impossible to provide for the redemption of such bonds and keep within the tax structure. The County Commissioners desire to suspend the bond issue, and, if possible, to sell only a portion of such issue, amounting possibly to \$5,000 and use the same to remodel the present hospital.

QUERY

1. May the Board of County Commissioners suspend or cancel the provisions of the bond issue approved and adopted by the electors at the general election?
2. May the Board of County Commissioners utilize and sell only a portion of the bond issue as adopted for the purpose of remodeling the present hospital?
3. If the answer to question No. 2 is in the negative, may the Board of County Commissioners follow the procedure of adopting an emergency loan for the improvement and remodeling of the present hospital site?

OPINION

The qualified electors of the county authorized the County Commissioners to borrow money for the purpose of constructing a county hospital by issuing bonds of the county.

There is no statute requiring that such bonds be sold within a designated time. The necessity of keeping the tax rate within the constitutional limit is the duty of the tax levying authorities.

There is no authority vested in the County Commissioners to cancel the bond issue. However, the courts in a number of States have held that there is no hard or fast rule as to what constitutes a reasonable time when, in the exercise of their discretion, a governing body finds it necessary to postpone the issuance of the bonds.

See, Re Verde River Irrigation & Power District, 296 P. 804, upholding the validity of bonds validated by a Court decree some seven years after the election at which they were authorized, there being a reasonable excuse for the delay, and the Court saying that the ordinary rule is that unless the statute requires bonds to be issued within a specific period of time after the election at which they were authorized, the time of issuance rests in the sound discretion of the officials upon whom that duty is imposed. Annotations, 135 A.L.R. 768.

As stated in 43 Am. Jur. page 368: "The question as to what is a reasonable or unreasonable length of time cannot always be determined from the length of time along, but all the surrounding facts and circumstances must be taken into consideration. ["

In answer to your first question we are unable to find authority under which the County Commissioners may cancel the provisions of the bond issue, but there is ample authority that a reasonable delay in the exercise of the authority to issue the bonds will not necessarily cause a forfeiture of that authority, if, in the light of all the facts and circumstances, the delay was reasonable, prudent, or necessary.

The answer to your second question, in our opinion, must be in the negative. 43 Am. Jur. 306, relates that a municipal corporation has no power, however, after a vote in favor of aid has been taken, to acquiesce in a radical change in the original plan which so far changes the enterprise that the vote does not apply to the new enterprise.

The question submitted to the voters of Nye County at the general election presented specifically the bonds to be issued and the purpose for which the money was to be used, that is, "* * * for the acquisition of site, construction of, and furnishings, fixtures, and equipment, including ambulance, for a public county hospital * * *."

As held by the Court in *Tukey v. Omaha* in 69 Am. St. Reports 711: "If the governing body of a municipality is authorized by vote of the people, and only thereby to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued."

In the case of *State ex rel. King v. Lothrop*, [44 Nev. 405](#), the Court held that the statute authorizing County Commissioners to issue bonds to build or purchase, in their discretion the buildings required, did not contemplate the issuance of bonds for the repairing or remodeling buildings for county purposes.

The answer to your third question will depend upon the facts submitted to the State Board of Finance under the provisions of section 3014, 1929 N.C.L., 1941 Supp.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-103. STATE HEALTH DEPARTMENT may be authorized by State Board of Examiners to allow out-of-State travel and expense of employee of State Hygienic Laboratory to enroll in course provided by U.S. Public Health Service under provisions of Section 6492, N.C.L. 1929.

Carson City, October 5, 1951.

Hon. Chester H. Smith, Budget Director and Ex Officio Clerk, Board of Examiners, Carson City, Nevada.

Dear Mr. Smith:

This will acknowledge receipt of your letter in this office September 28, 1951, relative to a matter of out-of-State travel and per diem payments for a State Health Department employee in hygienic laboratory department.

STATEMENT

The State Board of Examiners has been requested to approve the out-of-State travel of an employee of the State department hygienic laboratory to enroll in laboratory courses for diagnosis of tuberculosis and mycotic diseases at the Communicable Disease Center, U.S. Public Health Service, Atlanta, Georgia.

It is indicated that part of the expenses will be paid from U.S. Public Health Service funds paid into the State for health purposes, said funds being under the jurisdiction of the Board of Examiners as far as claims by the Health Department against said funds are concerned.

QUERY

Would such a trip and schooling period for the State Health Department employee conform with State statutes governing the expense allowance of officials or employees of the State while traveling on official business, as provided in section 6942, N.C.L. 1929?

Also, as to how said proposed trip for schooling purpose would square with Attorney General's Opinion No. 43, dated April 17, 1951.

OPINION

Section 17 of the Act creating the State Board of Health, as amended by Chapter 204, Statutes of 1951, subsection (b) provides:

It shall be the duty of every attending physician upon any case of infectious tuberculosis to forthwith establish and maintain the isolation of such person or persons in conformity with the requirements, rules and regulations which shall be established by the State Board of Health.

Section 5267, N.C.L. 1943-1949 Supp., provides that the State Department of Health shall maintain the State Hygienic Laboratory. The purpose of the laboratory is to make available to health officials and licensed physicians prompt diagnosis of communicable diseases, and to undertake such other technical and laboratory duties as the State board may direct in the interest of public health.

The director of laboratories shall be a skilled bacteriologist, and shall have technical assistants as may be appointed by the State Health Officer with the approval of the State Board of Health. Reports of investigations may be published in the discretion of the State Board of Health.

The isolation of persons in cases of infectious tuberculosis, in conformity with the rules and regulations of the State Department of Health, constitutes a proper exercise of the police powers of the State Legislation for the control of tuberculosis is comparatively recent in this State. The Department of Health, in order to make adequate and reasonable rules and regulations for the control of this disease, must be informed in the latest technical and laboratory diagnosis.

Congress makes an annual appropriation to be used by the Surgeon General in the training of personnel for State work in the prevention, treatment, and control of tuberculosis.

Title 42, U.S.C.A., section 246 (b), as appears in the 1951 Supplement, provides an appropriation for each fiscal year to enable the Surgeon General to carry out the purposes of research and investigations generally, and to develop more effective measures for the treatment of tuberculosis, including facilities for training State personnel for such work.

The official business of the State Department of Health includes the duty to maintain its hygienic laboratory in efficient operation, in accord with such effective measures, developed by the Surgeon General, in order for the department to establish reasonable rules and regulations for the isolation of persons in cases of infectious tuberculosis.

The U.S. Public Health Service at Atlanta, Georgia, a communicable disease center, furnishes technical instruction in laboratory courses for diagnosing tuberculosis and mycotic diseases.

While it is difficult to draw the line between legitimate services which may constitute State business and those which are not included therein, the Courts have distinguished the cases upon the facts presented.

In the case of *Madden v. Riley*, 128 P.2d 602, the chief of the narcotic division received consent of the Governor and the Director of Finance of California to attend a convention of law enforcement officials at Reno, Nevada. The Controller rejected the claim on the ground it was not State business.

The Court held that the necessary traveling expenses were incurred for the purpose of securing expert information and knowledge of modern methods of apprehending and convicting violators of the narcotic laws, and to secure cooperation of other law enforcement officers of the several States and Federal authorities. The Court held that there was a clear distinction between cases which involve the payment for traveling expenses incurred in attending conventions for purely educational purposes and the present case.

Louisville and Jefferson County Board of Health v. Steinfeld, a Kentucky case, in 215 S.W.(2) 1011, held that under a statute charging the Board of Health with responsibility for collecting from official and other sources and for the publication of such statistics and information as may

be useful and necessary for the performance of its duties, the board could bear the expense of its officers and employees in attending medical meetings outside the State where such research information and statistics could be found.

These cases are distinguished from *Jefferson County and Jefferson Fiscal Court*, 108 S.W.(2) 810, in which it was held that expenses incurred by officers in travel outside the State were not expressly or by necessary implication authorized by statute. The court said: "The presumption that such officers were qualified for the performance of their duties before they were employed, and if they desire further education or information relative to their work, they must acquire such at their own expense. It would be no more reasonable for the county to pay such expense of officers here in question than it would be to pay tuition and other expenses incurred in sending any other county official duties." To same effect *Shanks v. Commissioners*, 292 S.W. 837; *Smith v. Holovtchnier*, 162 N.W. 630.

The preservation of the public health is of paramount importance, particularly where such a communicable disease as tuberculosis is concerned. It follows then that every known method of treatment or diagnosis of such disease should be made available to the State Health Department, and that the laboratory course at the Communicable Disease Center of the U.S. Public Health Service at Atlanta, Georgia, no doubt will furnish most necessary information and instruction with respect to the latest methods of diagnosis and treatment.

It is therefore the opinion of this office that out-of-State travel for a State Health Department employee for the purpose of enrolling in a laboratory course for the diagnosis of tuberculosis and mycotic diseases as provided by the U.S. Public Health Service, is authorized by a most evident implication contained in the health laws of this State relating to the preservation of the public health.

You inquire as to how the trip proposed above will square with the opinion from this office under No. 43, rendered April 17, 1951. This opinion related to the authority of the Welfare Department to pay transportation to persons outside the State to come to this State for the purpose of seeking employment, and also payments advanced to workers granted educational leave for transportation to and from schools of social work outside the State. The later inquiry was based upon a policy of the Welfare Department effective December 15, 1950. We held that there was no statutory authority for granting such educational leave and no authority to allow transportation expenses for such purpose outside the State. If such a policy was desired the matter should be submitted to the Legislature. Such authority could not be implied from the powers granted the Welfare Department, as held in such cases as *Jefferson County v. Jefferson County Fiscal Court*, and other like cases cited above.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-104. INSURANCE—Guaranteed coupons.

Carson City, October 8, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

You request the opinion of this office as to whether or not the “Guaranteed Coupons,” as used in the sample policy No. 910 of the Franklin Life Insurance Company are in violation of section 82 of the Nevada Insurance Code.

Section 82, being section 3656.82, 1929 N.C.L., 1941 Supp., provides as follows:

Illegal Inducements—Penalty. 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 issues or permits its agents, officers or employees to 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 returns and profits as an inducement to insurance*; and no corporation acting as an agent of a life company, or any of its agents, officer 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. (Emphasis added.)

STATEMENT

The sample policy herein concerned is not offering “company shares or other capital shares, benefit certificates or shares in any common law corporation, securities of any special or advisory board * * *.” Therefore the only question remaining is, do these “Guaranteed Coupons” amount to “promising returns and profits as an inducement to insurance * * *?”

OPINION

A thorough consideration of the effect of the “Guaranteed Coupons” upon the policyholder, from a monetary point of view, discloses that the assured is receiving only those benefits for which he has paid by way of extra premiums.

In calculating all the benefits possible to accrue to a policyholder (except as to uncertain dividends) it is evident, when the policy is cautiously read, that for the premiums charged the policyholder is not receiving “returns and profits” or a promise therefor in the sense of receiving something more than that for which he is actually paying.

The States of North Carolina and Virginia upon application for approval of like policy forms, required the Franklin Company to place upon the face of the policy, in 14-point type, the following statement: “The annual premium above includes an extra premium of \$..... for coupon benefits.” Such action by these eminent States manifests their desire to maintain as paramount the protection of the unwary as well as the vigilant.

It is, therefore, the opinion of this office that if the Franklin Life Insurance Company will place on the face of its policy a statement similar to those required by North Carolina and Virginia, the policy would not be in violation of section 82 of the Nevada Insurance Act.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-105. INSURANCE—Reciprocal or interinsurance companies presently licensed in Nevada.

Carson City, October 8, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

This will acknowledge receipt of your letter of August 20, 1951, requesting the opinion of this office as follows:

Your opinion is requested as to whether or not an insurance company engaged in the exchanging of reciprocal or interinsurance contracts licensed in Nevada prior to the passage of present laws prohibiting the licensing of such companies, may be permitted to retain their license and continue to do business in Nevada.

The attention of the Attorney General is called to an opinion from the Attorney General's office, No. 458, dated May 14, 1947.

STATEMENT

The opinion of this office, No. 458, dated May 14, 1947, pertaining to the licensing of an insurance company engaged in the exchanging of reciprocal or interinsurance contracts not theretofore licensed in this State, is a correct statement of the law and is applicable in the instant case.

The question here presented pertains to companies licensed in 1936 and their licenses which have been continuously renewed, including the year 1951. The original form of organization of the companies and their types of business were approved under the provisions of the Insurance Act of 1881, as amended.

As set forth in Opinion No. 458 above mentioned, the Insurance Act of 1941 does not provide for companies engaged in the exchanging of reciprocal or interinsurance contracts. Mention of reciprocal or interinsurance appears only under the definition of "Company" (sec. 1 of the Act), and the Act fails to provide further for "reciprocals," as will be found in the Illinois Insurance Code of 1947 (Art. IV, sec. 61 et seq.), from which a goodly portion of our 1941 Act was copied.

OPINION

That portion of section 6, subsection (2) of the Nevada Insurance Act of 1941, pertinent to the question presented, provides as follows:

* * * provided, that any foreign insurance company which has been licensed to do the business of *life insurance* in this state prior to the effective date of this act may continue to be licensed, in the discretion of the commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to the

taking effect of this act. (The above portion of sec. 6 was not affected by the amendment to said section; 1951 Stats. 74.)

The two companies herein concerned, first licensed to do business in this State in 1936, are not life insurance companies, and did not do a *life insurance* business prior to the effective date of the 1941 Insurance Act. Under such circumstances it is clear that the “saving” or “grandfather clause,” above quoted, is not applicable.

