

OPINION NO. 1954-310. Hospitals—Constitutional Law—Provision in the Public Hospital Act Relating to the Inclusion of the County Commissioners as Ex Officio Members of the Board of Trustees is Unconstitutional.

CARSON CITY, January 4, 1954.

HONORABLE ROGER D. FOLEY, *District Attorney, Las Vegas, Nevada.*

DEAR MR. FOLEY: We are receipt of your letter dated December 15, 1953, relative to the interpretation of the Public Hospital Act.

STATEMENT

Section 2 of the Public Hospital Act of 1929, as amended, 1949 Statutes, page 83, being Section 2226, N.C.L. 1949 Supp., provides in part as follows:

Provided, however, that in any county wherein there was cast a vote for representative in congress in excess of nineteen thousand votes in a general election held in 1948 the board of trustees of said public hospital shall be composed of the five regularly elected or appointed members, and in addition the said county commissioners shall be ex officio members thereof. Any five of said regular or ex officio members shall constitute a quorum for the transaction of business.

In Clark County the total vote cast for Representative in Congress was as follows:

1948.....	15,887
1950.....	15,869
1952.....	24,326

It is our information that Washoe County was the only county which in 1948 polled in excess of 19,000 votes for Representative in Congress.

QUESTION

We quote your question from your letter as follows:

Would you please render an official opinion as to whether or not the Board of County Commissioners of Clark County, Nevada, are now ex officio members of the Board of Hospital Trustees? Was it the intention of the Legislature that members of the Board of County Commissioners should become ex officio members as soon as the county reached a population large enough to bring about the casting of in excess of nineteen thousand votes for Representative in Congress? Or, would our Legislature intend that the Board of Commissioners not be ex officio members of the Board of Trustees where the vote cast in 1948 was less than nineteen thousand no matter how large a vote may be subsequently cast?

OPINION

In the opinion of this office, the above-quoted provision so clearly and explicitly confines itself to the 1948 election, that it does not admit of any other alternative than that of giving effect to its clear meaning. That is to say, only the counties polling the prescribed vote in the particular year of 1948 shall be affected by the provision even though other counties may at later elections attain the prescribed vote.

This office is therefore of the opinion that Clark County, although having cast a vote in 1952 in excess of nineteen thousand votes for Representative in Congress, does not fall within the mandate that requires County Commissioners to be ex officio hospital trustees as prescribed by the above-quoted provision.

The constitutional question so naturally follows here that we are constrained to set forth our views in that regard.

It is clear that the Legislature intended by the provision to create a classification of counties according to a voting population. This is not in itself objectionable. The fact that certain counties are placed in a classification according to voting population does not in itself render an Act local or special within the meaning of the constitutional prohibition against the passage of local or special laws. See *State v. Donovan*, 20 Nev. 75; Section 21, Article IV, Constitution of Nevada.

However, if the Act is so framed as to preclude counties in the future from coming within the classification when the Act can be generally applicable to them, it is unconstitutional. As stated in *State v. Donovan*, supra:

All acts or parts of acts attempting to create a classification of counties or cities by a voting population, which are confined in their operation to the existing state of facts at the time of their passage * * * have always been held unconstitutional.

There remains, therefore, the question of whether the provision precludes other counties from coming within the classification in the future. This question is to be resolved by a determination of what the intention of the Legislature was in the enactment of the provision.

We are aware of the settled rule in the construction of statutes involving their constitutionality, and wherein there is any doubt, that every possible presumption and intendment will be made in favor of their constitutionality.

We are also aware of the rule in the construction of statutes that in order to reach the intention of the Legislature, courts are not bound to always take the words of a statute either 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.

However, in light of the clear wording of the provision, we are unable to discern any other intent by the Legislature than that which is so clearly expressed. Nor can the liberty be taken to impute some other meaning than that which is clearly expressed. In *Odd Fellows Bank v. Quillen*, 11 Nev. 109, the Nevada court quoting from *McCluskey v. Cromwell*, 11 N.Y. 601 had this to say:

It is beyond question the duty of the courts in construing statutes, to give effect to the intent of the law making power, and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.

By the clear wording of the provision in question, this office is of the opinion that the legislative intent is expressed to the effect that counties polling the prescribed vote in 1948 are to be affected by the provision. We take it that 1948 means 1948 and not 1950 or 1952. We are consequently of the opinion that the provision is unconstitutional.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-311. Constitutional Law—Elections—Legislative Act Providing Five-Year Domicile in Nevada Prior to Exercising Right to Become a Candidate for Public Office Unconstitutional.

CARSON CITY, January 13, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor of Nevada, Carson City, Nevada*.

DEAR GOVERNOR RUSSELL: Some time ago you requested the opinion of this office concerning the constitutionality of the inclusion in Chapter 370, Statutes of 1953, amending Section 4766, N.C.L. 1929, the language, "No person who is not a qualified elector *and domiciled in the State of Nevada for five years next preceding his declaration or acceptance of candidacy* shall be eligible to any office, etc." This office regrets the delay in furnishing the opinion, but we advised you upon the receipt of the request that some delay would be occasioned by reason of the great press of work then lodged in this office.

OPINION

Undoubtedly the Legislature has provided an additional qualification upon qualified electors to become candidates for the offices mentioned in Section 4766, N.C.L. 1929. The question is, did the Legislature possess the constitutional power to require that qualified electors be domiciled in the State for five years before any such elector could exercise his or her right to become a candidate for public office? We think a close examination of the Nevada Constitution discloses that the Legislature was not endowed with the constitutional power to so legislate.

It may be that the Legislature of this State is endowed with absolute legislative power and can perform any act not prohibited by the Constitution. However, such absolute power is not in all cases restricted by express prohibitions. Our Supreme Court in *State v. Hallock*, 14 Nev. at page 205, stated the rule thusly:

It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. "Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance." (*People v. Draper*, 15 N.Y. 544.) The presumption is always that the positive provisions of a constitution are mandatory and not merely directory (*Cooley's Con. Lim.* 78, 79), and there is nothing to overthrow this presumption with respect to the provisions under discussion.

Again, in *State v. Arrington*, 18 Nev. at page 415, the Supreme Court reiterated the rule in the following language:

We admit, also, that the legislature can perform any act not prohibited by the constitution; that, outside of constitutional limitations and restrictions, its power is “as absolute, omnipotent, and uncontrollable as parliament.” But in seeking for limitations and restrictions, we must not confine ourselves to express prohibitions. Negative words are not indispensable in the creation of limitations to legislative power, and, if the constitution prescribes one method of filling an office, the legislature cannot adopt another. From its nature, a constitution cannot specify in detail and in terms, every minor limitation obviously intended. It follows that implied as well as express restrictions must be regarded, and that neither the legislature nor any other department of the government can perform any act that is prohibited, either expressly or by fair implication. (People v. Draper, 15 N.Y. 543; Lowrey v. Gridley, 30 Conn. 458; People v. Hurlbut, 24 Mich. 98.) Prohibitions implied, if they plainly exist in a constitution, have all the force of express prohibitions.

Later, in Moore v. Humboldt County, 48 Nev. at pages 402-403, the court quoted with approval the rule enunciated in State v. Hallock, supra.

We think the Nevada Constitution, with respect to the instant question, contains such positive directions that militate against legislation contrary thereto. Section 1, Article II of the Constitution, provides:

All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; provided, that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights and no idiot or insane person shall be entitled to the privilege of an elector. There shall be no denial of the elective franchise at any election on account of sex.

The Supreme Court in State v. Findlay, 20 Nev. 198, held squarely that the Legislature cannot deny, abridge, extend or change the qualifications of an elector as fixed in the Constitution. To the same effect is State v. Board of Examiners, 21 Nev. 67. The Supreme Court in Schur Ex Rel. v. Payne, 57 Nev. at page 291, quoted with approval from the case of Ward v. Crowell (Calif.), 76 Pac. 491, “That the right of the people to select from citizens and qualified electors whom the please to fill an elective office is not to be circumscribed except by legal provisions clearly limiting the right.”

Section 3, Article XV of the Constitution, provides:

No person shall be eligible to any office who is not a qualified elector under this constitution.

Thus the framers of the Constitution to all intents and purposes made the qualifications of an elector as set forth in said Section 1 of Article II of the Constitution the basic qualifications of candidates for public office. We submit, applying the rule stated by the Supreme Court against implications to contrary, set forth hereinbefore, that no implication can well be presumed thereby empowering the Legislature to insert the five-year domicile clause in the statute in question.

An examination of the Constitution discloses that in three instances only was the period of residence in the State necessary to qualify the candidate for public office extended beyond the six-month period provided in Section 1 of Article II of the Constitution.

1. Section 3 Article V, provides:

No person shall be eligible to the office of governor who is not a qualified elector, and who, at the time of such election, has not attained the age of twenty-five years, and who, except at the first election under this constitution, shall not have been a citizen resident of this state for two years next preceding the election.

2. Section 17, Article V, provides for the election of a Lieutenant Governor, as follows:

A lieutenant governor shall be elected at the same time and places, and in the same manner as the governor, and his term of office and his eligibility shall also be the same. * * *.

3. Section 3, Article XV, providing that “No person shall be eligible to any office who is not a qualified elector under this constitution,” was amended by vote of the people at the general election of 1912, the amendment being by the addition to said section a proviso reading:

* * * provided, that females over the age of twenty-one years, who have resided in this state one year, and in the county and district six months next preceding any election to fill either of said offices, or the making of such appointment, shall be eligible to the office of superintendent of public instruction, deputy superintendent of public instruction, school trustee, and notary public.

This proviso extended the right to females who had resided in the State one year next preceding the election to become candidates for the offices only therein mentioned. However, we think that such proviso was superseded by the adoption by the people at the general election in 1914 the amended Section 1 of Article II of the Constitution which amendment granted full suffrage rights to women and thereby denominated them qualified electors entitled as such to become candidates for public office.

It is significant to note the provisions of Section 19, Article V of the Constitution, reading as follows:

A secretary of state, a treasurer, a controller, a surveyor general, and an attorney general, shall be elected at the same time and places, and in the same manner as the governor. The term of office of each shall be the same as is prescribed for the governor. *Any elector shall be eligible to either of said offices.* (Italics ours.)

Most certainly the inclusion of the language of this last sentence established a distinct policy, aside from the Governor and Lieutenant Governor, that as to five high important State offices any qualified elector was eligible to fill the same. No Act of the Legislature can impose any additional qualifications with respect to the period of time candidates for said offices must be domiciled in the State beyond the six-month period set forth in Section 1 of Article II of the Constitution.

In *State v. Clark*, 3 Nev. 566, the Supreme Court has occasion to state the effect of the last sentence of said Section 19. The court said:

Section 3, of article V, provides that a party, to be eligible to the office of governor, shall possess certain qualifications as to age and length of residence, beyond those required for a mere elector.

Section 17, of the same article, requires the same qualifications to make a party eligible to the office of lieutenant governor as are required for governor. Section 19, in regard to attorney general and other officers, concludes by declaring that “any elector shall be eligible to those offices.” This, taken in connection with the preceding sections, we think, shows that the connection intended by the latter sentence to express the qualification as to age and residence which would be required in such officers * * *.

In the case of *Parus v. District Court*, 42 Nev. 229, the Supreme Court held squarely with respect to the constitutional provisions relating to the right to hold office, that qualified electorship is the primary basis of the right to hold office. Most certainly qualified electorship must rest upon the organic law of this State, the State Constitution. The people of this State in adopting and amending such Constitution have most definitely placed therein the foundation law stating how and when qualified electorship is established by the adoption of Section 1, Article II.

The fact that the Constitution has since 1864 contained but three provisions whereby the period of time of residence or domicile within the State was extended beyond the six-month period in order to qualify as an elector entitled to exercise his or her right to become a candidate for public office all as hereinbefore stated and set forth, is significant. We submit that nowhere in the Constitution is there any provision whereby any implication can be drawn that the qualified electorship policy, based upon the provisions of Section 1 of Article II of the Constitution as providing the primary basis of the right to be a candidate for and/or hold a public office is to be abrogated or changed except by the will of the people in amending the Constitution with respect to an extended period of time of residence within the State preceding the election for public office.