Section 161 of the 1941 Act provides as follows: “All licenses issued under the provisions of any act prior to the date of approval of this act shall remain in full force and effect up to and including March 1, 1942, and thereafter licenses shall be issued and expire in accordance with the provisions of this act.” (3656.151, 1929 N.C.L., 1941 Supp.)

It is therefore the opinion of this office that there is no statutory authority for the licensing of a reciprocal or interinsurance company, hence the procedure for revocation or suspension of licenses as set forth in section 31, subsection (2), Nevada Insurance Act, should be invoked.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-106. FISH AND GAME COMMISSION—Agents selling hunting, fishing or trapping licenses must be bonded.

Carson City, October 9, 1951.

Mr. Frank W. Groves, Director, Fish and Game Commission, P.O. Box 678, Reno, Nevada.

Dear Mr. Groves:

This will acknowledge receipt of your recent letter in which you request the opinion of this office as to the following question:

May licenses be issued to the agents as provided in Chapter 313, 1951 Stats. 507, on a cash basis and thereby forego the necessity of the agents furnishing bonds to the Commission for the proper performance of their duties?

OPINION

Section 49 of Chapter 313, 1951 Statutes of Nevada provides in part as follows:

Agents designated by the fish and game commission shall be responsible for the correct issuance of all licenses entrusted to him, and so far as he is able to determine that no licenses shall be issued upon the false statement of an applicant. He is responsible to the commission for the collection of the correct and required fee, for the safeguarding of the moneys collected by him, and for the prompt remission to the commission for deposit in the state treasury of all moneys collected. Agents *shall* be required to furnish bond to the commission for the proper performance of their duties in such amounts as may be determined by the

commission. Premiums for such bond shall be paid from the state fish and game fund.

Obviously the word “shall” makes this portion of the statute mandatory and consequently the Commission does not have the statutory authority to issue hunting and fishing license to their designated agents on a cash basis.

In answer to your second question in which you inquire as to whether or not there is any prohibition against designating agents who live outside the State of Nevada: As there is nothing in the law requiring an agent to reside in the State of Nevada, it is our opinion that the Commission can legally designate agents who live outside the State, assuming, of course, that they are governed by the rules and regulations and statutes that govern those agents residing in the State.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Robert L. McDonald
Deputy Attorney General

OPINION NO. 51-107. PUBLIC SCHOOLS—State Board of Education has authority to supervise drivers training courses.

Carson City, October 16, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office October 10, 1951, presenting the following inquiry:

Will you please give me your opinion as to whether the appointment of a Supervisor of Drivers Training Education in our public schools by the State Board of Education would be legal in view of the wording of Chapter 133 of Statutes of 1949?

OPINION

Section 15 of the School Code, section 6084.25, 1929 N.C.L., 1949 Supp., which defines the powers and duties of the State Board of Education, contains the following language: “To prescribe and cause to be enforced the courses of study for the public schools of this state * * *.” Chapter 133, Statutes of 1949, section 3.5, contains this language: “The functions of the said public service commission of the State of Nevada concerning highway safety and safety education shall not be duplicated by any other agency, department, commissioner or officer of the State of Nevada.”

The various functions of the Public Service Commission outlined in the Act do not include courses in the public schools. Courses of study in the public schools are prescribed by the State Board of Education, and the right to supervise such courses is vested in such board.

The supervision of drivers training courses, authorized by the State Board of Education, in the public schools would not be duplicating the functions of the Commission. It would be in the nature of coordinative training efforts in the schools, and in cooperation with the Public Service Commission.

We are, therefore, of the opinion that the appointment of a Supervisor of Drivers Training in the public schools by the State Board of Education would not be in conflict with the provisions of section 3.5 of Chapter 133, Statutes of Nevada 1949.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: GEORGE P. ANNAND
Deputy Attorney General

OPINION NO. 51-108. CONSTITUTIONAL LAW—Nevada Industrial Insurance Commission; assemblyman who was member of legislature increasing salary of chairman of the commission ineligible to appointment thereto in view of Section 8, Article IV, Constitution of Nevada.

Carson City, October 22, 1951.

Hon. Charles H. Russell, Governor of Nevada, Carson City, Nevada.

Dear Governor Russell:

On Friday afternoon, October 19, 1951, at about the hour of 3:30 p.m. there was delivered to this office by messenger from your office a letter requesting the formal opinion of this office concerning the validity of the appointment of one Mr. X as chairman of the Nevada Industrial Commission. This request followed telephonic conversations between our respective offices during the early part of the same afternoon wherein this office advised that in our opinion there was grave doubt as to the validity of the appointment and suggested that a formal opinion be requested. We quote from your letter, substituting "Mr. X" in lieu of the named person:

I have on this date, effective on October 22, 1951, named Mr. X as chairman of the Nevada Industrial Commission.

Mr. X served as a member of the Nevada State Legislature this year, and his appointment has been questioned under the stipulations made under Article IV, section 8, of the Constitution of the State of Nevada.

Chapter 330, page 548, Statutes of Nevada 1951, contains an Act, passed by the Nevada State Legislature, which sets the salary of the chairman of the commission at \$550 per month. Previously the salary was set at \$150 per month plus additional compensation to be set by the commissioners of the Nevada Industrial Commission.

Chapter 330, page 548, Statutes of Nevada 1951, contains an Act, passed by the Nevada State Legislature, which sets the salary of the chairman of the commission at \$550 per month. Previously the salary was set at \$150 per month plus additional compensation to be set by the commissioners of the Nevada Industrial Commission.

The former chairman, prior to the adoption of the 1951 Act, received compensation in a total amount of \$6,000 a year, or \$500 a month.

I would appreciate a ruling on the question as to the validity, under the constitutional provision, of the appointment of Mr. X to the position of chairman of the Nevada Industrial Commission.

OPINION

Section 8, Article IV, Constitution of Nevada provides:

No senator or member of the 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 election by the people.

This provision of the Constitution is most clear and express in its terms, and as applied to the instant question it contains an express prohibition against the appointment of any Senator or Assemblyman to a civil office of profit under this State the emoluments of which have been increased by the Legislature during the term of any such Senator or Assemblyman for one year after the expiration of such term. It cannot well be said that the chairmanship of the Industrial Commission of Nevada is not a civil office of profit created by the laws of this State.

In 1947 the Legislature reenacted the Nevada Industrial Insurance Act. 1947 Stats. 569. In section 39 of said Act, the Legislature provided for the appointment of the Industrial Commission, including the chairman thereof, fixing the compensation of the chairman thereof, fixing the compensation of the chairman in the following language:

As compensation for their services, the chairman of the commission shall receive the sum of one hundred and fifty dollars (\$150) per month, and shall also serve as executive officer of the commission, in charge of the office and affairs the commission, and shall be entitled to additional compensation for such service, which shall be fixed by the industrial commission board and approved by the Governor. Paragraph (c), section 39.

Section 39 was amended at 1949 Stats. 662 in particulars not material here. The provisions of paragraph (c) with respect to the appointment and compensation of the chairman were not changed. However, paragraph (c) of said section 39 was most materially amended at 1951 Stats. 549. Such paragraph with respect to the compensation of the chairman now provides:

As compensation for his services, the chairman of the commission shall receive the sum of five hundred and fifty dollars \$550 per month, and shall also serve as executive officer of the commission, in charge of the office and affairs of the commission.

Thus, the Legislature withdrew from the Industrial Commission Board any and all power with respect to the fixing of the compensation of the chairman and executive officer and fixed a definite salary for all such services.

It appears that prior to the 1951 amendment the chairman of the Industrial Commission received a salary of \$150 per month for such services, and the sum of \$350 per month for services as executive officer, totaling \$500 per month. The Legislature in the 1951 amendment combined the two salaries into one specific salary covering both said services, and in so doing increased the total of the compensations theretofore paid \$50 per month. This increase in the compensations resulted in and results in the increase in the emoluments of the office in question. In the emoluments of the office in question.

In the case of *State ex rel. Benson v. Schnahl*, 145 N.W. 794, the Court in construing the constitutional provision of Minnesota, substantially the same as ours, providing "that no senator

or representative should hold any office which had been increased during the session of the legislature of which he was a member, or until one year after the expiration of his term of office," held that the term "emoluments" used in such constitutional provision did not refer to the salary as fixed in the statute, but that it included such fees and compensation as the incumbent of an office was by law entitled to receive because he held such office and performed services required of him, and that the Court in determining whether there was an increase in the emoluments must take all of the compensations into consideration. Such is the situation here. Taking into consideration of the fact that the compensation paid the chairman and executive officer of the Commission prior to the enactment of the 1951 amendment totaled \$500 per month and that such compensations constituted the emoluments of the office, it necessarily follows that the legislative enactment increasing such emoluments to \$550 per month increased the emoluments of the office in question within the meaning of section 8, Article IV of the Constitution of Nevada.

It is, therefore, the opinion of this office that "Mr. X," being an elective member of the 1951 Legislature, was and is not eligible to appointment to the office of chairman and executive officer of the Nevada Industrial Commission.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-109. INSURANCE—Interpretation of section 13 concerning title insurance.

Carson City, October 22, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

This will acknowledge receipt of your letter of October 8, 1951, requesting the opinion of this office as to the meaning of section 13 of "An Act to regulate the business of title insurance in the State of Nevada," as added, 1951 Stats. 429.

More specifically the question presented is whether or not a title insurance company may compute its tax upon the gross title insurance risk premium less the cost of maintaining an abstracting and record searching department.

OPINION

In order to determine upon what the two percent (2%) tax is to be levied, it is necessary to read together the first and last sentences of section 13, as follows:

Every title insurance company under the provisions of this act, doing business in this state, shall annually file with the insurance commissioner of the State of Nevada its schedules of prices for title risk insurance, and shall annually pay to the insurance commissioner of the State of Nevada, a tax of two percent (2%) upon the total title risk insurance premium income of all classes of business covering property or risks located in this state during the next preceding calendar year. * * * Such title insurance risk rates shall not include service charge for abstracting, record searching, certificates as to the record title to real estate that are not in form or substance an insurance of the title, escrow, closing and other services that may

be offered by such company or to such company's costs and expenses of procuring examination of titles by attorneys approved or selected by it for such purpose.

When read as above, it is manifest that the schedules of prices (or rates) for title risk insurance to be annually filed, are not to include service charges for abstracting, record searching, etc. Hence the computation of the tax must therefore be upon the title insurance risk premium less only that deduction provided by section 13 as to the annual licenses paid by such title companies. The annual license fee is the only deduction specifically set forth in section 13.

It is the presumption when one person or thing is expressly mentioned in a statute, that all other persons and things are to be excluded. *Virginia and Truckee Railroad Co. v. Elliott*, [5 Nev. 358](#).

Expressio unius est exclusio alterius. In re Arascada, [44 Nev. 30](#).

The fundamental theory of the tax structure of the several states is that all taxable property should bear its fair share of the cost and expense of the government; and while property is taxable only when declared so by legislative enactment, the law does not read into the taxing statutes any implied exemption of particular property or particular property owners unless the intentment of the statute to make an exemption is plain. When the statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against the one who asserts the claim of exemption, in the absence of expressed legislative intent that the exemption is to be construed otherwise, or of anything to indicate that the purpose of the exemption was to secure equality of assessment. An exemption from taxation must be clearly defined and founded upon plain language, without doubt or ambiguity. Whenever doubt arises it is to be resolved against the exemption. These principles have been variously expressed. Thus, it is asserted that a claim to a tax exemption must be in terms too plain to be mistaken; that it must be founded upon language which cannot be otherwise reasonably construed, in clear and unmistakable words, or in regard to which there is no doubt; that it must be so plain as to leave no room for controversy, or so clear and unmistakable as to leave no doubt of the legislative purpose. 51 Am. Jur. 526, section 524.

It is, therefore, the opinion of this office that a title insurance company may *not* compute its tax upon the gross title insurance risk premium less the cost of maintaining an abstracting or record searching department.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: THOMAS A. FOLEY
Deputy Attorney General

OPINION NO. 51-110. GAMBLING—Free bingo operated by gambling establishment comes within statute regulating gambling games, but does not violate lottery statutes.

Carson City, October 23, 1951.

Hon. Jon R. Collins, District Attorney, Ely, White Pine County, Nevada.

Dear Mr. Collins:

This will acknowledge receipt of your letter in this office October 19, 1951, in which you request an opinion as to whether a game known as free bingo violates the lottery law of this State.

STATEMENT

The game is operated by a club holding licenses to conduct gambling games, but the contestants pay no consideration for playing the game. It is operated in accordance with the conception of the game of bingo and as an advertising stunt.

QUERY

Does the above-described game violate section 10176 and 10177, Nevada Compiled Laws 1929?

OPINION

Section 10176, N.C.L. 1929, defines a lottery as any scheme for the disposal or distribution of property, by chance, among persons who have paid or promise to pay any valuable consideration for the chance of obtaining such property.

Sections 10177 through 10183, N.C.L. 1929, refer to drawing a lottery, selling, keeping, aiding or guaranteeing lottery tickets, whether the lottery is drawn or to be drawn with this State or not.

Section 3302, N.C.L. 1943-1949 Supp., makes it unlawful for any person either as owner, lessee, or employee, whether for hire or not, to deal, operate, carry on, conduct, maintain or expose for play in this State any gambling game, specifying certain games, in which any person, firm, association or corporation keeping, conducting, managing, or permitting the same to be carried on, receives directly or indirectly, any compensation or reward or any percentage or share of the money or property played, without first having procured a license for the same as provided in the Act regulating gambling.