We reiterate that while the framers of the Constitution wrote into that instrument a two-year residential requirement that candidates for the office of Governor and Lieutenant Governor shall have been citizen residents of the State for two years preceding the election therefor, still, at the same time, having written into the Constitution that any elector shall be eligible for either of the five important State offices, i.e., Secretary of State, Treasurer, Controller, Surveyor General and Attorney General, it certainly follows that the framers have established that any qualified elector was eligible to fill any of such offices, and not having in any other provision of the Constitution impliedly or at all that any other rule or policy was to govern with respect to the residential qualification over and above that provided in Section 1 of Article II of the Constitution, that then the policy in regard to the time element of residence with respect to the right to hold public office became and is fixed, subject to change only by amendment of the Constitution. Surely it would be incongruous to require a longer period of domicile within the State for all other public officers than that required of the five State officers in question.

We think that the qualifications of an elector, both as to his or her right to vote, and also as to the right to be a candidate for and to hold public office, necessarily must be at least permanently fixed and determined, and this by means of constitutional provisions. If one Legislature may add additional qualifications to the primary basis of the right to hold office, the next succeeding Legislature could make material changes in the law. There would be no stability with respect to the qualified electorship and the fundamental right to hold office. In brief, the legislative Act, changeable at the will of the Legislature, would supplant the Constitution.

Entertaining the foregoing views, it is the considered opinion of this office that the insertion of the language "and domiciled in the State of Nevada for five years next preceding his declaration or acceptance of candidacy" in Chapter 370, Statutes of 1953, amending Section 4766, N.C.L. 1929, was beyond the constitutional power of the Legislature to enact.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-312. Constitutional Law—Elections. Secretary of State Cannot Refuse to Accept Nomination Papers Which Do Not Contain the Five-Year Domicile Requirement.

CARSON CITY, January 21, 1954.

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

DEAR MR. KOONTZ: Reference is hereby made to your letter of January 20, 1954, requesting the opinion of this office as follows:

Reference is made to your Opinion No. 311, dated January 13, 1954, concerning the constitutionality of Section 4766, N.C.L. 1929, as amended by Chapter 370, Statutes of Nevada 1953, a copy of which opinion was provided me.

Reference is also made to the provisions of Chapter 368, Statutes of Nevada 1953, wherein Section 2408, N.C.L. 1929, is amended to provide that the nomination papers of candidates shall contain the statement "that I have been domiciled in the State of Nevada for five years next preceding the date of this affidavit; * * *."

Your considered opinion being that the 1953 amendment to Section 4766, N.C.L. 1929, was beyond the constitutional power of the Legislature to enact, would it now be proper for me, as a public officer to refuse to accept nomination papers from prospective candidates for public office when such nomination papers fail to include the language of five years' domicile as required by the provisions of Chapter 370, Statutes of Nevada 1953?

OPINION

It is a well-settled principal of constitutional law that an unconstitutional Act of the Legislature does not constitute a law, in brief, the courts hold that it is no law. Such rule of construction applies even to a part of a section of a statute and where a part of a section is unconstitutional, such invalidity will not prevent the enforcement of the remainder of the section. *Ormsby County v. Kearney*, 37 Nev. 316; *Turner v. Fogg*, 39 Nev. 406; *Ex Parte Arascada*, 44 Nev. 30.

Our Opinion No. 311 held that the Legislature did not have the constitutional power to insert the provision "and domiciled in the State of Nevada for five years next preceding his declaration or acceptance of candidacy" in Chapter 370, Statutes of 1953, amending Section 4766, N.C.L. 1929.

Chapter 368, Statutes of 1953, amends Section 2408, N.C.L. 1929, as amended by Chapter 29, Statutes of 1951, providing the requirement of the filing of declarations of candidacy and the statutory form thereof. The Legislature in the 1953 amendment inserted therein the following language, "* * * that I have been domiciled in the State of Nevada for five years next preceding the date of this affidavit." This language is of the same import and has the same meaning and the same effect as that inserted in said Chapter 370 of the 1953 Statutes. We submit such language was also beyond the constitutional power of Legislature to enact and therefore is in fact no law and we so hold.

It is therefore the considered opinion of this office that you, as a public officer, cannot legally refuse to accept the nomination papers from prospective candidates for public office when such papers fail to include the language of five years' domicile required by Chapter 370, Statutes of Nevada 1953.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-313. Taxation—Exemption of Real Property of National Organization of Ex-Service Men or Women From Taxation Under Chapter 344, Statutes of Nevada 1953, Construed.

CARSON CITY, February 2, 1954.

HONORABLE JACK STREETER, *District Attorney, Reno, Nevada.*

DEAR MR. STREETER: This will acknowledge receipt of your letter in this office February 1, 1954.

You request an opinion from this office upon the following subject:

STATEMENT

The Darrell Dunkle Post Number 204 of the American Legion has acquired a lot and dwelling in Washoe County, Nevada. The post has executed a deed of trust to the property. A local guaranty company is named trustee, and two members of the post are the beneficiaries under the trust deed to secure the loan.

QUERY

1. Under Chapter 343, Statutes of Nevada 1953, is said property exempt up to the sum of \$5000, assuming said real property is used exclusively by any national organization of ex-service men or women?
2. If question No. 1 is answered in the affirmative would the property still be exempt from taxation if said property was rented to other civic organizations from which rental fee was charged?

OPINION

We are of the opinion that the answer to your first question is in the affirmative. Your second question in our opinion must be answered in the negative.

Chapter 344, Statutes of 1953, Section 1, provides: All property of every kind and nature whatsoever within this State shall be subject to taxation except:

The seventh exception includes the following language, deemed relevant to the question: "The real property owned and used exclusively by any post of any national organization of ex-service men or women for the legitimate purposes and customary objects of such posts; provided that such exemption shall in no case exceed the sum of five thousand (\$5000) dollars to any one post or organization thereof."

The word owned is not used in a technical sense as disclosed by reading Section 3 of the Revenue Act, which describes taxable real estate, and uses the term in connection with property, as "the ownership of, or claim to, or possession of, or right of possession of any person, firm, or corporation, association or company * * *."

The Act concerning trust deeds, contained in Sections 7710-7716. N.C.L. 1929, as amended, provides in the covenants that the grantor will pay all taxes which are a lien upon the trust premises.

The purpose of the exemption as expressed in the Revenue Act is to relieve any national organization of ex-service men or women of the payment of taxes upon a certain valuation of property.

A trust deed under the statute provides for the reconveyance of the trust property to the grantor by the trustee, upon the faithful performance of the obligation and covenants in the trust deed.

The American Legion Post in question would be the grantor in the deed of trust with the right to have the property reconveyed upon the payment of the loan, and performance of the covenants in the trust deed.

As held by the court in *State v. Bauman*, 153 SW(2) 31, the right to call in the legal title ordinarily presumes an equitable title in the person who may exercise the right. An equitable title has been described as the right in the party to whom it belongs to have the legal title transferred to him upon the performance of specified conditions.

The court, quoting from Cooley, Taxation, Section 677, said: "It has been held that the term 'property' includes an equitable as well as a legal interest. So the word 'owned' in an exemption statute is generally construed to comprehend an equitable as well as a legal ownership."

While the word "owned" may have a technical meaning, it does not appear from the context of the Revenue Act, and the object sought in the exemption, that it is to be construed as a technical term.

The court in the case of Orr Ditch Co. v. District Court, 64 Nev. 149, said: "But where a word has both a technical and a popular meaning—no matter in what sort of a statute it appears—the latter meaning will prevail over the former, in the absence of any indication that the word was used in its technical sense."

We are therefore of the opinion that the real property of the American Legion Post, in question, comes within the exemption as real property owned by the post.

The answer to your second question requires the comprehension of the entire section to determine the meaning of the term "used exclusively."

Section 1, paragraph seventh, supra, uses the language "* * * and used exclusively by any post of any national organization of ex-service men or women for the legitimate purposes and customary objects of such posts; * * *." The term "used exclusively" has the same meaning as the restrictions noted in paragraphs third, eighth, ninth and tenth; such as "and used as a home for its members;" "and a rent or other valuable consideration is received for its use, the same shall be taxed;" "and if such property is used for any purpose other than carrying out the legitimate functions * * * the same shall be taxed."

This construction is supported by the rule expressed in Carpenter v. District Court, 59 Nev. 48, which is, that in interpreting a section of a statute, every portion of the section must be given effect, and all portions must be harmonized.

We are therefore of the opinion that the renting of the property would take it out of the exemption from taxation, as it would be a non-observance of the restriction in the term "used exclusively" and would not be within the customary objects of such post.

Respectfully submitted,

W. T. MATHEWS, *Attorney General.*

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

OPINION NO. 1954-314. Taxation; Motor Vehicles; Military Personnel—Military Servicemen Temporarily Residing in Nevada not Required to Pay Personal Property Tax on Automobile.

CARSON CITY, February 3, 1954.

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

DEAR MR. BLAISDELL: This will acknowledge receipt of your letter dated December 16, 1953, requesting an opinion of this office on the following question as quoted from your letter:

Is a serviceman in a State of temporary residence by virtue of military orders liable for the payment of a personal property tax on his automobile in connection with the purchase of license plates, or otherwise?

OPINION

We are of the opinion that a serviceman temporarily residing in the State of Nevada by virtue of military orders is not required to pay the personal property tax levied on his automobile by the State of Nevada; provided such serviceman, while in the military service, is not at the same time

engaged in a private trade or business in Nevada in which he uses such personal property or from which such property arises.

In this connection, we are in accord with the well-written opinion on this subject of Lt. Donald J. Pepple, legal officer of the Hawthorne Naval Ammunition Depot.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, Chapter 888, 54 Statutes at Large, as amended (50 U.S.C. App., Sec.574) provides as follows:

Residence for tax purposes.

(1) For the purpose of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purpose of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section, (a) the term "Personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof; Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.

With regard to the taxation of personal property referred to in the above-quoted section, the constitutionality and construction of this section has been settled by the United States Supreme Court in *Dameron v. Brodhead*, 73 S. Ct. 721. In that case, a commissioned officer of the Air Force, whose residence and domicile was that of Louisiana, was, by reason of military orders, temporarily residing in Denver, Colorado, and maintained and lived in an apartment in the city of Denver which contained certain of his personal property consisting mostly of household goods. The Assessor of the city and county of Denver levied tax on his personal property, which the officer paid under protest and sued to recover. The Supreme Court of Colorado held that the purpose of the Federal statute was to prevent multiple taxation of military personnel, but since Louisiana had not taxed the officer's personal property, Colorado was free to do so. The Supreme Court of the United States reversed the Colorado Court discussing first the constitutionality of the Federal legislation wherein they held that the constitutional power of Congress to restrict State taxation in cases involving Federal operations and functions cannot be questioned. Secondly the court construed the statute as meaning clearly what it says that personal property shall not be deemed to be located or present in or to have situs for taxation in the State of temporary presence. The United States Supreme Court has, therefore, held that under such

circumstances the personal property of a serviceman is not taxable by the State of temporary residence.

It is true that the court in *Dameron v. Brodhead* did not discuss State taxation of motor vehicles as a particular type of personal property. However, it seems entirely clear to us that, in light of the fact that the Federal statute in its definition of personal property specifically includes motor vehicles, no different ruling would apply to such personal property as a motor vehicle.

Whether or not this office is in accord with the majority opinion in *Dameron v. Brodhead* is of no moment inasmuch as it appears that the matter is foreclosed by that opinion. Nevertheless, we wish to state that this office is most certainly in accord with the dissent in that opinion. It appears to us that the majority opinion in *Dameron v. Brodhead* premised its determination of the constitutionality of the Federal statute upon the ground that military personnel are engaged in a governmental function or endeavor and for that reason Congress is free to limit State taxation of such persons. It seems to us clear that military servicemen engaged in military work are engaged in a Federal function, but when such personnel chooses to live away from his assigned military base and in an apartment or lodging of his own choosing which is furnished with his own personal comforts, it becomes difficult for us to comprehend in what way that private phase of the man's life is in any way connected with the Federal function. Moreover, the court in support of its position that it is within the Federal power to so limit the State power of taxation said: "What has been said in no way affects the reserved powers of the State to tax. For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments." Again the court, in refuting the theory that the Federal statute is designed to prevent multiple State taxation said: "It saved the sole right of taxation to the state of original residence whether or not that state exercised that right." It appears, therefore, that the court thought that the power to tax the personal property of the serviceman located in the State of temporary residence was reserved to the State of original residence. However, we are unable to square this with the long-established rule of law that a State cannot tax property beyond its territorial limits and outside of its power to control. See *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, a representative case. Under the *Dameron* case, wherein lies the power of Louisiana to tax property located in Colorado, which property, particularly if the serviceman were regular service personnel making the service his chosen career, more than likely never had, and probably never would have a situs in Louisiana? We are aware that in the case of an automobile owned by the serviceman, if he desired to retain a current license plate of the State of original residence, the personal property tax on his automobile would very likely be extracted from him by the State of original residence at the time the license was purchased in his home State.

Regardless of the attitude of this office concerning the majority opinion in the *Dameron* case, we consider the law settled by that opinion.

We are therefore of the opinion that a serviceman temporarily residing in Nevada by virtue of military orders cannot be required to pay a Nevada personal property tax levied on his automobile in connection with the purchase of license plates, or otherwise.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-315. Personnel Department. Section 42 of Personnel Act Interpreted. No Payment for Accumulated Leave at Termination of Service.

CARSON CITY, February 19, 1954.

MR. WORTH MCCLURE, JR., *Personnel Director, State Personnel Department, Carson City, Nevada.*

DEAR MR. MCCLURE: This will acknowledge receipt of your letter in this office January 27, 1954.

STATEMENT

We summarize your questions as follows:

1. Interpretation of Section 42, Chapter 351, Statutes of Nevada 1953.
2. Cash payments for accumulated vacation leave to an employee leaving State service.
3. Adoption of rule by Director requiring six months' service by employee to qualify for vacation leave with pay.

OPINION

Section 42, Chapter 351, Statutes of Nevada 1953:

All employees in the public service, whether in the classified or unclassified service, shall be entitled to annual leave with pay of not less than one and one-quarter working days for each calendar month of service and may be accumulative from year to year not to exceed thirty working days.

This part of the section is prospective.

The section further provides that any employee entitled to annual leave on the effective date of this Act shall be credited with such unused leave time upon the effective date of this Act.

This part of the section is retrospective and refers back to the statute allowing annual leave before the effective date of the Personnel Act.

State ex rel. Progress v. Court, 53 Nev. 386.

General rule is that statutes are prospective only unless it clearly, strongly and imperatively appears from the Act itself that the Legislature intended that it should be retrospective in its operation.

The language, "Any employee entitled to annual leave on the effective date of this act shall be credited with such unused leave time upon the effective date of this act." is clearly retrospective.

Section 7279, N.C.L. 1929, provides leave of absence for State employees in the following language: "Each and every state employee who has been in the service of the state for six months or more, in whatever capacity, shall be allowed, in each calendar year, a leave of absence of fifteen days, with full pay, providing the head of each department shall fix the date of such leave of absence."

This statute has been interpreted to mean that a state employee must first have served in State employment for a period of six months before he is entitled to any leave of absence. During the first year he must have completed six months' service before he was entitled to the 15 days' leave. Thereafter, if he continued in the service, he was entitled to 15 days' leave at any time during that year, subject to the fixing of the date for the beginning of such leave by the head of his department. The proviso was to prevent a number of employees of a department taking such leave at the same time, and thus cripple the administration of the department. Under this statute any employee who had been in the service of the State for six months or more was allowed in each calendar year a leave of 15 days with pay. This is the annual leave which Section 42 of the Personnel Act refers back to and contemplates in the language, "Any employee entitled to annual leave on the effective date of this act."

The ordinary use of the words calendar year means from January 1 to December 31. The calendar year began on January 1, 1953 for an employee who had qualified by service as a State employee entitled to vacation.

There was nothing in the old statute to prohibit such employee from taking 15 days in January 1953 if consent was given.

The provisions of the old Act did not contemplate that such leave should be cumulative. If an employee did not take his leave in the current year he could not be paid for it, or add it to the granted time in the next year.

Section 42 of the Act in question provides any employee entitled to annual leave on the effective date of this Act, March 30, 1953, "shall be credited with such unused leave on March 30, 1953."

The language, "shall be credited with such unused leave time" is retrospective and retroactive as credit means acknowledgment of the provisions of Section 7279 supra, "allowed, in each calendar year a leave of absence of fifteen days."

In January or February or March of 1953 the qualified State employee was entitled to 15 days' leave during any part of the calendar year 1953. Thus, for example, a qualified State employee who requested his vacation beginning March 1, 1953, and his employer granted it, he would have 15 days' leave to his credit.

If an employee was granted leave any time in the year 1953, after March 30, effective date of Personnel Act, he would be entitled to the 15 days credited to him by the retroactive effect of the new Act, plus one and one-quarter days each month from March 30, 1953 to the month in which he took his vacation.

An employee who took only 15 days' leave in 1953 was only taking the time allowed under Section 7279 for which he was given credit by Section 42 of the Personnel Act. Since the effective date of this Act all employees in the public service of the State will be entitled to any unused and credited leave, and may accumulate leave at the rate of one and one-quarter working days for each month's service during the year not to exceed a leave of 30 days.

Cash Payment for Accumulated Vacation Leave to Employees Leaving State Service.

66 C.J., page 393, defines the ordinary meaning of the word vacation as a holiday, an intermission of ordinary work, or any other stated employment; a period of leisure or rest; a stated interval in a round of duty or employment. A vacation may be a personal privilege; and it may imply a continuance of service.

The use of the words leave with pay in the statute means an intermission of ordinary work for a definite period of leisure or rest.

Section 42 applies to employees in service, and provides for a vacation period during such service without loss of pay. The pay during such vacation is not a bonus. The employee's compensation is the same whether or not he exercises his privilege to a leave with pay. The cumulative leave is additional time that he may remain away from his regular service and not additional compensation.

A vacation is a personal privilege that can be waived. In re Croker, 67 N.E. 307. A vacation clearly implies a continuance of service rather than that the service is ended. Gutzwiller v. American Tobacco Co., 122 A. 586.

An employee who does not exercise the privilege granted during service has lost such privilege when such service is terminated. After leaving the service he is no longer an employee and cannot claim additional pay for a period during which he worked instead of resting and for which he had been paid. Payment for accumulated vacation to an employee leaving State service would be additional pay for service not rendered or a bonus.

Any other interpretation might be construed to apply to Section 43 which provides for sick and disability leave which allows sick and disability leave with pay, which may be cumulative not to exceed 90 days.

The 1911 Act, Sec. 7279, N.C.L. 1929, did not provide for cumulative vacation period. An employee was required to be in the service of the State for at least six months before he qualified for any vacation. An employee who had not been in State service six months prior to March 30, 1953 was not entitled to be credited with unused leave on the effective date of the Personnel Act.

Authority of Director to Make Rules and Regulations.

Section 41 provides that the director shall prescribe rules and regulations for attendance, and leave with or without pay or reduced pay, in various classes of positions in the public service.

The proposal is not in conflict with Section 42. The proposal does not deprive the employee of the right to start accumulating leave time upon the start of employment, but simply proposes that credit for time worked shall not be credited until after six months of service if such service is continued.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-316. Public Schools—Governing Boards of Public Schools Have No Authority to Allow Use of Public School Building or Facilities by Religious Groups for Sectarian Purposes.

CARSON CITY, February 19, 1954.

HONORABLE ROGER D. FOLEY, *District Attorney, Clark County, Las Vegas, Nevada*.

DEAR MR. FOLEY: This will acknowledge receipt of your letter of January 4, 1954, relative to the use of public school properties by religious congregations. Letters accompanying your request present the following relevant facts:

STATEMENT

A comprehensive outline of the particular question presented indicates that six religious denominations are involved in applications to the Board of Education of a school district for the use of public school facilities by religious groups for sectarian purposes, with or without rental for such use of school property.

OPINION

The Constitution is the premise from which we infer and conclude that the governing boards of public schools, being governmental agencies of the State of Nevada, do not have authority to allow the use of public school buildings or facilities by religious groups for sectarian purposes.

Article I, Section 4 of the Constitution of Nevada, contains within its provisions the following language: "The free exercise and enjoyment of religious profession and worship without discrimination or preference shall ever be allowed in this state * * *."

Article XI, Section 2, provides as follows: "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, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools."

Section 9, same Article, reads: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution."

Section 10 reads: "No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes."

The language contained in Section 2, *supra*, came up for discussion during the debates and proceedings in the Constitutional Convention, Official Report Debates and Proceedings, Andrew J. March, page 568, 569. The question was raised that the word "district" evidently governed the sentence and implied that the district would be held responsible for the action of private parties,

in organization of sectarian schools within such district. It was decided, however, that an additional phrase was not necessary. "The subject of the sentence is 'common schools' and a 'school' to be established 'in such school district.' These are the words which should receive the stress of the voice." Then follows: "And any school district neglecting to establish and maintain *such a school*, or which shall allow instruction of a sectarian character *therein* * * *."

The question was asked, "In the district?" The answer was "No sir, in 'such a school' that is the only proper construction. If the words 'therein' does not refer to 'such a school,' then I do not understand the English language."

The language as now appears in this section was adopted.

The meaning of the term "sectarian purposes" as used in the Constitution was defined in *State of Nevada v. Hallock*, 16 Nev. 373. The court, for the purpose of ascertaining the meaning of the words "sectarian purposes," examined the history of the State in relation to appropriations, as shown by the statutes and legislative journals. The court held that the words were used in the popular sense; that a religious sect is a body or number of persons, united in tenets, but constituting a distinct party by holding doctrines different from those of other sects, or people, and that every sect of that character is sectarian within the meaning of the word as used in the Constitution.

Article XI of the Constitution designates certain funds for educational purposes, and also provides that the Legislature shall provide a special tax in addition to the other means provided for the support and maintenance of common schools.

Chapter 28 of the School Code provides for the issuance of school bonds in order to borrow money for the purpose of acquiring school grounds, erecting school buildings and maintaining the same.

The word "school" is used throughout the Constitution and the statutes in its general or popular sense. According to Webster, the word "general" relates to the total, that which comprehends or relates to all.

The word "school" is a generic term denoting an institution or place for instruction or education, or the collective body of instructors and pupils in any such place or institution. *State v. Boyd*, 28 N.E. 256.

The word "school" except when applied to a building or place implies plurality and consociation. *St. Johns Military Academy v. Edwards*, 128 N.W. 113.

A school building used for the special purpose of maintaining a public school represents public funds.

Section 10, Article XI of the Nevada Constitution, provides: "No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes."

"Sectarian purposes" has been defined by the Supreme Court of this State.

Funds for construction and maintenance of public school buildings are raised by taxation.

"No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *People of the State of Illinois v. Board of Education*, 68 S. Ct. Reports 461.

The question presented to the Attorney General of Nevada presents a situation in which six religious denominations are involved in applications to use school buildings for religious purposes. It is evident that the Board of Education of the schools included must decide which organization may use, and when the schools may be used. There must be an order of choice, or preference. Others who were not preferred could claim discrimination under Article I, Section 4, of the Constitution of Nevada.

We have not been able to find a case which has been decided upon the particular facts presented for opinion. The thoughts of able jurists expressed in opinions on the subject generally may be classed as dictum, but are of assistance in arriving at a conclusion free from highly emotive phraseology, without doing violence to the informative contents of the Constitution and statutes.