As held by the Supreme Court in *Ex Parte Pierotte*, [43 Nev. 243](#), on page 248: "It is true that in common parlance, in a dictionary sense and the statutory definition, the word 'lottery' may be a game. But the legislature of this date of its organization as a state has plainly drawn a distinction between lotteries and unlawful gaming."

We are of the opinion that the game in question operated by an establishment licensed to conduct gambling games comes within the Act regulating gambling and requires a license, as the same indirectly results in a reward to the operator. In this respect the Legislature has not distinguished it from a lottery, as held in *Ex Parte Pierotte*, supra, and does not violate sections 10176-10183, N.C.L. 1929.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-111. PUBLIC SCHOOLS—Ch. 207, Statutes of 1951, relating to transportation of pupils in unorganized territory to schools in established districts construed.

Carson City, October 26, 1951.

Hon. Grant Sawyer, District Attorney, Elko County, Elko, Nevada.

Dear Mr. Sawyer:

This will acknowledge receipt of your letter in this office October 25, 1951, in which you request an opinion as to the interpretation of Chapter 207, Statutes of Nevada 1951.

STATEMENT

The above chapter which provides that where school children of school age reside in unorganized territory outside of an organized school district, the county shall pay the costs of transportation and tuition of such children to the nearest accessible school. In your county this Act would be applicable to a considerable number of children and could prove to be extremely expensive.

QUERY

Could this statute be interpreted to apply only in cases where five or more children of school age reside in an unorganized territory, where it is impracticable to establish a new school district, and thus alleviate the financial burden considerably?

OPINION

Chapter 207, Statutes of 1951, adds section 1632 to the School Code and reads as follows:

In any county in this state where there is situate unorganized school district territory and it is determined by the deputy state superintendent of schools of that county that is impracticable and uneconomical to establish a school district or districts in such unorganized territory, and that there are children of school age residing therein entitled to receive the educational facilities of the nearest school, whether it be in the same county or an adjoining county, the deputy superintendent may certify such facts to the board of county commissioners of the county containing such unorganized territory and therein petition such board to include in its county budget sufficient funds to pay the costs of transportation of such children to the nearest accessible school, and such tuition fees as will reimburse the school district wherein the students are attending for its per pupil costs based on its own per pupil cost.

The board of county commissioners to whom such petition is presented shall budget such funds and authorize such transportation costs and fees as may be necessary to carry out the purposes of this section.

Although the Act became effective March 20, 1951, the County Commissioners could not pay such expenses until the same was provided for in the budget and there was money in this fund.

There was another amendment to the School Code which might be applied in the circumstances presented in your question.

Chapter 150, Statutes of 1951, amends section 34 of the School Code. This amendment provides for the annexation of unorganized territory to an organized school district when a certified petition from parents or guardians of five or more resident children of school age, approved by the Deputy Superintendent, is presented to the Board of County Commissioners of the county concerned. The unorganized territory to be annexed is limited in area to 25 square miles, and such annexed limit of school districts as provided in section 37 of the School Code, which is 256 square miles, and not more than 20 miles in length in any one direction. The same section provides for the creation of new school districts when there are five or more resident children of school age.

If the provisions of the foregoing section could be applied, the problem of transportation would be shifted to the enlarged school district under the provisions of Chapter 63, Statutes of 1947, subchapter 24 of the School Code.

Respecting interpretation of Chapter 207, Statutes of 1951, we are of the opinion that the statute cannot be interpreted or construed to apply only to cases where there are five or more children of school age residing in a particular area. The plural "children" is used in connection with the area collectively and not confined to any one area.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-112. INSURANCE—Illegal inducements.

Carson City, October 26, 1951.

Hon. Paul A. Hammel, Insurance Commissioner, Carson City, Nevada.

Dear Mr. Hammel:

You request the opinion of this office as follows:

Your opinion is requested as to whether or not the "Special Ten-Year Bonus," as provided in Part B of the enclosed sample policy, No. 14 GH1 1M 12-50 of the Commercial Travelers Insurance Company, and the enclosed sample Coupon Bond Police, No. 53 (3-50) 2M of the Commercial Travelers Insurance Company, are in violation of that part of Section 82 of the Nevada Insurance Code, which reads "or other contracts of any kind promising returns and profits as inducement to insurance?"

OPINION

The sample policy, No. 14 GH1 1M 12-50 of the Commercial Travelers Insurance Company cannot be said to be in violation of section 82 of the Nevada Insurance Act, as the "Special Ten-Year Cash Bonus" features comes clearly within the exception enumerated under section 46 of the Act, which provides as follows:

Nothing in this section shall prevent a company from paying a bonus to policyholders or otherwise abating their premiums in whole or in part out of the surplus accumulated from nonparticipating insurance, * * *.

An examination of the sample Coupon Bond Policy, No. 53 (3-50) 2M of the Commercial Travelers Insurance Company, discloses that said policy is similar to the "Guaranteed Coupon" policy of the Franklin Life Insurance Company, hence the holding in Opinion No. 104, addressed to your office, dated October 8, 1951, is deemed applicable in the instant case.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

**OPINION NO. 51-113. HOSPITALS—ELKO COUNTY—ESTABLISHMENT—
PRESENT STATUS—NECESSITY OF BOND ISSUE.**

Carson City, November 15, 1951.

Hon. F. Grant Sawyer, District Attorney, Elko County, Elko, Nevada.

Attention: Ralph L. Denton, Deputy.

Dear Sir:

Receipt is hereby acknowledged of your letter of November 9, 1951, requesting the opinion of this office upon the hereinafter stated queries.

STATEMENT

The Elko County Hospital was established in pursuance to a special act of the legislature in 1919, being Chapter 149, Statutes of 1919. In September of 1950, and in pursuance, apparently, to Chapter 172, Statutes of 1923, Section 18, the Board of County Commissioners appointed a Board of Trustees, said board serving until the General Election of 1950 at which election a Board of Trustees was chosen by the electorates. Said Board of Trustees has been the governing body of the Elko County Hospital since that time. At the present time the Board of Trustees of the Elko Hospital, having made request for monies, the Elko County Board of Commissioners is desirous of submitting to the electorate the question of whether a bond issue should be floated for the purpose of building a new hospital building.

QUERY

1. Under the facts, as above stated, does the present Board of Trustees constitute a valid and legal governing board?

2. If the answer to query number 1 is in the affirmative, should said Board of County Commissioners follow the provision of section 2240 N.C.L., 1931-1941 Supplement, in the submission of the question to the electorate?

3. If the answer to query number 1 is in the negative, what is the present legal status of the Elko Hospital?

4. Assuming that a Board of Trustees had been appointed properly under the provisions of the 1923 Act but had been dissolved prior to the 1929 Act, would this have any bearing on the legal status of the Board of Trustees appointed in 1950?

5. In view of your answers to queries numbered 1, 2, 3, and 4 above, what would be your recommendation as to the proper procedure to be followed in the issuance of bonds for a new hospital?

OPINION

Answering query No. 1—This precise question received the consideration of this office in our Opinion No. 725, dated February 19, 1949, and reported in the Biennial Report of the Attorney General for the period July 1, 1948, to June 30, 1950. The same question was presented by the District Attorney of Mineral County where the board of hospital trustees was appointed to administer the affairs of the Mineral County Hospital without complying with the present law relating to such matter. In that opinion we held that the appointment of the board of trustees was invalid and that the Board of County Commissioners had no implied powers sufficient to override the plain requirements of the statutory provisions relative to the method of establishing county public hospitals. Opinion No. 725 constitutes the answer to your query No. 1 and we are constrained to hold that the present board of trustees of the Elko hospital does not constitute a valid and legal governing board.

We may further state that section 18 of the 1923 Hospital Act received the attention of former Attorney General Diskin in his Opinion No. 51, dated April 23, 1923, and reported in the Biennial Report of the Attorney General 1923-1924. Attorney General Diskin held in that opinion that there was a most grave doubt as to the constitutionality of section 18 of the 1923 Act, which section provided for the appointment of boards of trustees by Boards of County Commissioners to administer the affairs of county hospitals without the necessity of an election by the people being had to provide such hospitals. As stated in our Opinion No. 725, the 1923 Act was entirely repealed by the 1929 Act, which later Act contained no provision empowering the Boards of County Commissioners to make appointments of hospital trustees, save and except in conformity with the provisions of that Act. There has been no change in the law in this respect since that time.

Answering query No. 2—It follows from our answer to query No. 1 that the Board of County Commissioners is required to follow the provisions of section 2240, 1929 N.C.L., 1941 Supp.

Answering query No. 3—The present legal status of the Elko County Hospital is that it is a public county hospital under the control of the Board of County Commissioners, which control, under the law, will continue until otherwise changed in accordance with law.

Answering query No. 4—It is the opinion of this office that if the board of trustees had been legally appointed under the provisions of the 1923 Act, but dissolved prior to the 1929 Act, this in itself would not operate to change the present status of the hospital.

Answering query No. 5, wherein you request the recommendation of this office as to the proper procedure to follow now, we recommend as follows:

1. That petitions be circulated throughout the county pursuant to subsection (b) of section 2225, N.C.L. 1929, as amended at 1943 Statutes, page 213, which petitions should contain the following matters:

(a) That an annual tax be levied for the establishment and maintenance of a public hospital and specifying the maximum amount of money proposed to be expended for such purpose.

(b) That such petitions contain also a provision authorizing the present Elko County Hospital to be placed in and taken over by hospital trustees. The authority for this proposition will be found in Chapter 67, page 96, 1931 Statutes. The petitions would then petition for the establishment of the new proposed hospital and also the taking over of the present hospital by a Board of Trustees.

2. Upon the presentation of the petitions of at least 50 percent of the taxpayers of the county to the Board of County Commissioners, that then a special election be called pursuant to said section 2225, as amended, which election would be for the purpose of authorizing the construction of the new hospital, providing for the tax and bond issue therefor, and also providing for the legal taking over of the present hospital by a board of trustees. Such election to be held in conformity with the law concerning elections providing bond issues.

3. Upon the result of the election being ascertained and such election providing for the establishment of the new hospital and the taking over of the old hospital, then the Board of County Commissioners, pursuant to section 2226, N.C.L. 1929, as amended at page 83, 1949 Statutes, would appoint trustees in conformity with such section to serve until the next general election therefor.

Respectfully submitted,

W.T. MATHEWS
Attorney General

OPINION NO. 51-114. STATE WELFARE DEPARTMENT—Authority and duties under Section 7592, N.C.L. 1929, relative to children committed to state orphans' home and Chapter 197, Statutes of 1951, fixing responsibility of relatives to contribute to support of such children.

Carson City, November 16, 1951.

Mrs. Barbara C. Coughlan, State Director, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.

Dear Mrs. Coughlan:

This will acknowledge receipt of your letter in this office November 9, 1951, in which you request an opinion concerning the duties and responsibilities of the State Welfare Department under the provisions of Chapter 197, Statutes of 1951, respecting the Nevada State Children's Home.

STATEMENT

In some instances the order of the Court in committing dependent and neglected children to the State Home directs that the parent of the child reimburse the county in the amount of \$22.50 per month, which is the rate of maintenance presently charged counties for such maintenance. The investigation of the Welfare Department, under Chapter 197, Statutes of 1951, relative to responsibility of relatives to contribute to support of those receiving public assistance, shows that the parent is liable for contribution in the amount of \$10 per month. The chapter provides that in no case shall a relative be required to make contributions greater than the amount fixed by the

relative responsibility scale. Thus, in a number of cases there is a conflict with the order of the Court.

Another illustration is one in which the order of the Court fixes the charge at the present rate of \$22.50 and investigation discloses that the parent would be liable for a contribution of \$35 per month.

QUERY

Does the State Welfare Department's responsibility for investigating and determining the amount of support for which a relative is liable extend to cases where the Court order committing a child to the Nevada State Children's Home already specifies the amount the parent shall play for cost of care, and such amount is in conflict with the parent's responsibility as determined by Welfare Department?

OPINION

The statutes relating to the commitment of children to the institution now named the Nevada State Children's Home and the section added to the Public Welfare Act to determine and fix the ability of responsible relatives to contribute to the support of applicants or recipients of public assistance should be read together to arrive at the intention of the Legislature.

The Statutes of 1951 refer in some chapters to the institution as the Nevada State Orphans' Home and in others as Nevada State Children's Home.

Section 7592, N.C.L. 1929, places jurisdiction in the District to commit children to the State Orphans' Home. This section provides that the expenses, transportation and maintenance of such children when committed to this institution by any District Court shall become a charge against the county from which such children are committed, such charge for maintenance to be a reasonable rate to be fixed from time to time by the board of directors of the Orphans' Home. Such rate shall not be less than one-half of the cost of such maintenance by the State. A proviso reads, "that the district court, in its discretion, may order the parent, parents, guardian or guardians to reimburse the said county for the amount of the maintenance of such child or children in said orphans' home as fixed by the board of directors thereof * * *." The section contemplates that the proportion of the cost of such maintenance that the county or the relative should bear be at least one-half of the cost of such maintenance by the State. This fixes the minimum, the maximum would be the cost to the State for maintenance.