As stated in *Everson v. Board of Education*, 330 U.S. 1, on page 18, "The first amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

People of the State of Illinois v. Board of Education, 68 S. Ct. Reports 461, expresses a tenet which we acknowledge as full of import. The court said, "We renew our conviction that we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. * * * If nowhere else, in the relation between church and state 'good fences make good neighbors.'"

Therefore, we are constrained to advise that the Board of Education, or School Trustees, have no authority under the Constitution to let school buildings for religious purposes, with or without rent for the premises.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-317. Counties—Construction of Chapter 96, Statutes 1953, Pertaining to the Appointment of Deputy Sheriffs in Lander County.

CARSON CITY, February 25, 1954.

HONORABLE JOHN M. BARRY, *District Attorney, Lander County, Battle Mountain, Nevada*.

DEAR MR. BARRY: This will acknowledge receipt of your letter dated January 15, 1954, requesting the opinion of this office upon the following facts and questions:

STATEMENT

Three Deputy Sheriffs of Lander County have been appointed by the Lander County Sheriff since 1949. These appointments have never been approved by the Board of County Commissioners of Lander County (hereinafter referred to as the Commissioners). On January 5, 1954, the Commissioners issued a written order to the effect that no Deputy Sheriff of Lander County shall be vested with the authority of office until the appointment of such deputy be submitted to and approved by the Commissioners; that until such time, no salary of such deputy shall be approved or paid.

QUERY

1. What is the legal status and what authority does a Deputy Sheriff have, and does he have the right to collect salary if he is serving as a Deputy Sheriff when his appointment has not been approved by an order of the County Commissioners as is required by the Lander County Salary Act, Chapter 158, Statutes of Nevada 1949, Chapter 67, Statutes of Nevada 1951 and Chapter 96, Statutes of Nevada 1953? These questions are premised upon the fact that said Board has requested that the appointments be submitted to them and obtained a refusal by the Sheriff of Lander County, and whereupon the Board issued an order and resolution forbidding the payment of any such salary to existing appointees and to future appointees until such appointments be approved as is required by the aforesaid statutes. The appointments involved in this matter were made subsequent to the effective date of the 1949 Statutes.

2. Under the authority granted in Sections 2146, 2148 and 4848 of the Nevada Compiled Laws and in the light of Chapter 158, 1949 Statutes as amended, can a Sheriff appoint a deputy from month to month or for an indefinite period when no emergency exists, and does said deputy have a claim for salary for said services?

3. Assuming that a Deputy Sheriff is only a defacto officer because his appointment has not been approved, and because the Commissioners have acquiesced in his appointment and approved his salary in the past, does his legal status remain defacto when an order such as that hereto attached is issued by the Board of County Commissioners? In view of the Lander County Salary Acts, could the Board of County Commissioners of Lander County be violative of misappropriation of funds if salaries were paid to Deputy Sheriffs appointed after the enactment of said statutes and after they indicate a lack of acquiescence in the appointment, and further does the issuance of the attached order and resolution give any protection to said Board?

4. Does Section 1942, Subsections 1 and 3 of the 1931-1941 Nevada Compiled Laws give sufficient authority to the Board of County Commissioners to enter an order such as hereto attached?

5. What in your opinion is the liability of the County if claims for salaries of Deputy Sheriffs in the aforesaid circumstances be rejected, until their appointments be submitted and approved?

6. Assuming that the salary Acts in question are followed and the Board of County Commissioners refuses to pay salaries until the appointment or appointments of Deputy Sheriffs be approved by them, what authority or what procedure is available to remove the Deputy Sheriffs or cause the Sheriff to take some sort of action?

OPINION

We will not attempt to answer each question specifically and in order, but will set forth the opinion in such manner as will resolve the salient problems you have in mind regarding this particular situation.

This matter will be clarified somewhat by properly interpreting the Act regulating the employment of deputies in Lander County.

Chapter 158, Statutes of 1949, as amended by Chapter 96, Statutes of 1953, provides in part as follows:

The sheriff is authorized and empowered to employ, and may hereafter appoint, three deputies, such appointments to be made with the approval of the county commissioners.

We are of the opinion that the above-quoted provision empowers the Sheriff to employ and appoint three deputies. The provision does not direct the Sheriff to appoint three in number, but authorizes him to appoint a maximum of three in number. Such appointments, as to the number appointed, are to be made with the approval of the Commissioners. In other words, the provision sets up a maximum number of deputies which the Sheriff may appoint subject to the power of the Commissioners to approve three or a number less than three. It follows that as the Commissioners can approve or disapprove the number appointed, they can thereby limit the number of deputies. We are of the opinion that the provision does not go so far, nor was it the intention of the Legislature to go so far, as to empower the Commissioners to approve or disapprove the particular person appointed, and thereby limit the Sheriff in his choice of the particular person or personality he chooses to work under him as his deputy. One reason, among other reasons, why we are inclined to this view is that the general law, found in Section 2146, N.C.L. 1929, provides that a Sheriff shall be responsible for all the acts of his deputies and may remove his deputies at pleasure. It is not reasonable to conclude the Legislature in making the

Sheriff responsible for the acts of his deputies would at the same time deprive him of his choice of persons upon whom he must rely.

It is our opinion that the requirement of approval by the Commissioners is necessary to make such appointments legal. In other words, in the instant situation, these deputies are defacto and not de jure officers. As stated in 42 American Jurisprudence at page 962: "Constitutional or statutory provisions may require appointments to public office or to certain designated offices to be approved or confirmed by some body other than the appointing power, and until this is done the appointee may not be legally entitled to office."

The acts of such officers, while of a de facto status, are valid as to the public and individuals involved in such acts. See 43 Am. Jur., pages 224,225.

There appears to be a great variance among the decisions as to the right of a de facto officer to recover his salary or compensation from the State or political subdivision while in de facto status. The weight of authority appears to be to the effect that he cannot so recover. See Section 488, 43 Am. Jur., page 237. See also *Meagher v. County of Storey*, 5 Nev. 244. However, distinctions appear to have been made where the officer performs in good faith and all that appears to defeat his de jure status is some irregularity in the completion of his legal right to hold office. See *Bailey v. Turner*, 197 P. 214; see also Discussion and Notes in 43 Am. Jur., page 238. Under such circumstances, this office is inclined to the view that such de facto officer could, in the State of Nevada, recover compensation for services rendered in good faith.

In the situation presently under consideration, we are of the opinion that the power of the Lander County Commissioners is to be found in Chapter 96, 1953 Statutes. That is the power of approval or disapproval of the number of Deputy Sheriffs appointed. There appears to be no requirement that before the Commissioners can act there must be presented to them by the Sheriff the appointments made by him. Such presentment is not a necessary prerequisite to action by the Commission. By Section 2146, N.C.L. 1929, the oath and appointment of the deputy is to be filed in the office of the County Auditor. Upon such filing the Commission can and is required to express its approval or disapproval of the retention or addition of that office on the payroll of the county.

We are unable to say that the Commissioners by their action of January 5, 1954, approved or disapproved the appointment of the Deputy Sheriffs. It appears by their order and resolution of that date that they intended to approve or disapprove later and upon the submission of the appointments to them. We are of the opinion that until approval or disapproval by the Commissioners as to the number of deputies, those now acting and continuing to act are entitled to their salary as de facto officers, and as to the public their acts are valid. If the Commissioners disapprove of the appointment of three deputies and approve, for example, only two in number, there would be no authority to pay a third deputy.

Concerning your question numbered 2, we are of the opinion that under Chapter 96, 1953 Statutes, the Lander County Sheriff is authorized to appoint three salaried deputies subject to the approval of the Commissioners. In the execution of his duties the Sheriff is authorized in emergency to call upon the male inhabitants of his county for help. Such authority is derived from Section 4833, N.C.L. 1929 and Section 2148, N.C.L. 1929.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-318. Insurance—Group Credit Life and Group Credit Accident and Health Policies of Insurance not Authorized in Nevada.

CARSON CITY, February 26, 1954.

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada.*

DEAR MR. HAMMEL: Some time ago you requested an opinion of this office regarding the sale of group credit insurance in the State of Nevada, and you have at various times furnished us with a quantity of written material on the subject.

STATEMENT

In comparatively recent years a new type of insurance, known as group credit insurance, has been developed and is creating a problem in the administration of the insurance laws of the State of Nevada. An insurance company sells a blanket or group policy of life and/or health and accident insurance to a bank, lending agency, automobile dealer or other retail merchandiser for the purpose of insuring the payment of balances of money loaned under chattel mortgages or sales contracts remaining unpaid at the time of death or physical incapacitation of the individual debtors. Such policy is issued on the life of the individual debtor with the creditor being the policyholder and beneficiary. The individual debtor is furnished with a certificate of participation and pays to the creditor a contribution towards the premium on the policy. In the case of illness or injury rendering it difficult or impossible for the debtor to meet installment payments, the insurance company, under an accident and health policy, will make such payments. At the time the creditor-debtor relationship is created, the creditor presents the group policy plan to the debtor and explains to him the advantages which can accrue to him and/or his family, with participation by the debtor being, presumably, entirely voluntary. The advantages accruing to the creditor are the additional security provided together with the elimination of possible foreclosure action and/or repossession. One large financial institution in Nevada bore the expense of the credit life insurance on its loans until about the end of 1952, at which time it started passing such expense on to the borrower.

QUERY

The questions regarding which you have requested the opinion of this office are as follows:

Would a bank or loan company which purchases a "blanket policy" and then charges a pro rata share of the premium to a borrower be guilty of violation of Sections 141, 142 and 143 of the Nevada Insurance Code in acting as an insurance agent without a license and/or be in violation of Sections 49C and 49D with particular emphasis upon subparagraph (3) of Section 49D, and

Would a merchandise retailer, such as an automobile dealer, trailer dealer, etc., be guilty in a like manner as above for incorporating in an installment payment sales contract a charge for either life insurance or accident and health insurance?

OPINION

While you have used the term "blanket policy" in your request for an opinion, it is our understanding that we are concerned here with what is normally termed a "group policy" of insurance, and we shall confine ourselves to the latter term and type of policy in relation to the credit type policy above described

We have read very carefully, and with a great deal of interest, the materials with which you have furnished us on the subject of credit insurance, and find, as might reasonably be expected, that it is a highly controversial issue throughout the United State. It is particularly interesting to note that the National Association of Insurance Commissioners has experienced, and is experiencing, considerable difficulty with credit life and credit accident and health insurance.

In Vol. 29, Am. Jur., Insurance, Section 1370, group insurance is discussed generally as follows:

SEC. 1370. *Generally.* The group insurance policy is a comparatively recent innovation in the insurance field, although a few cases which considered contracts of insurance which were essentially group insurance contracts, although not so called, arose at an earlier date. The group insurance contract is peculiar in that it is made by the insurer and the employer or someone in an analogous position, instead of between the insurer and the insured, as in other contracts of insurance, thus affecting four parties—the insurer, the employer, the insured, and the beneficiary. Also, group insurance is oftentimes a gratuity in that the employer pays either the whole or a part of the premium. Group insurance differs from old-line life insurance, but is similar in many respects to workmen’s compensation insurance, in that each is secured by the employer for the benefit of the employee, and in that employment is a condition precedent for each to be effective. It should be borne in mind however, that group insurance is not indemnity insurance for the benefit of the employer, but insurance upon the life of the employee for his personal benefit and the protection of those depending upon him, and is in addition to and distinct from workmen’s compensation insurance provided for by the laws of the state. In some states, there are statutes which provide regulations for group insurance, apart from the general laws on insurance.

We do not think that the credit type policy of insurance as hereinbefore described can qualify as group insurance under the law of insurance as above-quoted. While it might be, and has been, argued that technically the credit type policy falls within the general definition of group insurance since there are four parties, namely, insurer, policy holder, insured and beneficiary, it is apparent that, in fact, there are only three parties, the creditor being both the policy holder and the only possible named beneficiary. Moreover, in addition to being the only possible named beneficiary, the creditor is also the principal beneficiary since the primary purpose of such insurance is to furnish the creditor with additional security and to eliminate the possible necessity of foreclosure or repossession. We realize that the incidental benefit to the debtor and/or his family is very real, but it is nonetheless secondary to that of the creditor.