The statutes creating a board of directors for the State Orphans' Home have been changed from time to time. Chapter 79, Statutes of 1943, amended the Act for the government of the home and named the State Board of Relief, Work Planning and Pension Control and provided that the State Welfare Department should administer and manager the affairs of the Nevada State Orphans' Home. Chapter 254, policy-making board of the Nevada State Children's Home.

It appears therefrom that the State Welfare Board, insofar as the State Home is concerned, supersedes previous boards of directors of the State Home. The responsibility of fixing the rate of charges for maintenance of children at the home in conformity with section 7592, N.C.L. 1929, is lodged in the State Welfare Board.

Chapter 197, Statutes of 1951, amends the general Public Welfare Act by adding a new section which provides that certain relatives of an applicant for or recipient of public assistance, if of sufficient financial ability, are liable for such support according to a relative contribution scale set out in the section. The State Welfare Department shall investigate such ability and determine the amount of such support for which such relative is responsible. The Nevada Children's Home is included in the section. As appears from the statutes, the State Welfare Board would fix the rate to be charged for maintenance at the home and the State Welfare Department will determine the responsibility of relatives.

The first instance presented is one in which the Court order requires the relative to reimburse the county in the amount of \$22.50 per month and the Welfare Department determined such relative to be liable in the amount of \$10 per month. The relative contribution Act provides that

in no case shall a relative be required to make contributions greater than the amount fixed by the relative responsibility scale. We are of the opinion, in such a case, that the county could only be reimbursed to the extent of \$10 per month, if an action was brought to collect the same.

The second instance presents a case in which the Court ordered payment of \$22.50 per month and the parent was declared to be liable to pay \$35 per month. In such a case the order of the Court would prevail until changed by the Court.

The statute considered above uses the term "reimburse the county." "Reimburse," according to Webster's Dictionary, means to pay back, repay, to make restoration equivalent to. The statute relating to commitment of children to the State Home makes the cost of maintenance of such child a charge against the county, with a proviso that the Court in its discretion may order the parent to reimburse the county. If the county has not paid out the cost of maintenance, there would be no basis for an action to reimburse it. In the event the parent failed to pay and the county was charged with the amount, the county could only require restoration for the amount paid. A possible solution for such a problem appears to be within the province of the Welfare Department by presenting facts to the Court, either before or after an order is made by the Court.

The facts presented should show the minimum rate of charge at the State Home, not less than one-half, and the actual cost of maintenance, and the financial responsibility of the parent. The Court in its discretion could order the parent to pay a reasonable amount of the maintenance cost fixed by the Welfare Board as directors of the State Orphans' Home.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

cc: Dr. W.J. Hemingway, Chairman, Nevada State Welfare Board.

OPINION NO. 51-115. PUBLIC HEALTH—Resident qualification to receive indigent medical care for active tuberculosis patients.

Carson City, November 16, 1951.

Daniel J. Hurley, M.D., Acting State Health Officer, Nevada State Department of Health, Carson City, Nevada.

Dear Dr. Hurley:

This will acknowledge receipt of your letter in this office November 8, 1951, enclosing a questionnaire from the consultant on tuberculosis for the State Department of Health covering seven technical questions relative to the establishment of residence by a person affected with active tuberculosis, in order to qualify for indigent medical care.

QUERY

A summary reduction of the inquiry requires an answer as to the interpretation or construction of the language used in the Act of the Legislature which provides for State assistance in the care of persons in active stages of tuberculosis.

OPINION

The Legislature in 1945 enacted an Act to permit the State of Nevada to assist, extend and improve the care of persons in active stages of tuberculosis being cared for at public expense in any approved tuberculosis facility in any county of the State. The preamble to the Act stated that tuberculosis had caused deaths in the State of Nevada to the extent that the State was placed sixth to third highest in mortality in the Nation from the disease.

Section 2 of the original Act made provision for the care of persons in the active stages of tuberculosis who were unable to pay for such care, and had no relative legally liable and financially able to pay for their support. Subsection (d) contained the following language: "Has been for one year a bona fide resident of the county."

In 1947 a new Act on the same subject was enacted; section 2 was changed, but the identical language as to residence in the county was retained. This Act was amended by Chapter 327, Statutes of 1951, fixing the amount that the State would reimburse the county and making an appropriation of \$140,000. Section 2 was not amended and the language, "Has been for one year a bona fide resident of the county," remains in the statute. It is evident from the history of the legislation that a number of amendments were submitted to the Legislature, including an increase in the appropriation from \$10,000 to \$140,000, but the ambiguous language relative to residential requirement was not submitted for clarification.

As appears in the inquiry, the County Commissioners and social workers are faced with a problem in attempting to establish resident qualifications for the purpose of medical indigent care.

The provision in section 2 of the Act is indefinite and ambiguous.

A rule of construction applied to such statutes by the Supreme Court of this State is, if there be any ambiguity or an indefinite expression found in a statute, it is incumbent on the Courts to adopt that construction which best accords with the true intent and meaning of all the statutes touching the subject under consideration. *In Re Lavendal's Estate*, [46 Nev. 181](#); *Escalle v. Mark*, [43 Nev. 172](#).

The indefinite expression is residence in the county without defining residence in the State. It necessarily follows, however, that a person who is a resident in a county of this State for a period of one year must have been a resident of the State for at least such period.

The statute does not specify a point from which the period of one year is to be determined. Reference to statutes touching the subject of residence as a condition precedent to establish a claim or right will disclose that the period mentioned is immediately before the time when the right or remedy is claimed. The evident policy and purpose of the Act is to assist in providing care for persons found to have active tuberculosis and who have been a resident in the State for one year, and to avoid a situation in which the State might become a retreat for indigent medical care. A literal interpretation of the language requiring residence in the county for one year before a person infected with active tuberculosis, and determined to be a menace to the general public, would receive the care provided in the statute, would result in absurd consequences.

A person so affected could have been an actual resident of the State for many years and not be a bona fide resident of one county for a period of one year prior to receiving indigent medical care.

Any reasonable construction which the phraseology of a statute or a part of a statute will bear, must be drawn to avoid an absurd meaning. *Garson v. Steamboat Const. Co.*, [43 Nev. 298](#); *Nye County v. Schmidt*, [39 Nev. 456](#).

It is a cardinal rule of construction that a statute should be construed so as to give effect, if possible, to all its parts. And to effect this it is often necessary to restrict or extend the ordinary and usual meaning of words. *In Re McGregory*, [56 Nev. 407](#).

Section 6405, N.C.L. 1929, which defines legal residence, contains this language: "* * * is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him

or her; provided, however, should any person absent himself from the jurisdiction of his residence with intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence.”

As stated in 54 Corpus Juris, page 712. It is not easy to give a satisfactory definition of the term resident, for it is a flexible, somewhat ambiguous word, used in many and various senses, with the sense in which it should be used controlled by reference to the object. It has no technical meaning. The construction is generally governed by the connection in which the word is used, and the meaning is to be determined from the facts and circumstances taken together in each particular case.

The object of the Act providing indigent medical care in cases of active tuberculosis is not only to aid such persons, but to prevent a menace to the health of the general public.

The problem confronting the County Commissioners and social workers in establishing resident qualifications could be materially assisted by regulations of the State Health Department through investigation in each case to determine residence by the acts of the persons involved, as indicating intention, and also by cooperation of the counties in an endeavor to further the intent of the Legislature.

The application for assistance should contain something more than the one question, “length of residence in county,” which is misleading. It should contain questions as to residence in the State, where first established, where now residing and reason for change, if any. The investigation would disclose the county of residence, which residence would not be changed due to the absence from such county for the purpose of receiving indigent medical care in another county.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-116. PUBLIC HEALTH—Authority of State Health Officer to request State Board of Dental Examiners to issue limited licenses.

Carson City, November 20, 1951.

Daniel J. Hurley, M.D., Secretary, State Board of Health, Carson City, Nevada.

Dear Dr. Hurley:

This will acknowledge receipt of your letter in this office November 19, 1951, requesting an interpretation of the Nevada Dental Act, Chapter 152, Statutes of 1951.

STATEMENT

A vacancy in the employment of dentists in the State Health Department, under limited license, sometimes occur between the regular meetings of the State Board of Health and it is necessary to fill such vacancy without delay.

QUERY

Is it necessary for the State Board of Health to be in session to make a request to the Board of Dental Examiners for a limited license for a dentist to be employed by the State Department of Health?

OPINION

The Act creating the State Board of Health provides for semiannual meetings of the board at Carson City, and for special meetings under certain conditions.

Section 5259, 1929 N.C.L., 1941 Supp., section 25 of the Act, defines the powers of the State Board of Health, giving it general supervision over matters relating to the public health. The board has the power to adopt, promulgate, amend and enforce reasonable rules and regulations consistent with law to carry out the purposes of the Act. Rules and regulations are adopted by the board to carry out cooperative plans with the Federal Government and State regulations relative to public health, among which the employment of dental services would be required.

Section 5239, 1929 N.C.L., 1949 Supp., declares the State Health Officer to be the executive officer of the State Board of Health and requires him to enforce all laws and regulations pertaining to public health. The same section provides that the State Board of Health and the State Health Officer shall comprise the State Department of Health.

Chapter 152, Statutes of 1951, is an Act defining and regulating the practice of dentistry and dental hygiene and creating a State Board of Dental Examiners. Section 5 makes provision for the issuance of limited licenses to dentists, one of which reads as follows: "Upon request of the state board of health, with the concurrence of the dental members thereof, to a dentist or dental hygienist to serve the state department of health in such institution or area and with such limited duties as may be defined in such request."

The Act creating the State Board of Health makes provision that one member of the board shall be a qualified doctor of dental surgery.

When the State Board of Health has adopted regulations or plans that require the employment of a dentist or dental hygienist in a limited capacity, it becomes the duty of the State Health Officer to take all necessary steps to put such plans or regulations into effect concurred in by the dental member of the State Board of Health, would be sufficient to meet the requirements in section 5, Chapter 152, Statutes of 1951, for the issuance of a limited license as provided therein.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-117. PUBLIC SCHOOLS—Apportionment of county aid to District High Schools Fund.

Carson City, November 21, 1951.

Hon. Glenn A. Duncan, State Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Duncan:

This will acknowledge receipt of your letter in this office November 16, 1951, enclosing copies of correspondence from your office with a Deputy Superintendent of Public Instruction and superintendent of a district high school relative to apportionment of any balance remaining at the end of a year in a County Aid to District High School Fund.

STATEMENT

It appears that the amount of money collected from taxes for county aid to district high schools in the county in question was not sufficient to meet the total requests from the district high schools in 1950. In 1951 the amount of taxes collected paid in full the total requests of all districts and there will be a balance in the County Aid to District High School Fund at the end of this calendar year. Request is made to the State Superintendent of Public Instruction to make supplemental apportionment to that made in September to make up for the amount that the districts were short in 1950. The State Superintendent of Public Instruction views the statute to allow only one disposition of this balance, that is, that it shall remain in and become a part of the County Aid to district High Schools Fund for the apportionment therefrom in the next calendar year and that he has no authority to reduce such balance by a supplemental apportionment to meet a deficiency in a previous year.

QUERY

Does the statute authorize a supplemental apportionment at this time to cover a deficiency in 1950?

OPINION

Section 132 of the 1947 School Code, which provides aid for district high schools in counties not having an established county high school, defines the method of apportionment of the County Aid Fund, quoting that part deemed relevant, reads as follows:

The state superintendent of public instruction *shall* apportion the county aid to district high schools to the various district high schools of the county in the *following manner*: In January, March, July and September of each year he shall apportion to each district high school its proportionate share of the total amount reported by the county treasurer in his quarterly report; provided, *that in no event shall the total amount apportioned in any calendar year exceed the amount requested by the board of school trustees of the district high school for that calendar year*; and provided further, that in the event the district high school has requested an amount in excess of that to which it is entitled under section 132 of this chapter, only that amount to which it is entitled shall be apportioned.

Any balance remaining in the "County Aid to District High School Fund" at the end of the calendar year after each district high school has received the amount requested for said calendar year, shall remain in and become a part of such "County Aid to District High School Fund" for apportionment therefrom in the next calendar year; provided, each district high school in such county, shall have received the requested amount of said fund in the calendar year for which it was so requested.

The procedure followed by the Department of Education is to make the quarterly apportionments from the reports submitted by the County Treasurer. If during the current year each district high school has received the amount requested, if it does not exceed the amount to which entitled, and there is money remaining in the fund, such amount will be shown in the report of the Treasurer at the end of the calendar year. This amount or balance is apportioned in the next calendar year, beginning in January.

It is clear from the language in the first part of the third paragraph of said section that any balance remaining is contingent upon the districts receiving the amount requested in that calendar year. The proviso in the last part of the paragraph which uses the same language, "provided, each district high school in such county shall have received the requested amount of said fund in the calendar year for which it was so requested," is not perfectly clear. It does not indicate that the proviso changes the clear language in the first part of the paragraph to mean that a district high school should receive out of such balance an apportionment needed in any calendar year in which a request was made. It must be used in the same sense as the preceding language in the paragraph. It would be necessary to read into the proviso that a supplemental apportionment could be made at the end of the calendar year to meet a deficiency in a preceding year, notwithstanding the language which clearly earmarks such balance for apportionment therefrom in the next calendar year according to the request for that year. This meaning is supported by the language, "that in no event shall the total amount apportioned in any calendar year exceed the amount requested by the board of school trustees of the district high school for that calendar year."

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 the 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. *National M. Co. v. District Court*, [34 Nev. 67](#), page 78.

The word "shall" as used in directing the Superintendent of Public Instruction to make apportionments is not merely directory, it is mandatory.

Section 124 of the 1947 School Code which provides county aid to district high schools in counties having a county high school contains the identical language found in the paragraph under discussion in section 132.

In making these apportionments the Department of Education for a number of years has construed the language in the section relative to apportionment to mean that after the January, March, July, and September apportionments had been made to each district for the current year, any balance remaining became a part of the County Aid to District High School Fund and could be used for apportionment therefrom in the next calendar year. That no authority existed to make a supplemental apportionment out of such balance to cover a deficiency in a previous year.

Where a doubt may exist as to the proper construction placed on a constitutional or statutory provision, courts will give weight to construction placed thereon by other coordinate branches of government and by officers whose duty it is to execute its provisions. *Seaborn v. Wingfield*, [56 Nev. 260](#), page 270; *State v. Brodigan*, [35 Nev. 35-39](#); *State v. Glenn*, [18 Nev. 34](#).

We are, therefore of the opinion that the procedure for administering the apportionment of County Aid to District High School Fund established by the State Superintendent of Public Instruction is in conformity with the statute. If such construction results in a privation, the circumstances should be submitted to the Legislature for clarification.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-118. COUNTY COMMISSIONERS—A particular written agreement between county commissioners and attorney-at-law held valid although execution of part of agreement extends beyond term of officers making agreements.

Carson City, November 27, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter in this office November 9, 1951, enclosing a copy of an agreement by the Board of County Commissioners with an attorney-at-law as special counsel for the county to collect license fees from a municipal corporation of California, under a certain county ordinance.

STATEMENT

The agreement was made in August 1948 by the County Commissioners, in which the attorney was retained as special counsel to represent the county in regard to license fees and the enforcement of a county ordinance. This included a study of the ordinance, the preparation of pleadings in the event suit is filed, and full representation in regard to all matters necessary to bring the question of the enforceability of the particular ordinance to a final conclusion or judgment.

The attorney agrees to take equal responsibility with the District Attorney and work with and assist him in matters pertaining to the ordinance until finally ruled upon and determined by the Court.

As compensation for such services the county agreed to pay \$1,500 immediately, the further sum of \$1,500 on or before March 15, 1949, and in addition thereto 3 percent of the total amount of revenue accruing to the county under the terms of the ordinance to the date of final judgment. The sum of \$3,000 has already been paid under the agreement.

An action was commenced by Clark County against the City of Los Angeles, California, on November 4, 1950, to recover certain money for the period of May 1, 1948, to September 30, 1950, claimed to be due the county as a license tax under the county ordinance.

QUERY

Is the contract made in 1948 by County Commissioners then in office now binding on the county?

OPINION

We assume that the inquiry is whether a Board of County Commissioners has the power to make a contract which may extend beyond the term of the officers making it.

Section 1942, N.C.L. 1931-1941 Supp., which defines the powers and jurisdiction of County Commissioners, contains the following language in paragraph 12: "To control the prosecution or defense of all suits to which the county is a party; * * *."

Litigation can only be controlled by means of attorneys having the authority to appear in the courts; hence, to give full effect to this power, the county commissioners must in the very outset have power to employ counsel. Nor is it any answer to say that the law designates and provides an attorney for that purpose—the

district attorney; for it is not unfrequently the case that he may be unable to attend to the business of the county, or its interests in some particular suit may be of such magnitude that the assistance of other counsel would be very desirable, or possible indispensable. *Ellis v. Washoe County*, [7 Nev. 291](#); *Clark v. Lyon County*, [8 Nev. 181](#).

County boards having authority to contract for the county may in so contracting make such specific stipulations as they may deem proper, provided the same are within the scope of their authority as fixed by law and not contrary to public policy. 15 C.J., page 554.

Section 1973, N.C.L. 1929, provides that 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.

There is good authority for the proposition that if a Board of County Commissioners has express power to make a particular contract at any time during its term of office, a contract made by such board, in accordance with the law, a short time before the expiration of its term of office is not contrary to public policy and, in the absence of fraud, is valid and binding on the incoming board of commissioners, although it extends far into their term of office. It has been said that to hold contracts invalid because a part or all of a board cease to exercise public functions would be to put these corporations at enormous disadvantage in making the contracts which are essential to the safe, prudent, and economical management of the affairs of the county. 14 Am. Jur., page 210.

The agreement which is the subject of this opinion does not employ counsel for a definite period beyond the term of the commissioners. It is not beyond inference that the entire agreement might have been fully executed before the term of any one of the commissioners expired.

In the case of *Denio v. City of Huntington Beach*, 140 P(2) 392, the Court held that a contract made by municipal council, if apparently fair, just and reasonable and prompted by necessity of the situation or advantageous to the municipality at the time of its execution, is neither void nor voidable merely because some of its executory features may extend beyond the term of council members, but is binding on the municipality and may not be summarily cancelled by successor council in absence of some other ground of avoidance. The case involved a contract with an attorney to act as special counsel for the city in all legal matters to obtain returns from oil and gas in tide lands.

In *Board of County Commissioners of Edwards County v. Simmons*, 151 P.2d 960, The Court said that decisions in some jurisdictions may show some conflict of authority, but each case must be viewed in the light of the specific provisions of the statute therein involved. And the test generally applied is whether the contract at issue extending beyond the term is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of a sort reasonably necessary to protection of the public property, interest or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid.

The Arizona statute relative to powers and jurisdiction of County Supervisors, contains the same language as the Nevada statute, empowering the supervisors to direct and control the prosecution and defense of all actions to which the county is a party.

The Arizona court in *Prima County v. Grassetta*, 97 P.2d 538, referring to the above statute decided a case in which the County Supervisors entered into a contract with attorneys for the purpose of making certain collections for the county on a contingent basis. The court said: "The contracts in question were not for the employment of the various attorneys as general advisors to the board of supervisors, but were unitary contracts to handle certain specified matters for a fixed compensation and not on a time basis. We think, therefore, they will fall within the class of contracts which may extend beyond the term of the contracting parties."

This office concluded that the agreement of August 1948, entered into by the Board of County Commissioners of Clark County with the attorney-at-law was for the performance of a particular act for a fixed compensation; i.e., to have the validity of the ordinance in question finally determined by a court of competent jurisdiction, which necessarily implies a final determination

by the Supreme Court. The time of such determination was practically impossible at the time of the execution of the agreement, and which determination might or might not be brought about during the term of the County Commissioners making the agreement.

The agreement does not show that it was on a time basis that would extend beyond the term of the commissioners then in office.

We are therefore of the opinion that the agreement is a valid contract by Clark County, and cannot be summarily cancelled by the successor Board of County Commissioners.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-119. SECRETARY OF STATE—Discretion in filing offered papers may be exercised as to form, but not as to merits of application.

Carson City, November 28, 1951.

Hon. John Koontz, Secretary of State, Carson City, Nevada.

Dear Mr. Koontz:

This will acknowledge receipt of your letter in this office November 14, 1951, enclosing a certificate of revival or renewal of a corporation, and correspondence relative to the duty of the Secretary of State to file the same under the statute.

STATEMENT

The corporation, on September 7, 1950, filed in this office of the Secretary of State its certificate of dissolution dissolving the corporation pursuant to section 64 of the Corporation Act. Since said date the corporation has continued its usual business.

On May 15, 1951, the corporation presented to the Secretary of State a certificate of revivor in compliance with section 1692, 1929 N.C.L., 1941 Supp., which the Secretary refused to file on the ground that the corporation could not lawfully claim that it is or has been duly organized and carrying on the business authorized by its existing or original charter, as required by section 65 of the Incorporation Act, and particularly under paragraph 5 of that section.

QUERY

Does section 1692, 1929 N.C.L., 1941 Supp., permit the revivor of a corporation which was previously dissolved pursuant to section 1663, N.C.L. 1929?

OPINION

Section 1692, 1929 N.C.L., 1941 Supp., first paragraph, reads as follows:

Any corporation heretofore, or now, existing under the laws of this state may at any time procure a renewal or revival of its charter for any period, together with all the rights, franchises, privileges and immunities, and subject to all of its existing and pre-existing debts, duties and liabilities secured or imposed by its original charter and amendments thereto, or existing charter, by filing a certificate with the secretary of state, which certificate shall set forth * * *.

Then follows five items which the certificate shall contain. The information required in paragraph 5 contains the condition which the Secretary of State claims the applicant for revival cannot lawfully allege in the certificate. Paragraph 5:

That the corporation desiring to renew or revive, and so renewing or reviving its charter, is, or has been, duly organized and carrying on the business authorized by its existing or original charter and amendments thereto, and desires to renew or continue through revival its existence under and pursuant to and subject to the provisions of this act.

This is followed by a provision for a corporation for which the charter has not expired. The next provision is as follows:

Any corporation seeking a revivor of its original or amended charter shall cause said certificate to be signed by such person or persons as may be designated or appointed by the stockholders of such corporation and duly verified by such person or persons before any person authorized to administer oaths or affirmations. The execution and filing of such certificate must be authorized by the written consent of all the stockholders of the corporation and shall contain a recital that such unanimous consent was secured; and such corporation shall further pay to the secretary of state the same fees as are now required to establish a new corporation under the provisions of this act.

The provision for renewal when the charter has not expired requires the certificate to be signed by the president and secretary, and must be authorized by two-thirds in interest of the stock.

A corporation seeking a revivor of its original charter shall cause the certificate to be signed by such person as may be designated by the stockholders by the written consent of all the stockholders. The provision for revivor can only apply to a corporation which has been dissolved as it does not refer to a president or secretary, but requires the unanimous written consent of all the stockholders.

The Legislature used the words “revivor” and “revival” according to their accepted meaning.

The primary meaning of the word “revive” is to give life again. The first syllable indicates the use of the old matter, and the latter means to give life to, which is one of the primary meanings of the word “create.” *In re Bank of Commerce*, 53 N.E. 950; *Words & Phrases*, Permanent Edition, Vol. 37a.

Section 65 of the Act does not overthrow the meaning of the provision for revivor, it merely limits the conditions under which a corporation may continue as a body corporate.

Section 65, section 1664, 1929 N.C.L., 1949 Supp. quoting that part deemed relevant reads as follows:

All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for a term of three years from such expiration or dissolution be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their

capital stock, but not for the purpose of conducting the business for which said corporation shall have been established * * *.

According to this section they prosecute and defend suits by or against them as bodies corporate, but they cannot continue their business as bodies corporate. If they could continue such business as bodies corporate, there would be no necessity for renewal or revival. The section does not forbid them to continue business, or make it unlawful for them to do so. They not be bodies corporate with the rights, franchises, privileges and immunities of bodies corporate. There is nothing in the statute which prohibits the stockholders from seeking a revival instead of closing out its business.

* * * stockholders who continue to act and carry on business after the termination of the charter, taking no steps to close up its affairs, will be regarded as doing business as partners, and will be personally liable for debts. 14a C.J., page 1189; *Seavy v. I.X.L. Laundry Co.*, [60 Nev. 324](#).

When the stockholders seek revival of the corporation under section 1692, 1929 N.C.L., 1941 Supp., the corporation cannot escape its liabilities during its former existence as a body corporate, as the section provides that it shall be subject to all its existing and pre-existing debts, duties and liabilities imposed under its original charter.

When papers are presented to the Secretary of State for filing and such papers substantially comply with the statutes, his discretion does not extend to the merits of the application, although it may be exercised as to matters of form.

Generally, such officer has no discretionary power to look beyond the face of the incorporation papers and determine from matters outside of such papers whether or not to file the papers. He cannot consider extraneous matters. *State v. Brodigan*, [44 Nev. 212](#); Attorney General's Opinion No. 193, 1925-1926 Biennial Report, citing *State v. Brodigan*.

We are, therefore, of the opinion that the Secretary of State should file the certificate presented by the stockholders in this particular instance.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-120. MOTOR VEHICLES—"Undercover plates," fees required for issuance thereof.

Carson City, December 6, 1951.

Hon. Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada.

Dear Mr. Allen:

Your letter of November 20, 1951, requesting an opinion of this office, presents substantially the following question:

May the Motor Vehicle Division issue to agencies of the federal or state government, *civilian type*, or, as so-called, "*Undercover Plates*," without receiving therefor the license fee of five (\$5) dollars?

OPINION

The only statutory provisions exempting any person, firm, governmental agency, or commission, etc., from the payment of the license fee of five (\$5) dollars is section 6(f) of the Motor Vehicle Registration Act, being section 4435.05(f), 1929 N.C.L., 1949 Supp., which provides as follows:

(f) All motor vehicles owned by the State of Nevada, or by any board, bureau, department, or commission thereof, or any county, city, town, school district, or irrigation district in the state shall be exempt from the payment of the license fee thereon. The department shall provide suitable distinguishing plates for said vehicles, which shall be provided at cost and shall be displayed on said vehicles in the same manner as provided for privately owned vehicles.

Applications for such licenses shall be made through the head of the department, board, bureau, commission, school district, or irrigation district, or through the chairman of the board of county commissioners of the county or town or through the mayor of the city, owning or controlling said vehicles, and no plate or plates shall be issued until a certificate shall have been filed with the department showing that the name of the department, board, bureau, commission, county, city, town, school district, or irrigation district, as the case may be, and the words "For official use only" have been permanently and legibly affixed to each side of said vehicle.