Turning now to the statutory law of insurance in the State of Nevada, we find that the Legislature has exercised the unquestioned power of the State to regulate insurance companies and the method of conducting an insurance business. (See Appleman, *Insurance Law and Practice*, Vol. 19, Section 10321, for power to regulate insurance business.)

Section 3656, N.C.L. 1931-1941 Supp., as amended by Chapter 21, 1949 Statutes of Nevada, has to do with group insurance and provides, in part, as follows:

Group Accident and Health Insurance. (1) Any company authorized to do the business of accident and health insurance in this state may issue group policies insuring against bodily injury or death caused by accident or by accidental means or against sickness, or both, coming within any of the following classifications:

(a) A policy issued to an employer, who shall be deemed the policyholder, insuring at least five (5) employees of such employer for the benefit of persons other than the employer, or to the trustees of a fund established by two (2) or more employers or by one (1) or more labor unions, or by one (1) or more employers and one (1) or more labor unions, which trustees shall be deemed the policyholder, insuring at least twenty-five (25) employees of such employers or members of such union or both for the benefit of persons other than the trustees, employers, or unions. The term “employees” as used herein shall be deemed to include the officers, managers, and employees of the employer, the partners, if the employer is a partnership, the officers, managers, and employees of subsidiary or affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of individuals and firms, the business of which is controlled by the insured employer through stock ownership, contract, or otherwise. The term “employer” as used herein may be deemed to include any municipal or

governmental corporation, unit, agency, or department thereof and the proper officers, as such, of any unincorporated municipality or department thereof, as well as private individuals, partnerships, and corporations.

(b) A policy issued to an association which has a constitution and bylaws and which has been organized and is maintained in good faith for purposes other than that of obtaining insurance, insuring at least twenty-five (25) members of the association for the benefit of persons other than the association or its officers or trustees as such.

(c) A policy issued to any common carrier of passengers, insuring all persons who may become passengers of such carrier or all of any class of classes thereof determined by the means of transportation used by the insured class or classes, insuring against bodily injury or death either while, or as a result of, being such passengers.

(d) A policy issued to a college, school, or other institution of learning or to the head or principal thereof, insuring students, or students and employees, of such institution.

(e) A policy issued to or in the name of any volunteer fire department, insuring all of the members of such department against any one or more of the hazards to which they are exposed by reason of such membership.

Since the Legislature has seen fit to legislate regarding the issuance of group policies in the fields of accident and health and life insurance, and has provided that group policies coming within any of five clearly defined classifications may be issued, we think that the only group policies authorized for issuance in the State of Nevada are those which come within any of the enumerated classifications. If there can be any doubt as to the intention of the Legislature regarding said Section 3656.93, we think the rule of statutory construction “*expressio unius est exclusio alterius*” operates to limit group policies to those coming within the defined classifications to the exclusion of all others. Such being the case it is our opinion that the group credit policies herein discussed unquestionably do not, and cannot, come within any of the statutory classifications, and, therefore, are not authorized for issuance in the State of Nevada.

In view of the foregoing, we are of the further opinion that unless and until the Legislature sees fit to provide, by statute, for group credit insurance, such insurance is not, and cannot be, an authorized type of insurance in the State of Nevada.

Since, in our opinion, group policies of credit life and credit accident and health insurance are not authorized for issuance in the State of Nevada, no violations of the licensing and unfair practices provisions of the State insurance laws can, as a practical matter, occur. For this reason we have not answered your questions specifically.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: JOHN W. BARRETT, *Deputy Attorney General*.

OPINION NO. 1954-319. Criminal Law—Detention at Nevada State Hospital of Defendant Under Section 11190, N.C.L. 1929. Sanity Restored, Construed in the Statutory Sense.

CARSON CITY, March 1, 1954.

SIDNEY 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 February 25, 1954. You request advice in the matter of the case of State of Nevada v. Dale Eugene Sollars, committed to the Nevada State Hospital under Section 11190, Nevada Compiled Laws 1929.

STATEMENT

Dale Eugene Sollars was tried before a jury under Section 11184, N.C.L. 1929, which provides that when an indictment or information is called for trial, if doubt shall arise as to the sanity of defendant, the court shall order the question to be submitted to a jury.

We are informed that the jury brought in a verdict: "We, the jury, find the Defendant to be insane for the purpose of standing trial for the crime charged."

The court in its order stated that he be detained in the State Hospital until he shall become sane.

QUERY

Does the wording in the court's order mean sane in a medical sense, or merely restored to the condition that he can appreciate the nature of the proceedings?

OPINION

We are of the opinion that the terms insane and sane used in the statute are not strictly used in a medical sense, but in the sense established by the construction of law. That a person committed to the Nevada State Hospital under Section 11190, N.C.L. 1929, is sane, under such construction when he has so far recovered as to appreciate the nature of the criminal proceedings against him, and can assist in his defense in a rational manner.

Section 11184, N.C.L. 1929 provides: "When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt shall arise as to the sanity of defendant, the court shall order the question to be submitted to a jury that must be drawn and selected as in other cases."

Section 11190, N.C.L. 1929 provides: "If the defendant be received into the state hospital for mental diseases he must be detained there until he becomes sane. When he becomes sane, notice must be given to the sheriff and district attorney of the county of that fact. The sheriff shall thereupon, without delay, take the defendant and place him in proper custody, until he is brought to trial or judgment, as the case may be, or be otherwise legally discharged."

These sections were copied from the California Penal Code, Section 1372.

When the Legislature of one State adopts a statute already in force in another State, it is presumed that the construction given such statute is also adopted.

Johnson v. Garner, 233 Fed. 756.

In re Walker River Irr. District, 44 Nev. 321.

This section was construed by the California courts in an early case, and followed in later cases. In the case of Re Buchanan, reported in 50 L.R.A. 378, the court said: "The question however, is not whether he has become sane in every sense of the word, but whether he has become sane in the sense of the statute, which requires a suspension of the proceeding in a criminal cause whenever it is found that the defendant is presently insane. In other words, if there is a difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter, as counterdistinguished from the former view. * * * If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subject his mind may be deranged or unsound."

People v. Superior Court of Contra Costa, California, 47 P(2) 724, held that action by superintendent of hospital for insane in making official record and in reporting to Sheriff in

murder prosecution, that one who had been committed to hospital for insanity but who was never considered insane by superintendent, was not insane, constituted sufficient certification of defendant's sanity to justify the proper officials in proceedings with criminal prosecution, although superintendent did not certify that defendant had recovered his sanity. Pen. Code 1368, 1370, 1372.

Ex Parte Phyle, 186 P(2) 134, citing People v. Superior Court, 4 Cal. 2, 136, 47 P(2) 724, said: "this court held that the question of defendant's restoration to sanity is for the superintendent to determine. The court stated that once a person has been committed to a state hospital under Section 1372 'no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum' * * *."

The criterion to determine the statutory construction of the term "becomes sane," as used in Section 11190, N.C.L. 1929, would be the degree of sanity inquired into at the proceeding followed in Section 11184, supra.

As held in U.S. v. Harrman, 4 Fed. Supp. 186: Issue before the court on inquiry into accused's mental condition before trial is whether he is able to comprehend his condition and to rationally assist in defense or whether his mental condition is so abnormal that it would be unjust to try him.

It is therefore our opinion that the Superintendent of the Nevada State Hospital should determine when the person in question is capable of understanding the nature and object of the proceedings at a trial on the criminal charge against him, and he can rationally assist in his defense.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-320. Public Schools—Released Time From School Attendance for Purpose of Religious Instruction Not Authorized by the Laws of Nevada.

CARSON CITY, March 3, 1954.

HONORABLE GLENN A. DUNCAN, *Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MR. DUNCAN: You have requested the opinion of this office upon a question going to the very heart of the constitutional policy of the United States and this State with respect to the separation of the State and the Church. You inquire as follows:

Does the release of a student at the request of a parent during a study hall period, consistently for 45 minutes each day during the regular public school hours of such day and during the entire school year, for the purpose of attending a class in sectarian instruction off the school property and not utilizing public school teachers or facilities constitute a violation of any provision of the Constitution or the laws of this State?

STATEMENT OF FACTS

The proponents of the released time program have submitted the following statement of facts: The following is an outline of the pertinent facts and circumstances surrounding the program of Seminary class instruction carried on by the Church of Jesus Christ of Latter-Day Saints in the Moapa and Virgin Valleys of Clark County, Nevada.

1. Time Classes Held:
 - a. Seven 45-minute periods each day. Monday through Friday—three morning periods in the Virgin Valley and four afternoon periods in the Moapa Valley.
 - b. Virgin Valley (Bunkerville) High School:
 - 8:00 a.m. to 8:45 a.m.
 - 8:45 a.m. to 9:30 a.m.
 - 9:30 a.m. to 10:15 a.m.(Regular public school classes begin at 8:00 a.m. in the Virgin Valley)
 - c. Moapa Valley (Overton) High School:
 - 12:30 p.m. to 1:15 p.m.
 - 1:15 p.m. to 2:00 p.m.
 - 2:00 p.m. to 2:45 p.m.
 - 2:45 p.m. to 3:30 p.m.(Regular public school classes are dismissed at 3:30 p.m. in the Moapa Valley)
2. The classes are held off school property and solely on church property. There is to be no use of public school facilities whatsoever.

The Seminary classes are conducted on church property within walking distance of public school grounds and each student walks to and from his Seminary class.

3. The courses taught in these Seminary classes include courses in Old and New Testament History, the Bible as literature and Latter-day Saints Church history.

4. The teacher of these Seminary classes is duly qualified and accredited by the State of Utah, holding a secondary teaching certificate of that State, and his salary is paid by the Latter-day Saints Church and he is not supervised by Nevada public school authorities.

5. Each student enrolled in this Seminary program attends a Seminary class one 45-minute period each day, Monday through Friday each week, and each student attends his Seminary class only during a regular study or “free” period. He misses no regular class period in the public school curriculum.

Each student is permitted to attend Seminary class only upon the written request and consent of his parents filed with the principal of the public school he attends.

There appears to be no inconvenience as to those students not enrolled in the Seminary program. Those students attend the same public school classes during the same hours as they would whether the Seminary program was conducted or not. Inasmuch as the Seminary program begins and ends at the same hour as does the public school curriculum, no student is required to come earlier or remain later than he otherwise would.

6. Transportation of Students.

The public school system provides buses for the transportation of students to and from their public school classes. These buses transport to and from the public school buildings any student who is enrolled in the public schools; included among these students are those who attend the Seminary class. There appears to be no deviation in either the time schedule or the route for the accommodation of the Seminary.

Public school buses arrive at both the Moapa Valley High School and the Virgin Valley High School at 8:00 a.m. In the Moapa Valley these buses leave the public school at 3:30 p.m. No such bus is held later to accommodate Seminary classes or students enrolled therein.

It also appears from statements by the proponents that the L.D.S. Church is the predominating religion in the areas involved.

The Superintendent of Public Instruction advises that pursuant to the school law of this State and the curriculum and course of study provided for a school day, the regular study period provided therein does not constitute a “free period,” but to the contrary constitutes a vital part and period of the school day and requires the attendance of the students thereto. He directs attention to the fact that under the law of this State it is compulsory that all children between the ages of 7 and 18 years shall attend the public schools of this State during all the time such schools shall be in session in the school district in which such child shall reside, save and except, as any such child may be excused therefrom under the exemption provisions set forth in Chapter 1, School Code, Section 1, 1947 Statutes, page 92. Such exemption provisions, however, do not

provide any released time for the purpose of receiving religious instruction. It further appears that there is no statutory authority in this State for released time for sectarian instruction.