The Motor Vehicle Registration Act does not contain any provisions for "undercover" license plates. It must be presumed that the persons or governmental agencies requesting such plates, desire to be issued license plates of a nondistinguishing type, similar in all respects to those plates issued for privately owned vehicles.

As will be noted in section 6, above quoted, that "* * * no plate or plates shall be issued until a certificate shall have been filed with the department showing that the name of the department * * * and the words 'For official use only' have been permanently and legibly affixed to each side of said vehicle."

The Department of Motor Vehicles has provided as a suitable distinguishing plate one having the letters "EX" preceding numerals, for all persons and governmental agencies making application and meeting the several requirements of section 6 above.

It is a fundamental rule of statutory construction that an exemption statute is to be strictly construed.

Examination of the Motor Vehicle Act of 1931, as amended, discloses only the above-mentioned exemption which requires as a condition precedent that the vehicle be legibly labeled "For official use only" is clearly in conflict with the use desired to be effected by using "undercover" plates. Hence it is the opinion of this office that any persons or governmental agency desiring "undercover" plates would not be exempt from the payment of the five (\$5) dollar license fee, now required for the operation of a privately owned vehicle.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By Thomas A. Foley

Deputy Attorney General

OPINION NO. 51-121. SECRETARY OF STATE—Corporate seal not required unless the charter or statute requires same.

Carson City, December 6, 1951.

Hon. John Koontz, Secretary of State, Carson City, Nevada.

Dear Mr. Koontz:

Your letter dated November 20, 1951, requests the opinion of this office on substantially the following question:

QUERY

Must a certificate of dissolution as required by section 64 of the Nevada Corporation Laws have affixed thereon the corporate seal of the particular corporation before your office may accept same for filing?

STATEMENT

Section 8, Nevada Corporation Laws, being section 1607, N.C.L. 1929, provides: “Every corporation, by virtue of its existence as such, shall have power: * * * 3. To make contracts and to adopt and use a common seal, and use a common seal, and alter the same at pleasure.”

Section 64, being section 1663, N.C.L. 1929, presents two distinct methods by which a corporation may dissolve itself. There is no mention contained in said section relative to the use or nonuse of a corporate seal.

The Secretary of State is purely a ministerial officer insofar as corporations are concerned and, as a ministerial officer, he can exercise only such powers as are specifically granted in the law. (Opinion of the Attorney General, No. 776, dated July 14, 1949, citing *State v. Brodigan*, [44 Nev. 212.](#))

OPINION

A corporation may, under the provisions of section 8, above quoted, adopt and alter at pleasure a corporate seal. Our corporation laws do not make it mandatory that a corporation adopt a common seal. On the contrary, our laws permit such adoption at the pleasure of the corporation. Common practice, however, indicates that generally corporations do so adopt a seal.

“Under the old common-law rule a corporation could act only by its seal. It is now been long established, however, that unless the charter or governing statute requires it, the act of the corporation need not be evidenced by its corporate seal, except where a seal would be required in the case of individuals. Thus, a corporation may be mere vote or other corporate act, not under seal, appoint an agent whose acts and contracts, within the scope of his authority, are binding on the corporation. The lack of a corporate seal does not invalidate a contract made by an authorized agent. Under the present rule, however, in the absence of the corporate seal, there is no presumption that the act is a corporate act, and it devolves upon the party relying thereon to show that the officer or agent had authority to execute it.” 13 Am. Jur. 280, sec. 146.

Section 64 above quoted, requires for dissolution of a corporation two procedures. (1) By resolution of directors calling for a meeting thereafter a meeting of stockholders, a resolution by

the stockholders, and a certification of dissolution. (2) By consent of stockholders having nine-tenths of voting power, in writing properly filed. We are concerned here with No. (1) above.

From the foregoing it is seemingly clear: (1) That a corporation may or may not adopt a corporate seal at its pleasure. (2) An Act of a corporation is not invalidated by not using a seal even though it may have adopted one. (3) Section 64 does not require the use of a seal to effect dissolution, on the contrary, it is clearly and unambiguously stated that the Secretary of State being satisfied of the requirements *aforesaid* (no other requirements), he *shall* issue the certificate of dissolution. (4) That the Secretary of State is a ministerial officer.

We are, therefore, of the opinion that when a certificate, complying with the several requirements of section 64, is offered for filing in your office, same must be accepted irrespective of whether there be a corporate seal affixed thereon or not.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-122. EMPLOYMENT AGENCIES—Theatrical booking agents fall within the definition of “employment agency.”

Carson City, December 6, 1951.

Hon. D.W. Everett, Labor Commissioner, Carson City, Nevada.

Dear Mr. Everett:

This is to acknowledge receipt of your letter of November 20, 1951, requesting an opinion of this office on the following question:

QUERY

Would a person planning on becoming a booking agent for theatrical productions be required to obtain a State license under sections 2835 to 2850, N.C.L. 1929?

OPINION

Section 2835, N.C.L. 1929, provides, insofar as is pertinent as follows:

The term “employment agency” means and includes the business of conducting as owner, agent, manager, contractor, subcontractor, or in any other capacity, an intelligence office, domestic and commercial employment agency, general employment bureau, shipping agency, stage line, hotel *or any other agency for the purpose of procuring or attempting to procure help or employment for persons seeking employment, or for the registration of persons seeking such employment or help, or for giving information as to where and of whom such help or employment may be secured, where and of whom such help or employment may be secured, where a fee or other valuable consideration is exacted, or attempted to be collected for such*

services, or in connection with transportation furnished by stage line as part of the employment agreement, whether such business is conducted in a building or on a street or elsewhere.
(Emphasis added.)

The explicit meaning of the words “theatrical booking agent” may well be difficult of comprehension due to the diversity of the work of such agent, however, the recognized connotation or meaning generally accepted is to the effect that such an agent, for a fee, commission or other valuable consideration, procures or attempts to procure employment for artists, either singularly or as a group, either on their behalf or on behalf of an employer seeking the services of such theatric personnel.

The language of section 2835, N.C.L. 1929, above quoted, is plain and the meaning unmistakable. any person or persons falling within the definitions contained in said section is for the purpose of the Employment Agencies Act an “employment agency.”

Where the language of a statute is plain and the meaning unmistakable, there is no room for construction, and the courts may not search for the meaning beyond the statute itself. *State v. Jepson*, [46 Nev. 193](#), 209 P.501.

We are, therefore, of the opinion that a person planning on becoming a booking agent for theatrical productions is required to comply with sections 2835 through section 2850, N.C.L. 1929.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-123. FISH AND GAME—License agents designated by the Fish and Game Commission are not public officers.

Carson City, December 10, 1951.

Mr. Chester H. Smith, Director of the Budget and Clerk, Board of Examiners, Carson City, Nevada.

Dear Mr. Smith:

Your letter of December 6, 1951, written in your capacity as clerk of the State Board of Examiners, requests the opinion of this office on the following question.

QUERY

Whether or not the license sales agents designated by the State Fish and Game Commission should be bonded under the State Bonding Act or whether or not section 49, Chapter 313, Statutes of Nevada 1951 (1951 Stats. 507), authorized private bonding companies to perform this duty?

More specifically you have presented the following: “Would the above-mentioned agents of the Nevada Fish and Game Commission be constituted officers of the State of Nevada within the provisions of the State Bonding Act? [“]

STATEMENT

There are numerous and varied definitions, connotations and meaning attributed to the seemingly simple terms “officer,” “office,” “public officers,” and “public offices,” as used in statutes and Constitutions. They are terms of vague and variant import, the meaning of which necessarily vary with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used.

OPINION

The question presented is not novel. The earliest text writers found it arduous. Blackstone defines an office to be: “A right to exercise a public or private employment, and take the fees and emoluments thereunto belonging.” (2 Black. Comm., c. 3, p. 36.)

Chancellor Kent: “Offices consist of a right and corresponding duty, to execute a public or private trust, and to take the emoluments belonging thereto.” (3 Kent Comm. 454.)

“And we apprehend that it may be stated as universally true that where an employment or duty is a *continuing one*, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it an officer.” (*Shelby v. Alcorn*, 36 Miss. 289, 72 Am. Dec. 169.)

“The courts are sometimes called upon to distinguish between those who are public officers and those who are merely agents for some governmental subdivision. A public officer exercises a portion of the sovereignty of government and for that reason he is in a sense an agent of the state, and may be properly spoken of as such. But an agency is a contractual relation, while a public office, as has been stated, is not a contract, and the right of the incumbent to the position does not rest upon any agreement between the government and himself.” (42 Am. Jur. 892, sec. 14.)

Irrespective of the perplexity of the instant question and the diversity of the numerous court holdings, we find after an exhaustive search of the law that the status of the law on this question is conclusively settled in the State of Nevada and is binding on this office. Our Supreme Court in *State v. Cole*, [38 Nev. 215](#) (1915), on facts similar to the instant problem, held that a superintendent designated by a commission which was constituted by legislative enactment was not an “officer.” Justice Coleman, delivering the opinion of the Court, on page 220, said: “While it may appear to be a simple matter to determine whether a position is an office or not, the courts have experienced a good deal of trouble in doing so.”

The Court cites with approval the following excerpts from cases: “While, generally speaking, an officer is one employed on behalf of the government, in a strict legal sense it means an employment on behalf of the government in some *fixed* and *permanent* capacity, not in a capacity *merely transient, occasional, or incidental*. Those engaged in mere transient or occasional employments on behalf of the municipality are more properly employees than officers. *Bilger v. State*, 63 Wash. 457, 116 P. 19.” (Emphasis supplied.)

“In the case now before us we find the superintendent of public instruction is not appointed by the mayor, nor elected by the people, nor appointed by a joint convention of the two branches of the council. He takes no official oath, gives no *official* bond, has no commission issued to him, and has no fixed or definite tenure of office, but is appointed at the pleasure of the school board.

It also appears from an examination of the charter that all the executive power relating to educational matters is vested in a department known as ‘the department of education,’ and this department is composed of the board of school commissioners. The superintendent of public instruction exercises no power except what is derived from and through this board. He is simply, then, an employee or the agent of the school board, and not a municipal official, within the meaning of the charter. *Baltimore v. Lyman*, 92 Md. 591, 48 Atl. 145.” (Emphasis supplied.)

“The bonds declared upon in appellant’s complaint are not official bonds; but the trustees of the town had the right to employ Craycraft as a superintendent in the management of the water-works, and to accept a bond from him conditioned for the faithful performance of his duties as such superintendent, and he became in no sense an officer of the town by such employment.

Town of Salem v. McClintock, 16 Ind. App. 656, 46 N.E. 39.”

Justice Coleman (*Stat v. Cole*, supra) on page 223 adds: “The great weight of authority holds the term ‘office’ to embrace the idea of tenure, duration, fees, or emoluments, and duties.” (Citing cases.) “It also held that the taking of an oath is some indication by which to determine if a position is an office.” (Citing cases.) “Section 2, Art. 15, of the Constitution of Nevada provides that all officers shall taken an oath. It does not appear that relator was required to take an oath. Evidently the state officers did not consider relator an officer.”

Applying, then, the principles of law alluded to above to the instant question, we find as follows:

(1) The Fish and Game Commission is legally constituted by legislative enactment. The Legislature by amending section 49 of the Act creating said commission has authorized the commission to designate license agents, to hold said agents accountable to the commission, to provide rules and regulations relative to the number to be designated and to fix their compensation in conformity with a specific standard.

(2) Section 49, as amended (1951 Stats. 507), requires a bond to the commission, not to the State as such, the amount thereof to be fixed by the commission. There is no requirement that the license agents take an oath. (See sec. 2 Art. 15, Constitution of Nevada.)

(3) Those persons designated or to be designated license agents will not serve as such for a definite term, on the contrary, they will discharge their assignments intermittently and incidentally to their own business or professions. Their employment or duties are not of a continuing nature but only for the hunting and fishing seasons. There is nothing fixed and permanent with respect to the capacity, but merely transient, occasional and incidental.

(4) The commission is given authority to demand and fix the amount of bonds from the agents conditioned for the faithful performance of their duties and the premiums therefore are to be paid from the commission’s funds, not from the State funds as such.

It is, therefore, the opinion of this office that the facts presented are analogous to a sufficient degree to the facts of *State v. Cole*, supra, hence that pronouncement by our highest Court will prevail and the “license sales agents” cannot be held to be “officers” or “public officers” within the contemplation of the State Bonding Act.

We can find no statutory or constitutional inhibitions against using commercial or private bonding companies for the bonding of the license agents concerned herein.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-124. NEVADA STATE HOSPITAL—Provisions of Chapter 336, Statutes of 1951, relating to hospitals, nursing and maternity homes do not apply to Nevada State Hospital.

Carson City, December 11, 1951.

S.J. Tillim, M.D., Superintendent, Nevada State Hospital, P.O. Box 2460, Reno, Nevada.

Dear Dr. Tillim:

This will acknowledge receipt of your letter in this office December 10, 1951, in which you request an opinion from this office relative to the following inquiry.

STATEMENT

The Nevada State Department of Health, section of hospital services, has submitted an application form for licensing the Nevada State Hospital and requiring a license fee of \$50.

QUERY

Is the Nevada State Hospital required to register and pay the fee set by the hospital section of the State Department of Health?

OPINION

Chapter 336, Statutes of 1951, is an Act entitled, "An Act relating to hospitals, nursing and maternity homes, providing for the licensing, regulation, and inspection thereof, and establishing a hospital advisory council to the state department of health."