It further appears that the State Board of Education, provided for in Chapter 3, School Code, Section 15, 1947 Statutes 96, is the only board empowered to prescribe and cause to be enforced the courses of study for the public schools of this State. Boards of School Trustees are directed and it is their duty to enforce in schools the courses of study and the use of textbooks prescribed by the proper authority. Chapter 31, Section 274, School Code, 1947 Statutes, page 208. Also, it is provided in Section 293, Chapter 31, School Code, 1947 Statutes, page 213, that "the boards of school trustees and county boards of education must maintain all the schools established by them for an equal length of time during the year and as far as practicable with equal rights and privileges."

Adverting to proponents' statement of facts it is clearly apparent that in the Virgin Valley school 2 hours and 15 minutes of the school day is consumed as released time for religious instruction, while in the Moapa Valley school some 3 hours per day are devoted to the same purpose, not however, by the same class or the same students. We are advised each 45-minute period is devoted to one particular class of students taking the Seminary class instruction. Projecting the released time of 45 minutes each school day per student taking Seminary instruction for a school month of five days per week for four weeks such released time amounts to 15 hours, and projecting such time for a school year of 36 weeks such released time from the study period provided in the school curriculum would be 135 hours.

We are further advised that students not taking the Seminary course of instruction are required to remain in the study hall during the study period while those students in the same class are released for the purpose of receiving religious instruction.

OPINION

At the threshold of this opinion we think it apropos to discuss briefly the doctrine of the separation of the State and the Church as adopted and enunciated by a myriad of cases tried in the courts of this country since the promulgation thereof by the Virginia legislature in 1786 when it enacted the famous Virginia Bill for Religious Liberty which provided:

That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.

In 1789 some 12 amendments were proposed by Congress to the Constitution, 10 of which were proclaimed in force in December of 1791. The first amendment so adopted provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The provisions of this amendment prior to the adoption of the Fourteenth Amendment was applicable or applied to Congress and not applicable to the States. However, the Supreme Court of the United States in *Cantwell v. Connecticut*, 310 U.S. 413, and other U.S. cases, held that the provisions of the First Amendment were by the Fourteenth Amendment made applicable to the States.

The United States Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, speaking through Justice Black, after discussing the centuries of civil strife and persecutions in Europe generally generated in part by sects determined to maintain their absolute political and religious supremacy, with the power of government supporting them at various times and places, and pointing out that such practices of the old world were transplanted to and began to thrive in the soil of New America, and discussing the Virginia Bill of Rights, and the fact some States persisted for a half a century after the adoption of the First Amendment in imposing restraints

upon the free exercise of religion and in discriminating against particular religious groups, said at pages 14-16:

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given to the Amendment by these earlier cases has been accepted by this Court in its decision concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730. "*The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.*"

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."* *Reynolds v. United States, supra at 164.* (Italics ours.)

In the recent case of *Bernard Tudor v. The Gideons International*, decided December 7, 1953 by the Supreme Court of New Jersey, and reported in 100 Atl.2d 857, Adv. Op., a case concerning the furnishing to each of the children in the public schools of Rutherford, New Jersey, a Gideon Institute Bible, consisting of King James Version of the New Testament and the book of Proverbs and Psalms. Parents of children who desired Bibles signed request therefor, which Bibles were thereupon delivered to such children in the home rooms of the schools; other children were excluded from such rooms at time of presentation of the Bibles. The court after an exhaustive examination of the facts and the law held that such practice was invading the constitutional doctrine of the separation of the State and the Church. The opinion is one of the most illuminating opinions upon this important question, well pointing out the historic background of the facts leading up to the erection of the wall of separation between the State and Church. Adverting to the adoption of the First Amendment, the court said:

At the very first session of Congress the first ten amendments, or Bill of Rights, were proposed and largely through the efforts of James Madison were adopted, the First Amendment providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It took is over fourteen centuries and an incalculable amount of persecution to gain the religious tolerance and freedom expounded in 313 A.D. by the rulers of the Roman world.

The First Amendment, of course, applied only to the federal government, but it has been held that upon the adoption of the Fourteenth Amendment the prohibitions

of the First Amendment were applicable to state action abridging religious freedom, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 85 L. ed. 1213, 1217, 60 S. Ct. 900 (1940).

Later in the opinion the court said:

We are well aware of the ever continuing debates that have been taking place in this country for many years as to the meaning which should be given to the First Amendment. There are those who contend that our forefathers never intended to erect a "wall of separation" between Church and State. On the other hand, there are those who insist upon this absolute separation between Church and State. The plaudits and the criticisms of the various majority concurring, and dissenting opinions rendered by the United States Supreme Court in *People ex rel. Everson v. Board of Education*, supra. 330 U.S. 1, *People ex rel. McCollum v. Board of Education*, 333 U.S. 203, 92 L. ed. 648, 68 S. Ct. 461 (1948) and *Zorach v. Clausen*, supra 343 U.S. 306, still continue.

But regardless of what our views on this fundamental question may be, our decision in this case must be based upon the undoubted doctrine of both the Federal Constitution and our New Jersey Constitution, that the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another. Such favoritism cannot be tolerated and must be disapproved as a clear violation of the Bill of Rights of our Constitution.

There is no question but that the framers of the Nevada Constitution recognized the import of the First Amendment and in the Constitution provided that the free exercise and enjoyment of religious profession and worship, without discrimination or *preference*, shall forever be allowed in this State. Section 20, N.C.L. 1929, Ordinance; Section 4, Article I, Constitution. Thus the Nevada Constitution aside from the Fourteenth Amendment of the U.S. Constitution, prohibits the Legislature from making any law respecting the establishment of religion or the free exercise thereof.

But the establishment and maintenance of the public schools of this State constituted them one of the important temporal institutions of the State. They are such institutions that belong upon the opposite side of the wall from religious institutions and subject solely to the law governing secular institutions.

The framers of our Constitution provided therein for the exercise of the temporal power of the State in the establishment of its public schools.

Section 2, Article XI of the Constitution provides:

The legislature shall provide for a uniform system of common schools, by which a school district shall be established and maintained in each school district at least six months in every year; and any school district neglecting to establish and maintain such a school, or which shall allow instruction of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such neglect or infraction; and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

Section 9, Article XI, provides that "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution."

And Section 10 of said Article states that "No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes."

In furtherance of the nonsectarian provisions of the Constitution, the Legislature many years ago enacted a statutory provision, now incorporated in the School Code of 1947, providing:

Sectarian Literature Prohibited. No books, tracts, or papers of a sectarian or denominational character shall be used or introduced in any schools established under the provisions of this school code; nor shall any sectarian or denominational doctrines be taught therein; nor shall any school which has not been taught in accordance with the provisions of this section receive any of the public school funds. (Section 422, 1947 Statutes 256.)

Thus there is a most clean cut division of the sectarian and secular powers contained in the Nevada Constitution. Religious freedom is guaranteed. The Legislature may make no law respecting the free exercise and enjoyment of religious profession and worship. On the other hand the Legislature may make no law which will allow sectarian instruction in the public schools, nor permit the use of public funds of any character for sectarian purposes. Most certainly the constitutional provisions have effectively erected "a wall of separation between Church and State."

Such being the status of the constitutional law, the question propounded in the request for this opinion is to be answered upon the basis of the law governing a temporal institution, the public schools.

The Legislature following the mandate of the Constitution that it shall provide for a uniform system of public schools, has down through the years provided for such schools by enactment of comprehensive laws, the present law being known as the School Code enacted in 1947 and being found in 1947 Statutes, pages 91-264. The Code was amended in some particulars thereafter but such amendments are not material here.

Section 1 of the 1947 School Code provides, inter alia,

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; *

As stated in the statement of facts hereinbefore set forth that any such child may be excused from school attendance under and pursuant to the exemptions from such attendance set forth in said Section 1, none of such exemptions provide for released time for receiving sectarian instruction. In passing, it is to be noted that among such express statutory exemption is number 3, providing that a child may be excused from attendance at a public school when such "child is receiving under private or public instruction, at home or in some other school, equivalent instruction fully approved by the state board of education as to the kind and amount thereof."

That compulsory education is constitutional is beyond question. It is said in 47 Am. Jur. 412, Section 156, as follows:

Statutes making the education of children compulsory have become very general in the United States. Their constitutionality is beyond dispute, for the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal law. One of the most important natural duties of the parent is the obligation to educate his child; this duty he owes not only to the child, but also to the commonwealth. Hence if a parent neglects to perform such a civil obligation, or wilfully refuses to do so, he may be coerced by the law to execute it. On the other hand, free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good.

With respect to compliance with a statute requiring attendance at a public school, it is well settled that attendance at a private school may constitute sufficient attendance under a compulsory statute. In Section 157, Am. Jur., supra, it is stated:

Statutes requiring the attendance of children at public schools usually except from their provisions children who are otherwise educated for a like period in the subjects pursued at public schools. Under such a statute, sending a child to a private school approved by the school authorities is enough to comply with the requirement of the law, without further inquiry.

Such a provision, as above noted, is contained in the Nevada statute.

Such question, however, does not arise in the instant matter, as all of the students taking Seminary instruction are in compulsory attendance in the public schools involved herein. No doubt any child between the age of 7 and 18 years attending a private or parochial school wherein sectarian instruction was given and which provided a temporal course of study satisfactory to the State Board of Education would be entitled to be excused from attendance at a public school in this State, and in such other school receive sectarian instruction.

As hereinbefore pointed out the State Board of Education is the only board empowered and directed by law to prescribe and cause to be enforced the courses of study in the public schools, and that it is the mandatory duty of the Boards of School Trustees to enforce in the schools the courses of study and the use of textbooks prescribed by such State Board. We are advised that the State Board has prescribed and adopted a course of study for the high schools of the State and that such course is applicable and binding upon the schools in question, and that such course provides that 16 unit credits are required for graduation, each unit be based upon a recitation period of at least 40 minutes 5 times a week for 36 weeks, with a like time period of previous independent study in each unit on the part of the student. We think it clear that pursuant to such a course of study that the full school day schedule is taken up with the recitation period and the study period necessary for the independent study thereof on the part of the student.

It is well-settled general law that school officers only have such powers as are vested in them by statute. This rule of law is well stated in 47 Am. Jur. 324, Section 42:

It has been generally stated that it is the duty of school officers to administer the affairs of the corporation as directed by statute in the exercise of such powers and authority as are vested in them. As in the case of school districts, such officers have no power other than those conferred by legislative act, either expressly or by necessary implication, and doubtful claims of power are resolved against them. They have special powers and cannot exceed them. Although school officers and directors have a very wide discretion in matters intrusted to their care, they are the agents of the district or of the legislature, appointed to carry out the system provided for. And the directors of a school district can bind the district only by acts within the actual scope of their authority. If they act fraudulently, in violation of their trust, it may well be that the district will not be bound.

And in Section 43, supra, it is said:

The powers of school officers are limited not only by the general rule that they have only such powers as the statute grants expressly or by necessary implication, but may be further limited by express statutory limitations. For example, the statute may subject the power of a board of education to administer schools to the lawful regulation of other local authorities. And school boards come within the general rule that where a power is given to do an act, and the particular method by which that power is to be exercised is pointed out by statute, the mode is the measure of the power.

With respect to the fundamental power to prescribe courses of study in the public schools it is well said in 47 Am. Jur. 441, Section 200:

The fundamental power to select the system of instruction and course of study to be pursued in the public schools is in the legislature, and its mandate is final and binding on all persons. The power of the legislature to impose a system of public-school education upon local communities is not limited to the common branches. Hence, the legislature may, in its discretion, provide for courses in agriculture and home economics in the public schools and for the establishment of kindergartens as a part of the public-school system.

As a practical matter, the prescription of courses of study is often delegated to local authorities under general limitations and rules laid down by the legislature, the power to delegate such authority seemingly being unquestioned. The delegation of this power is usually in comprehensive terms, and its exercise within constitutional and statutory limits rests in the discretion and good judgment of the local authorities, always, however, subject to the expressed legislative will.

The Supreme Court of Nevada long ago in *State v. McBride*, 31 Nev. at page 64, well said:

It must be conceded as an elementary proposition that boards of school trustees and county commissioners are limited in their jurisdiction to the legislative authority conferred upon them.