Section 1 of the Act reads as follows: "No person, partnership, corporation, or association, nor any state or local government unit or agency thereof, shall establish, conduct, or maintain in this state any hospital without first obtaining a license therefor as provided in this act. As used in this act, the term 'hospital' shall mean any institution, place, building, or agency which maintains and operates facilities for the diagnosis, care and treatment of human illness, including convalescence, and including care during and after pregnancy, to which a person may be admitted for overnight stay or longer. The term 'hospital' shall include any sanitarium, rest home, nursing home, maternity home, and lying-in asylum."

The title of the Act embraces but one subject, that is hospitals, nursing and maternity homes and matters properly connected with such hospitals.

A hospital, whether it be a State or local government unit is defined as any place which maintains and operates facilities for the diagnosis, care and treatment of human illness, including convalescence and care during and after pregnancy. It shall include any sanitarium, rest home, nursing home, maternity home and lying-in asylum.

That which forms the groundwork of the Act as determined from the title of the Act and the definition of hospital determines the intention of the Legislature that the Act should apply to medical hospitals or those which deal with the science of medicine.

The title of the Nevada State Hospital has been changed from time to time, but it is an asylum for those without recognition of their own illness. The Legislature in 1879 declared it to be the duty of the State, under Article XIII, section 1 of the Constitution, to provide for and take care of the insane, and grounds for the site of an insane asylum were selected.

In 1895 the legal name of the institution was changed from insane asylum to Nevada Hospital for Mental Disease, and the Act of 1951, providing for the administration and organization, defined hospital to mean the Nevada State Hospital. The Nevada State Hospital is a public institution of the State brought into being to aid in the performance of the public duty of protecting society from the individual incompetent in mind.

Chapter 331, Statutes of 1951, is an Act that provides for the administration of the hospital in detail. It fixes the qualification of the superintendent and requires that he furnish bond for the faithful performance of his duties. The District Courts have jurisdiction to commit mentally ill persons to the hospital where they must remain in custody until it be determined that such person will not be detrimental to the public welfare or injurious to himself.

It is evident that such a State institution does not come within the definition of a hospital in Chapter 336, Statutes of 1951, which maintains facilities for diagnosis, care and treatment of illness, including pregnancy, sanitarium, rest home, nursing home, maternity home, lying-in asylum.

Sanitarium is a health station or retreat. 56 C.J. 126.

Chapter 336, Statutes of 1951, does not contain a repealing clause, and became law without the Governor's approval.

Chapter 331, adopted by the same Legislature, and approved March 24, 1951, contains a clause repealing all Acts and parts of Acts in conflict with its provisions.

The Legislature is presumed to have knowledge of the state of the law upon the subject upon which it legislates.

Clover Valley Land & S. Co. v. Lamb, [43 Nev. 375](#).

Chapter 158, Statutes of 1947, gives the State Health Officer supervision over the sanitation, healthfulness, cleanliness, and safety only of the Nevada State Hospital for Mental Diseases and other institutions therein mentioned.

We are therefore of the opinion that the Nevada State Hospital does not come within the provisions of Chapter 336, Statutes of Nevada 1951 which relates to hospitals, nursing and maternity homes.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-125. LICENSING—Sheriffs of the several counties may not issue temporary county liquor or gaming licenses.

Carson City, December 13, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

Your letter of November 8, 1951, requesting an opinion of this office, presents substantially the following questions:

1. Does the county Sheriff have authority under the provisions of section 2037, N.C.L. 1929, to issue a temporary liquor license until the next regular meeting of the licensing board or do the provisions of section 3681, N.C.L. 1929, as amended prevail?

2. Does the county Sheriff have authority under the provisions of section 2037, N.C.L. 1929, to issue a temporary gaming license to an applicant who has first obtained a State license?

OPINION

In answering question No. 1, an examination of the legislative history of the two sections concerned clearly establishes that county Sheriffs do not have authority to issue temporary liquor licenses.

Section 2037, N.C.L. 1929, became law by its approval March 3, 1923, Statutes of Nevada, page 62. At that time section 3681 had been on the books as law for a period of approximately six years, approved March 24, 1917, being 1917 Statutes of Nevada, page 356. In the year 1933 the Legislature amended section 3681 by enlarging said section to include, in addition to intoxicating liquors, the following, “beer, wines, or other beverages now or hereafter authorized to be sold by an Act of Congress.”

Whereas section 3681, N.C.L. 1929, as amended, authorized, empowered and commissioned the county liquor board to grant or refuse liquor licenses, section 2037, N.C.L. 1929, enumerated the following specific businesses for which there shall be county licenses, and providing that the Sheriff, in his discretion, may issue a temporary license therefor: “billiard or pool hall, dancing hall, bowling alley, theater, soft-drink establishment, gambling game or device permitted by law, or other place of amusement, entertainment, or recreation.”

Briefly stated, the Legislature in the year 1917 enacted laws covering the licensing of intoxicating liquors; thereafter, in 1923, the Legislature enacted laws covering specific business which were to be licensed. Those businesses specifically named did not include “Sale of intoxicating liquors.”

Even without alluding the case law, the well founded maxim, which has echoed from many pronouncements of courts from time immemorial, is sufficient in itself to properly hold that section 2037, N.C.L. 1929, does not authorize issuance of a temporary liquor license by the county Sheriffs. The maxim: “Expressio unius est exclusio alterius.” ([44 Nev. 30](#). [In re Arascada])

The legislature is presumed to have knowledge of the state of the law upon the subject upon which it legislates. [43 Nev. 375](#). [*Clover Valley Land and Livestock Co. v. Lamb*]

A right created solely by legislation will be limited in its application to the exact words of the act creating the right. [48 Nev. 253](#). [*Johns-Maniville v. Lander Co.*]

It is therefore, the opinion of this office that section 2037, N.C.L. 1929, does not authorize the Sheriffs of the several counties to issue temporary liquor licenses, but that the provisions of section 3681, N.C.L. 1929, as amended, shall govern.

The open Gambling Act of 1931, as amended, clearly supersedes that portion of section 2037, N.C.L. 1929, as pertains to gambling game or device—this is borne out by the language employed in section 1 thereof, reading in part as follows:

From and after the passage and approval of this act, it shall be unlawful for any person, firm, * * * to operate, carry on, conduct, maintain, or expose for play, in the State of Nevada, any game of faro, moute, roulette, * * * without having first procured a license for same as hereinafter provided.” (Sec. 3302, 1929 N.C.L., 1949 Supp.)

The open Gambling Act of 1931, as amended, provides under section 2 thereof (Sec. 3302.01, 1929 N.C.L., 1941 Supp.):

Any person, firm, association, or corporation desiring to conduct, operate, or carry on any gambling game, slot machine, or any game of chance enumerated or provided for in section one of this act shall, *upon proper application to the sheriff of the county* wherein it is proposed that such slot machine, game or games *shall be* conducted or operated, be *issued a license* for each particular device or game or slot machine under the following conditions and regulations. (Emphasis supplied.)

Section 2 above, if read alone, would indicate that the Sheriff could not only issue a temporary gaming license but a regular county license without the approval of the county licensing board. Such, however, is not the state of the law.

The whole act should be construed together to remove or explain any ambiguity in a particular statute. [36 Nev. 364.](#) [*State ex rel. Mighels v. Eggers*]

It is a fundamental rule of statutory construction that, where possible, effect should be given to all parts of the statute, and the various portions so harmonized as to enable them all to stand. [57 Nev. 307.](#) [*Neil v. Mikluch*]

Section 13b, being section 3302.14, 1929 N.C.L., 1941 Supp., provides as follows:

Nothing contained in this act shall be deemed to affect the powers conferred by the provisions of the charter or organize law of any county or incorporated city in the State of Nevada to fix, impose and collect a license tax and in all such counties or incorporated cities having such powers *the sheriff shall not issue any such license for the operation of any such slot machine, game or device within the boundaries of such county or incorporated city until the applicant shall have first exhibited to him a valid and subsisting license obtained from such county or incorporated city, located within his county, permitting the operation of such slot machine, game or device at the location applied for within the boundaries of such county or incorporated city.* (Emphasis supplied.)

Applying, then, the fundamental rules of construction, the Sheriff may issue a gaming license, “issue” meaning the ministerial act only, after the county has duly ordered that a license be granted. The county must, however, first ascertain compliance by the applicant to the provisions of section 13c, being sections 3302.14, 1929 N.C.L., 1949 Supp., which requires the applicant to first have secured a license from the Nevada Tax Commission.

It is, therefore, the opinion of this office that an applicant must first obtain a valid and subsisting license from (1) The Nevada Tax Commission and (2) the county before the Sheriffs of the several counties may issue a gaming license.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-126. SCHOOLS—Requirement of school districts, when purchasing school equipment, to advertise for bids.

Carson City, December 13, 1951.

Hon. Jon R. Collins, District Attorney, White Pine County, Ely, Nevada.

Dear Mr. Collins:

This will acknowledge receipt of your letter dated November 29, 1951, requesting an opinion of this office on the following question:

QUERY

Do the provisions of the School Code, 1947 Statutes, Chapter 63, require that contracts for the purchase of school equipment involving the expenditure of school funds in excess of \$1,000 must be advertized for bid? More specifically, is a contract for such equipment as band uniforms amounting in value to more than \$3,000 required to be advertized for bid?

OPINION

Only in certain instances does the School Code provide that expenses must be incurred in accordance with the procedure of calling for bids.

Section 286 as amended by Chapter 100, 1951 Statutes 115, requires in effect that if school furniture is to be purchased at a cost of over \$1,000, notice calling for bids must be published. The word "furniture" as used in this statute has previously been construed by this office in an opinion made August 16, 1949, No. 793, to mean those appendages or appurtenances of the building itself necessary to make the building usable or comfortable as a schoolhouse as distinguished from those articles of equipment and supply used for instruction purposes.

It seems clear that under the meaning of the word furniture as above construed, such items as band uniforms would not be considered as furniture.

Section 274, paragraph numbered 2 provides as follows: "The boards of trustees shall have the power and duty to build, purchase or rent schoolhouses when directed to do so by a vote of the registered electors and to *equip and supply the same with all things necessary for the successful operation of the schools* of the district. The board of trustees, without such vote, shall make necessary repairs in any school building when the expense of such repairs will not exceed five hundred dollars; provided; that in districts of the first class the board of trustees may make all necessary repairs without a vote of the electors. No public schoolhouse shall be erected in any school district until the plan of the same has been submitted to and approved by the deputy superintendent of public instruction. The county auditor shall draw no warrant in payment of any bill for the erection of such new schoolhouse until notified by the deputy superintendent of public instruction that plans for the said new schoolhouse have received is approval; *notwithstanding the foregoing provisions of this paragraph, bids must be advertized for all contracts over five hundred (now \$1,000.00) as provided in section 286 of this school code.*"

A possible construction of the above-quoted paragraph to the effect that all contracts in excess of \$1,000, including contracts for equipment necessary for instructional purposes, must be advertized for bids, would require that contracts for the purchase of such items as band equipment, being necessary equipment for the successful operation of the schools, would necessarily require the procedure of calling for bids. However, the correct interpretation to be placed on the clause requiring all contracts to be advertized for bids, in order to be in accordance with the legislative intent, must be found in a reading of the clause not separately but as part of the whole paragraph. It will be noted that throughout the whole paragraph the Legislature had in mind, and referred only to the acquisition of new schoolhouses, or the repair of old ones and the parts necessary to render them usable as schoolhouses. When it came to the direction of acquiring school equipment for instructional purposes, the Legislature provided separate sections in the statute for that purpose; indicating that their intent was to confine the requirement of advertizing for bids those contracts involving construction, purchase or repair of the schoolhouse itself and its furniture.

Section 275, paragraph numbered 8, provides: "The board of trustees shall have the power and duty to furnish writing and drawing paper, pens, inks, blackboard, eraser, crayons and legal pencils, *and other necessary supplies* for the use of the schools, and charges therefor must be audited and paid as other claims against the district school fund are audited and paid."

It may be argued that the above-quoted paragraph provides the procedure for purchasing such other equipment as band uniforms. The word supply is itself a general term which in its interpretation may cover all articles of equipment used in the process of instruction. It has been held in at least one case that a motor truck purchased by a school district is "school supply." See Words and Phrases, permanent edition, Vol. 38, 1951, pocket part. However, in interpreting the intent of the Legislature in using the phrase, it should be noted that the term supply as here used

must necessarily be influenced by the preceding particular wording. The supplies here indicated would be of the same class as writing and drawing paper, pens, inks. etc. This would indicate that the Legislature did not have in mind such items as band uniforms and equipment when using the term supply in this paragraph. This is further born out by the fact that the Legislature provided in another section of the statutes, section 276, paragraph 3, for the procedure in securing materials of a class more nearly related to band equipment.

Section 276 provides the procedure for purchasing textbooks. Therein it will be found that the trustees will purchase textbooks upon approval by the textbook commission, and this after bids have been received from various textbook companies, as provided in section 401 of the statute. Paragraph 3 of the same section, 276, provides specifically for the procedure in securing "*other equipment and materials*," wherein equipment and materials for use in the departments of manual, industrial and domestic science training are to be purchased in the same manner as textbooks.

Those supply men who supply material to the school districts are entitled to rely upon the apparent wording of the law. The law states that in certain instances bids must be made. If the materialmen contract to supply in those instances requiring bid, and later discover that their contracts are void because bidding was not made, a pitfall has been set up and an injustice done.

The Legislature has been specific in those instances where it deemed it necessary to purchase through the means of advertizing for bids, and no basis of construction can be found or is available for adding to it. If the Legislature intended that in every instance of an expenditure as large as that necessary for the purchase of band equipment there must be advertisement for bids, it did not so provide nor leave room for such interpretation.

In the opinion of this office, advertizement for bids is not required in the purchase of such equipment as band uniforms when the expenditure involves costs in excess of \$1,000.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Wm. N. Dunseath
Deputy Attorney General

OPINION NO. 51-127. TAXATION—County Commissioners should reconvey property without proceeding to sale, when tax deed is invalid and a cloud on title.

Carson City, December 14, 1951.

Hon. L.E. Blaisdell, District Attorney, Mineral County, Hawthorne, Nevada.

Dear Mr. Blaisdell:

This will acknowledge receipt of your letter in this office December 13, 1951, requesting an opinion upon the following statement:

STATEMENT

Mineral County took tax deed in 1937 to several lots in an unincorporated town in the county for nonpayment of taxes for the year of 1934. The property was owned by X, who conveyed to Y by deed in 1935. Y has paid taxes on the property, including the 1935 taxes to date. The record

owner Y is willing to pay the 1934 taxes, with interest, penalties and costs to remove the cloud on the title to the property.

QUERY

What procedure can the County Commissioners follow to remove the tax lien on the property and clear the record title of the deed for the delinquent taxes other than by advertising the property and selling it in the usual manner?

OPINION

Section 6447, N.C.L. 1943-1949, provides for the sale of property on which taxes are delinquent. The section provides that if the amount of taxes is not paid by the taxpayer or his successor in interest in the tax receiver will on the second Monday in September of the current year, issue to the County Treasurer as trustee for the State and county, a certificate of sale which authorizes him to hold the property, subject to redemption within two years after date of the certificate by payment of the taxes accruing with penalties, costs and interest. The section provides that at the time of publishing the delinquent notice the Treasurer shall send a copy of the same to the owner and also to the person listed as the taxpayer at the last address if known. In addition a second copy shall be sent in the same manner in the case of the first copy, not less than 60 days before the expiration of the period of redemption.

Section 6448, N.C.L. 1943-1949 Supp., provides that until the expiration of the period of redemption, the property held pursuant to the certificate shall be assessed to the County Treasurer as trustee annually. Section 6465, N.C.L. 1929, provides that such assessment shall be made against the Treasurer as trustee, but no proceedings taken to enforce the collection of taxes against the trustee.

According to the statement the taxes assessed in 1935 were paid by the owner of the property, from which it may be inferred that the property was placed on the assessment roll to the record owner and not assessed to the County Treasurer during the period for redemption, which would have given the purchaser of the property during the redemption notice of the tax lien.

As held in *Jackson v. Harris*, [64 Nev. 339](#), page 362, if section 6449 (N. 1931-1941 Supp., tax deeds convey absolute title) was intended by the Legislature to mean that all statutory requirements for tax proceedings were merely directory and that a tax deed wiped out all defects, including those commonly classed as jurisdictional, the saving clause in 6449—curing any irregularity, informality, omission, mistake, etc., “that does not affect the substantial property rights of persons whose property is taxed,” would be meaningless.

The levy of the tax is not questioned and it is a lien upon the property until paid. The deed to the county is void, but nevertheless remains a cloud upon the title.

The County Commissioner should by resolution show the lack of essential proceeding by which the county received the deed, and authorize the Treasurer as trustee, upon payment of the tax lien to convey to the owner by quitclaim deed the property in question. The granting clause of the deed should refer to the resolution.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General

OPINION NO. 51-128. BANKS AND BANKING—Personal property of state and national banks exempt from direct assessment for purposes of taxation.

Carson City, December 20, 1951.

Hon. Grant L. Robison, Superintendent of Banks, Carson City, Nevada.

Dear Mr. Robison:

Your letter of December 7, 1951, is hereby acknowledged. You request the opinion of this office as follows.

QUERY

Are banks, both State and national, operating in the State of Nevada, exempt from payment of taxes on personal property except when such property consists of automobiles which have been licensed in the name of the bank?

OPINION

Your question must be answered in the affirmative. A State bank is exempt from assessment on its personal property except as to its shares of stock, this holding is the only conclusion to be drawn in light of section 6574, N.C.L. 1929, which provides as follows:

No bank in which shares of stock have been issued shall be assessed upon other property than its real estate and no stockholder in such bank shall be assessed on account of his property interest therein except for his share of stock as hereinbefore provided.

It is noteworthy to cite that the real estate belonging to any bank shall be assessed to it in the same manner and form as other real estate is assessed to the owners thereof. See section 6573, N.C.L. 1929.

After an examination of Title 12 U.S.C. 548 (U.S.R.S. sec. 5219) as pertains to national banks, your question in this regard, too, must be answered in the affirmative.

The case of *Des Moines Nat. Bank v. Des Moines*, 1911, 153 Iowa 336, 133 N.W. 767, which has been upheld in many jurisdictions, is authority for the principle that, "The power of a State to tax national banks or the shares of stock in such banks is derived from Congress, and the decisions of the United States Supreme Court on questions touching the power of the State in this respect are controlling."

The United States Supreme Court in *Rosenblatt v. Johnston*, 104 U.S. 462, 26 L.Ed. 832, held: "The effect of this section is to exempt personal property belonging to national banks from direct assessment and taxation by the State; that is, the personal property of such banks cannot be directly assessed to them by the State for purposes of taxation."

Again it is noteworthy to cite, with respect to real property belonging to a national bank, that such real property may be assessed for taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed. See subsection 3, Title 12 U.S.C. 548 (U.S.R.S., sec. 5219.)

"Assessment against capital stock of national bank, including value of bank's realty, held not void because of additional assessment against realty." *People ex rel. First Nat. Bank v. Breder*, 223 N.Y.S. 579, 129 Misc. Rep. 787.

It is, therefore, the opinion of this office that personal property, automobiles which have been licensed in the name of either a State or national bank, in this State, is exempt from direct assessment for the purposes of taxation.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-129. COUNTY PROPERTY—A school trustee may bid at public auction on the sale of county property by the county.

Carson City, December 20, 1951.

Hon. L.E. Blaisdell, District Attorney, Mineral County, Hawthorne, Nevada.

Dear Mr. Blaisdell:

Your letter of December 11, 1951, is hereby acknowledged. You request the opinion of this office as follows:

QUERY

1. May a county officer bid, at public auction, on the sale of county property by the county?
2. If the answer is in the negative, is a school trustee an officer within the meaning of the applicable law?

OPINION

Section 6447, N.C.L. 1929, being section 39 of the Revenue Act of 1891, as amended, did not prohibit a county officer from bidding at public auction on the sale of county property by the county.

The fact that a prohibition against a county officer bidding was not set forth in the above-mentioned section does not in itself permit such by *all* county officers. Section 4828, N.C.L. 1929, provides, “It shall not be lawful for any town, city, county, or state officer, or member of the legislature, to be interested in any contract *made by such officer*, or legislature *of which he is a member, or be a purchaser*, or be interested in any purchase of sale by *such officer in the discharge of his official duties.*” (Emphases added.)

Hence, even in the absence of an express prohibition to bidding by public officers in section 6447, above mentioned, sec. 4828 would make unlawful a bidding by an officer whose official duties were in any way connected with the sale of the property, i.e., the County Commissioners would be prohibited because they must approve the sale of the property; the County Treasurer, too, would be prohibited since his official duties require his participation as the seller of said property.

It is seemingly inconceivable that a school trustee, even if he be a public officer, would in an official capacity have anything to do with the sale of the county property for delinquent taxes.

As set forth in your letter, section 6447, as amended 1937, 158, and again in 1945, 1945 Stats. 211, there was incorporated in said section the following language: “Provided, that no county officer shall directly or indirectly purchase, for his own private use and benefit, any property sold

at tax sales under the provisions of this act and/or any property owned by any county of this state.”

The above-quoted provision was omitted from section 6447 when said section was further amended in 1947, 1947 Stats. 616.

The status of the law on this subject is today as it was prior to the year 1937. Section 6447, 1929 N.C.L., 1949 Supp., contains no prohibition to bidding by county officers.

It is, therefore, the opinion of this office that a school trustee may bid at public auction on the sale of county property by the county, provided his official duties do not require his action in any manner connected with the procedure incident to the acquisition or disposition of the property.

The above precludes answering your second question.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: Thomas A. Foley
Deputy Attorney General

OPINION NO. 51-130. AIRPORTS—Operation of airports by County Commissioners under Chapter 215, Statutes of 1947, authorizes the making of contracts giving exclusive right to persons for ground service in transportation within airport area.

Carson City, December 28, 1951.

Hon. Roger D. Foley, District Attorney, Clark County, Las Vegas, Nevada.

Dear Mr. Foley:

This will acknowledge receipt of your letter in this office December 26, 1951, enclosing a summary of points and authorities relative to the power of the County Commissioners to contract for services at Clark County Public Airport.

STATEMENT

At the time of the completion of the Clark County Airport the county entered into agreements with the major airlines serving the Las Vegas area to accept the responsibility of providing ground transportation for the passengers and patrons of the air carriers. The board subsequently entered into an agreement with a certain motor carrier company granting exclusive right to solicit business within the airport area.

QUERY

Under sec. 296, N.C.L. 1949 Supp., do the County Commissioners have the power to grant an exclusive franchise or privilege to one ground transportation carrier exclusive of other ground transportation carriers in the area?

OPINION

Section 296, N.C.L. 1949 Supp., relates to leases by the Board of County Commissioners of property for use and occupancy as airports. The Municipal Airport Act, Chapter 215, Statutes of 1947, is the Act to be considered, as this Act provides for the acquisition, construction, maintenance, operation and regulation by municipalities and counties of airports and navigation facilities. The Act is contained in sections 293.20-293.49, N.C.L. 1943-1949 Supp.

Section 2 of the Act authorizes such municipalities to establish, maintain, equip, operate, regulate and protect airports and navigation facilities. They may operate the same for servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of goods, and commodities as an incident to the operation of its airport properties.

Section 8 grants the power to enter into contracts and other agreements in the operation of the airport or air navigation facility, with any persons, also conferring the privilege of supplying goods, commodities, things, services or facilities at such airport.

Section 12 authorizes the municipality to adopt, amend, and repeal reasonable ordinances, as it shall deem necessary for the management, and use of such airport. The section provides the procedure for the adoption of such ordinances.

Section 19 repeats the authority to enter into contracts necessary to the execution of the powers granted it, and for the purposes provided by the Act.

Section 21 provides that any two or more public agencies may enter into agreements with each other for joint action and specify its duration.

Section 26 provides that in addition to the general powers conferred, every municipality is authorized to exercise such powers as are necessarily incidental to the exercise of such general and special powers.

The Act provides that it shall be so interpreted and construed to make uniform the laws and regulations of this and other States having to do with the subject of municipal airports. The Act also provides that all Acts or parts of Acts inconsistent within the provisions of this Act are repealed.

Section 24 of the Act as amended by Chapter 305, Statutes of 1951, in relation to actions for damages arising from tort, that any county or municipality shall not be relieved of liability for such damages if the airport is operated or maintained by the county or municipality.

It is evident from the statute that the county, a governmental entity, is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would do. It cannot be assumed that the Legislature provided for the performance of such an important project N.C.L. 1929, enacted in 1895, which limits the County Commissioners in performing a governmental function, to contracts within the term of any of its members. The Municipal Airport Act specifically grants the power to enter into contracts and other agreements and to confer privileges for the operation of the airport or air navigation facilities. The responsibility of providing for prompt and efficient ground service on a 24-hour basis may be assumed by the authority operating an airport to insure modern servicing of aircraft and for comfort and accommodation of air travelers.

Contracts for the exclusive privilege of transporting ground passengers and baggage at airports and railroad terminals have been held valid and not contrary to public policy, and, being so the grantor of the right was not required to acknowledge claims of rival companies for the part of the business or an equal privilege to solicit the business, on the theory that such contracts were accessorial in nature.

Black & White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518; *Red Top Taxicab Co. v. Terminal Railroad Ass'n.*, 15 S.W. (2) 758; *State v. Jacksonville Terminal Co.*, 106 So. 576.

The court in the case of *Miami Beach Airline Service v. Crandon*, 32 So. (2) 153 was confronted with a question not materially different from the one presented here, and based on a statute similar to that of Nevada. The Court said:

When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals. No one would contend that a private or public service corporation

would be barred from entering into an exclusive contract like that involved here if the necessities of its business required. When county commissioners are clothed with a proprietary function wherein they are responsible to the public for prompt and efficient service, it necessarily follows that they must be clothed with powers to enable them to meet such requirements and we think the act in question does this.

The above case is cited with approval in *Ex Parte Houston*, 224 P(2) 281, which declared the right of a municipal airport, in conformity with the Uniform Municipal Airport Act, to enter into a contract for exclusive transportation of passengers to and from its airport terminal.

The Court held that the contracted service was incidental to the main operation of the airport, that it was a proprietary function authorized by the statute and the ordinance in question did not constitute a franchise, and that no franchise being involved the constitutional and statutory restrictions did not apply.

We are therefore of the opinion that the County Commissioners had the authority to adopt the ordinance and to make the agreement with the motor company, giving exclusive right to solicit business within the airport area.

Respectfully submitted,

W.T. MATHEWS
Attorney General

By: George P. Annand
Deputy Attorney General