To the same effect is *McCulloch v. Bianchini*, 53 Nev. 101.

A close examination of the temporal school laws of this State fails to disclose any express legislative Act from which any implication can be drawn that empowers any school administrative officer or board to authorize or sanction the release of students from attendance upon the public schools during a school day for the purpose of receiving sectarian instruction even though such instruction is not imparted in the school buildings or on the school grounds. The fact remains that such release is for religious instruction, while those students not participating therein are required to remain in attendance in the school. In this connection, we think, it was well stated by Justice Frankfurter in *People ex rel. McCollum v. Board of Education*, 333 U.S. pages 227-228.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however

innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.

Mention should not be omitted that the integration of religious instruction within the school system as practiced in Champaign is supported by arguments drawn from educational theories as diverse as those derived from Catholic conceptions and from the writings of John Dewey. Movements like "released time" are seldom single in origin or aim. Nor can the intrusion of religious instruction into the public school system of Champaign be minimized by saying that it absorbs less than an hour a week; in fact, that affords evidence of a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as "dismissed time," whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of "released time," as being only half or three quarters of an hour is to draw a thread from a fabric.

We are aware of the fact that the McCollum case dealt with the problem there presented wherein the sectarian instruction was given on and in the public school property. However, the matter of released time for the sectarian instruction was sharply drawn in question and most ably discussed by the court, and as to released time the statement of Justice Frankfurter is most applicable here. In the McCollum case only one hour per week was set aside for sectarian purposes. Likewise in the case of *Zorach v. Clausen*, 343 U.S. 305, wherein released time for sectarian instruction sanctioned by a statute of New York authorizing the Commissioner of Education to by rule provide for such time, was drawn in question, the released time was limited to one hour per week, and such hour was designated in the rule to be "the last hour of the day's session on one day each week as designated by the Superintendent of Schools" in the case of New York City Schools, and "not more than one hour each week at the close of the session at a time fixed by local school authorities" in schools outside of the city. See *Zorach v. Clausen*, 100 N.E.2d 463.

In our search of the law we have been unable to find any case wherein the released time for sectarian instruction was ever over one hour.

Here the proponents' plan, known as the Utah plan, calls for daily released time of 45 minutes for each class receiving sectarian instruction, and such time is staggered throughout the entire school day. It needs no extended comment to disclose what would happen to the scheduled school curriculum were other sects to demand the same privilege of released time for their children so as to provide them with sectarian instruction in their respective faiths. It is indeed conceivable that the school curriculum would be most seriously disrupted.

There is no question but what the Nevada compulsory school attendance law facilitates the imparting of sectarian instruction during the school day. Under the plan those students taking Seminary must attend the sectarian classes or else attend school classes daily. We think that any school administration officer or board permitting and/or sanctioning the operation of the plan in question and who or which is not so authorized by a legislative Act will be doing indirectly if not directly what the Supreme Court of the United States markedly pointed out cannot well be done in *Everson v. Board of Education*, 330 U.S. 1, that "Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups * * *." A most serious question may well arise whether even under the Constitution and laws of this State the Legislature of this State could constitutionally enact an Act sanctioning the Utah plan.

We have been furnished and have carefully studied the "Notes on Constitutionality of the Utah Released Time Program" written by Ruth W. Wilkins, wherein the Utah plan was exhaustively examined in the light of the decisions of the United States Supreme Court in many

cases, including particularly the cases of *Everson v. Board of Education*, 330 U.S. 1; *McCullum v. Board of Education*, 333 U.S. 203; *Zorach v. Clausen*, 343 U.S. 306. The commentator examined the matter and the cases minutely, giving each case a searching examination, and then concluded that in the final analysis the constitutionality of the Utah plan is not free from doubt. We concur in such conclusion, as we think a careful and close examination of the court's opinion and the dissenting opinions in the *Zorach* case can only lead to the conclusion that the Supreme Court has not set at rest the question of the constitutionality of released time programs for sectarian instruction.

Entertaining the views hereinbefore set forth it is the considered opinion of this office that the released time program for sectarian instruction as set forth in the statement of facts and as administered is a program made effective in such a manner as to constitute at least an indirect method of injecting sectarian instruction into the public schools in question which could not be accomplished by direct action therefor, and by reason thereof breaches the Constitution wall of separation between Church and State.

The inquiry is answered in the affirmative.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-321. Public Schools—Division of Lander County Into Two Unionized School Districts Not within Provisions of School Code.

CARSON CITY, March 10, 1954.

MRS. KATHRYN SCRIBNER, *Deputy State Superintendent, Third Supervision District, Lovelock, Nevada.*

DEAR MRS. SCRIBNER: This will acknowledge receipt of your letter in this office March 8, 1954, in which you submit a possible means of dividing Lander County, Nevada, into two union school districts.

STATEMENT

It appears from the records that Lander County has an established County High School located at Austin. There is a high school at Battle Mountain which is designated County High School No. 2. Both high schools are governed by a County Board of Education pursuant to Chapter 22 of the School Code and are supported by a tax levy on all taxable property in Lander County.

QUERY

1. Can Lander County divide the county into two school districts, i.e., a Battle Mountain district (composed of a Battle Mountain Elementary School and the Battle Mountain High School) and an Austin district (composed of the Austin Elementary District and the Austin High School)?
2. Can the Board of Education for the county as a whole be dispensed with; i.e., if a unionization in each area were formed could the two boards elected as a result of such unionization take the place of a County Board of Education?

OPINION

The questions submitted present an anomalous situation.

Chapter 19 of the Nevada School Code provides for the establishment of district high schools in counties having regularly established county high school.

There is no direct provision in the School Code under which the County Board of Education could be dispensed with as a whole. There is nothing in the School Code to indicate that a county high school could be transformed into a district high school within certain territory and change its means of support.

We conclude from our examination of the relevant statutes that a district high school might be established in the Battle Mountain area, and a district high school could unite with the elementary districts in such area and form a union school system. We cannot find statutory authority which would permit a county high school to unite with elementary school districts and form a union district.

County high schools are established under Chapter 22 of the School Code after petition and election as provided in Section 139. The location of the county high school is determined under Section 140. A special tax is levied on all the assessable property in the county for such high school, and a County Board of Education is elected at a general election.

County high schools may be discontinued under Section 138 when the average daily attendance falls to five, or a prospective attendance of at least eight for the ensuing year. Such high schools may also be discontinued under Section 156, as amended by Chapter 90, Statutes of 1951, whenever it shall appear feasible that such high schools be discontinued because of small enrollment of pupils or that better educational facilities may be provided the students at other nearby high schools. The section modifies this situation by the term "dormant."

Chapter 21 of the School Code authorizes the establishment of branch high schools in a county having a county high school. The area of a county high school embraces the entire county.

District high schools may be established in counties having county high schools under Chapter 19 of the School Code in certain areas.

Section 120, as amended by Chapter 76, Statutes of 1951, provides that a district high school differs from a regular county high school only in extent of territory; in plan of organization, and in means of support, and, as used in Chapter 19, shall be deemed to mean a high school established in a county which has a duly established county high school or county high schools.

Section 121 defines the method and certain conditions precedent in the establishment of a district high school. The district high school shall be governed by the already existing board of school trustees of the school district in which the district high school is established.

Section 123 provides for the levy of a special tax on the taxable property in the district.

Section 124 makes provisions for county aid to these district high schools. Section 125 requires the County Board of Education to include in its budget to be submitted to the Board of County Commissioners an estimate of the amount required to aid the district high schools established under Chapter 19, *supra*.

It appears from the foregoing that a district high school organized under Chapter 19 could come within the provisions of Chapter 12 and follow the unionization method defined in Section 74. This section contemplates two or more school districts adopting the method or any one or more elementary school districts uniting with the high school district to form a union school district.

The control of such a union district is invested in a temporary board of education until the next general election following the organization, when a board of education for the district shall be elected, two members of which shall be from the high school district, and three members from the elementary districts.

Section 81 provides the manner in which any union school district may be dissolved.

It is evident from the sections considered that an established and located county high school could not organize as a district high school in a defined area. That the county high school could not unite with an elementary school to form a union district, elect a Board of Education for such district, and have inherent power to annul the elected County Board of Education.

We conclude that the suggestion to divide Lander County into two unionized school districts cannot be confirmed.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-322. Highways—Traffic Accidents—Sheriff's Office Not Vested With Sole Power to Investigate Such Accidents.

CARSON CITY, March 18, 1954.

HONORABLE ROBERT A. ALLEN, *Chairman, Public Service Commission, Carson City, Nevada*.

DEAR MR. ALLEN: You inquire whether there are any Acts of the Legislature which would fix the responsibilities of the State Highway Patrol and Sheriffs, and Deputy Sheriffs, in the various counties in investigation of traffic accidents on the public highways. In brief, whether the sole responsibility of investigation of traffic accidents is lodged in the Sheriff's office.

OPINION

In 1949 the State Highway Patrol was created within the Public Service Commission. It is most clear that the Act of the Legislature so creating such Highway Patrol vested such Patrol with certain duties with respect to the public highways, one of them being to police the public highways of this State, and to enforce and to aid in enforcing thereon all the traffic laws of the State of Nevada. This provision being found in Section 7, Chapter 133, Statutes of 1949, page 255. It is further provided in Section 5 of the same Act as follows:

* * * 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 act, the motor vehicle carrier licensing and regulation act, and the laws 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 offenses they shall have the powers of police officers.
* * *

We think it is clear that, under Nevada law, all police officers, including sheriffs, deputies, and the members of the State Highway Patrol, have the absolute duty to at once inspect any traffic accident and make a report thereon. We fail to find in the statutes anywhere that the sole power of investigation of traffic accidents is vested in the Office of Sheriff and certainly the humanitarian aspects of traffic accidents should demand the earliest possible investigation by whatever peace officer first reaching the scene of the accident.

Section 4 of an Act to regulate traffic on the highways of this State being Section 4353, N.C.L. 1929, as amended at 1953 Statutes 359, provides that reports of accidents are to be made direct to the Sheriff of the county, if occurring outside of incorporated city or town and to the Chief of Police with respect to accidents happening inside of such town, by persons involved in traffic accidents wherein motor vehicles have collided. Here we have a situation where even a private citizen is required to make a report to the Sheriff or Chief of Police, the private citizen, under the statute, being someone involved in the accident. This section, however, does not provide for an exclusive investigation by the Sheriff's office or by any other office. The effect of the statute is that the report of the accident must be made to the Sheriff or Chief of Police, as the case may be, by persons involved in the accident and was first enacted in 1925, long before the

State Highway Patrol was created and does not detract from the power of police officers to investigate traffic accidents.

However, an examination of the Act creating the State Highway Patrol within the Public Service Commission discloses that the Commission itself may make certain rules and regulations with respect to the operation and administration by the State Highway Patrol and, no doubt, the Commission could require reports to be made to it by any of its patrolmen ascertaining the facts of the traffic accident.

In view of the status of the law, it is of the opinion of this office that neither the Office of Sheriff, Chief of Police, or Public Service Commission, acting by and through its State Highway Patrol, has the exclusive power of investigating traffic accidents. It is the thought of this office that the nearest police officer, whether he be a Sheriff, Deputy Sheriff, Constable, or State Highway Patrolman, being called to the scene of the accident or having knowledge thereof, would have the power to make an investigation and report thereon.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

OPINION NO. 1954-323. Public Employees Retirement—Forfeiture of Retirement Allowance by Reason of Person Accepting Employment with Political Subdivisions or Agencies of the State.

CARSON CITY, March 19, 1954.

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 March 18, 1954, in which you submit the following statement, and request an opinion.

STATEMENT

A person presently receiving retirement benefits has been offered a position as custodian of a schoolhouse in a school district. The school district is not a participant in the Public Employees Retirement System.

QUERY

In consideration of Section 23 of the Retirement Act, may a person receiving benefits of retirement compensation be employed in any capacity by political subdivisions of the State of Nevada not participating in the retirement system without forfeiture of retirement allowances for the period of employment?

OPINION

We are of the opinion that your question must be answered in the negative.

Section 23 of the Act establishing a system of benefits at retirement or death for certain officers and employees of the State and its political subdivisions, as amended by Chapter 125, Statutes of 1953, reads as follows:

Any person accepting or receiving the benefits of retirement compensation under this act shall not be employed in any capacity by the State of Nevada, by a political subdivision of the State of Nevada, or any department, branch, or agency

thereof, except as hereinafter provided, and any person accepting or enjoying the benefits of retirement compensation under this act, who accepts employment or receives any other compensation from the State of Nevada, from a political subdivision of the State of Nevada, or any department, branch, or agency thereof for services rendered, except as hereinafter provided, shall forfeit all the benefits of this act so long as he shall retain such employment or receive such compensation, and the proper officer shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person; provided, that persons accepting or receiving the benefits of retirement compensation under this act may be employed as members of boards or commissions of the State of Nevada or of its political subdivisions when such boards or commissions are advisory or directive and when membership thereon is noncompensable except for expenses incurred. Receipt of a fee for attendance at official sessions of a particular board or commission shall not be regarded as compensation provided such fees do not normally exceed a total of \$300 in a calendar year.

The provisions in the section are plain and the language is free from ambiguity.

Where the language of the 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. Jepsen*, 46 Nev. 193.

The right or privilege of receiving retirement compensation is regulated by negative language. Where an existing right or privilege is subject to regulation by a statute in negative words, the mode so prescribed is imperative. *Walser v. Moran*, 42 Nev. 111.

The exceptions made in the statute are specifically restricted to certain employment. It is the presumption when one person or thing is mentioned in a statute, all other persons and things are to be excluded. *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358.

Section 23(a), which was added by Chapter 183, Statutes of 1951, does not modify or change the mandatory provisions in Section 23. Section 23(a) relates to persons who have lost the right to retirement compensation under Section 23 and return to service as new members under certain conditions.

Section 237 of the Nevada School Code provides that all schools and the governing boards thereof are governmental agencies of the State of Nevada.

Therefore, we are of the opinion that a person accepting or receiving the benefits of retirement compensation under the Act, who accepts employment in an agency of the State of Nevada, forfeits all the benefits of the Act for the period of employment.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

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

OPINION NO. 1954-324. Personnel Administration. Director Cannot Make Regulation Limiting Preference Granted Veterans to One Examination in State Service.

CARSON CITY, March 24, 1954.

MR. WORTH MCCLURE, JR., *Personnel Director, Nevada State Personnel Department, Carson City, Nevada*.

DEAR MR. MCCLURE: This will acknowledge receipt of your letter in this office March 18, 1954. You call attention to Section 32, Chapter 351, 1953 Statutes of Nevada, and certain proposed rules for personnel administration for Nevada State service.

STATEMENT

The proposed rules for personnel administration for the Nevada State service , as now written, limit the use of the veterans' preference in examinations to one use by the qualified veteran. Further, it is proposed to limit the reference to veterans' widows in this same way and further limit the preference to the widows of veterans who have not remarried.

QUERY

1. Shall a veteran who qualifies under Section 32 of the Personnel Act of 1953 be granted veterans' preference on examinations only once while in the State service; or must the veteran be granted extra points on every examination he takes while in the State service?

2. Within the meaning of Section 32 may this preference be limited to the widows of veterans who have not remarried?

OPINION

Answering your first question, we are of the opinion that the veteran shall be granted extra points under the provision of the statute on every examination taken while in the State service.

This answer, in our opinion, applies to widows of veterans so long as they remain widows.

Chapter 351, Statutes of Nevada 1953 is an Act creating a State Department of Personnel and defines its powers and duties.

Section 25 of the Act provides that the director shall prescribe rules and regulations for open competitive examinations to test the fitness of applicants for the respective positions.

Sections 26,27,28 and 29 relate to the nature of the examinations.

Section 30 empowers the director to prescribe rules and regulations for the establishment of eligible lists for appointment and promotion which shall contain the names of successful candidates in the order of their relative excellence in the respective examinations. The words appointment and promotion are used conjunctively.

Section 32 specifically states the principle of giving advantages to veterans in the following language: "In establishing the lists of eligibles, certain preferences shall be allowed for veterans not dishonorably discharged from the armed forces of the United States. For disabled veterans, ten percent shall be added to the passing grade achieved on the examination; for ex-servicemen and women who have not suffered disabilities, and for the widows of veterans, five points shall be added to the passing grade achieved on the examination."

Throughout the Act general reference is made as to the authority of the director, but Section 32 specifically regulates the preference that shall be given a veteran in establishing eligibility.

One section of a statute treating specifically of a matter will prevail over other sections in which incidental or general reference is made to the same matter.

State v. Hamilton, 33 Nev. 418.

The draft of personnel rules, Section 5.19, relating to veterans' preference in examination, substantially follows the provisions in Section 32 of the Act, and then adds the following restrictions: "* * * and such credit shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotional, from an eligible list on which he was allowed the additional credit granted by this section." (Section 32, Personnel Act of 1953.)

Section 32 establishes a preferential right to veterans in plain language which cannot be construed to permit such a rule of limitation.

The expression of the court in *France v. United States*, 164 U.S. 682, is applicable here, that is, if it be argued that it is within reason, it would be so outside of the language of the statute that to include it in the statute would be to legislate and not to construe legislation.

We are therefore of the opinion that the director of personnel does not have the power under the Act to make the regulation limiting the provisions of Section 32 granting veterans' preference on examination only once while in the State service.

The foregoing comprehends the answer to your second question.

A widow is a woman who has lost her husband by death and has not married again. In *Re Cooks Estate*, 252 N.Y. S. 373.

A widow is an unmarried woman whose husband is dead. *Trachen v. U.S.*, 96 F. Supp. 809.

Words and Phrases, Permanent Edition.

Therefore, we are of the opinion that the limited preference in the proposed rules under Section 5.19 cannot be applied to widows of veterans while they maintain such status.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

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

OPINION NO. 1954-325. Public Schools—State Board of Education Authorized to Enter Into Agreements to Secure Federal Funds for School Districts Under Conditions Not Specifically Provided by Statute.

CARSON CITY, March 26, 1954.

HONORABLE GLENN A. DUNCAN, *State Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MR. DUNCAN: This will acknowledge receipt of your letter in this office March 25, 1954, in which you request an opinion upon the following statement and question.

STATEMENT

The Board of Trustees of the Owyhee school district has made application for financial aid from the Federal Government under Public Law 815, Statutes at Large, Vol. 64. It appears that the basis for requested aid is due to the predominance of Indian children attending the school. Aid is not requested for the construction and maintenance of a school building, but for the construction of a so-called teacherage, or a building designed to house regularly employed teachers in this school, because there are no present facilities for these teachers.

QUERY

A question arises in a letter from Mr. Paul Emmert, Regional Counsel, Region V, San Francisco, respecting establishment of a teacherage in the Owyhee school district and requesting a citation to the authority relied upon to give the Board of Trustees authority to plan, construct, finance and maintain and operate such a facility. Attention is called to Attorney General's Opinion No. 39.

OPINION

This office, under Opinion No. 39, dated April 12, 1951, held that under an application to acquire Federal funds for the construction of a school building, where the amount applied for was to defray the entire cost of providing the elementary school facility, such a grant was an outright gift, and the trustees had the authority to accept the entitlement and expend it for the designated purpose without an election.

The grant was under Section 201, Title II, Public Law 815, 81st Congress, relating to school construction in Federal affected areas. The language in the Act referred to local educational agencies as being eligible upon application submitted through the appropriate State educational agency.

The Nevada School Code specifically empowers Boards of School Trustees to construct, purchase and maintain school buildings. The grant referred to in the opinion was for the purpose of exercising powers conferred by statute.

In Opinion No. 39, *supra*, we held that Chapter 61, Statutes of Nevada 1945, was not applicable to the grant considered in the opinion as the Federal Act provided that the local educational agency of the State shall be eligible under the section.

There is no authority granted in the Nevada School Code under which a Board of Trustees for an elementary school district can construct or purchase a teacherage for the accommodation of school teachers.

Public Law 815, Section 102, Title I, relating to the construction of school facilities in areas affected by Federal activities, and for other purposes, provides that the application to the Commissioner of Education shall designate the State educational agency as the sole agency for carrying out such purpose.

While the school trustees have no authority to construct a teacherage, it appears that the Legislature by Chapter 61, Statutes of Nevada 1945, made a general provision under which funds from the Federal Government may be accepted for use by public tax-supported schools and school systems.

This Chapter reads as follows:

Section 1. The state board of education shall prescribe regulations under which contracts, agreements or arrangements may be made with agencies of the federal government for funds, services, commodities, or equipment to be made available to the public tax-supported schools and school systems under the supervision or control of the state department of education.

SEC. 2. All contracts, agreements, or arrangements made by public tax-supported schools and school systems in the State of Nevada involving funds, services, commodities, or equipment which may be provided by agencies of the federal government, shall be entered into in accordance with regulations prescribed by the said board of education and in no other manner.

Section 3 repeals Acts in conflict. Section 4 makes the Act effective from and after its passage and approval.

The title of this Act reads: "An Act relating to public education; to safeguard the educational interest and welfare of the state by prescribing conditions under which funds, services, commodities or equipment provided by agencies of the federal government may be accepted for use by public tax-supported schools and school systems of the State of Nevada."

The purpose of the Act is expressed in the title and broad powers are granted therein to effect relief where there is no specific statute.

We are informed that the practice of furnishing teacherages in Indian schools from Federal funds is common where facilities are not available for housing the teachers.

We are, therefore, of the opinion that the State Board of Education has the authority to make the necessary agreements with Federal agencies to secure funds to safeguard the educational interest and welfare of the State where the nature of the circumstances require the construction, financing and operation of a teacherage facility in a school district from Federal funds.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-326. Taxation—Petroleum Products—State Sealer—The Effect of Chapter 204, 1953 Statutes, Upon Chapter 238, 1931 Statutes, as amended.

CARSON CITY, April 13, 1954.

MR. WAYNE B. ADAMS, *State Sealer. P.O. Box 719, Reno, Nevada.*
Attention: E. L. Randall, Chemist.

DEAR SIR: This will acknowledge receipt of your letter dated March 31, 1954, requesting the opinion of this office upon the following facts and question.

STATEMENT

It appears that within the last several months the State Sealer, in the course of his duty as inspector of petroleum products, has picked up several samples of gasoline containing sulphur in excess of 0.35 percent. These samples were obtained from retail service stations of the General Petroleum Corporation. It appears, moreover, and it is our information, that an excessive sulphur content is damaging to automotive parts.

Because of this damaging effect, the State of Nevada, by legislative enactment in 1947, included within the standards or specifications for the quality of gasoline the requirement that the sulphur content of gasoline to be sold in Nevada shall not exceed 0.35 percent. The 1953 Legislature, by an Act designed, according to its title, to regulate the sale and distribution of petroleum products, again set forth specifications for the quality of gasoline. The specifications are, for all practical purposes, identical with the specifications set forth in the 1931 Statutes, as amended in 1947, with the exception that the 1953 enactment makes no mention of sulphur content in gasoline.

The General Petroleum Corporation, upon being informed by the Nevada State Sealer that the sulphur content of its gasoline must be held at or under the maximum of 0.35 percent, takes the position, in reply, that because of the 1953 enactment there no longer exists a restriction upon the sulphur content of gasoline sold in Nevada.

The 1931 Act is Chapter 238, 1931 Statutes, as amended by Chapter 249, 1947 Statutes. The 1953 Act is Chapter 204, 1953 Statutes.

QUESTION

Does the Nevada law presently require that gasoline sold in Nevada shall not contain sulphur in excess of 0.35 percent?

OPINION

The answer is in the negative.

A careful examination of the 1931 and the 1953 Acts discloses that, as to those sections of the two Acts which set forth specifications for the quality of gasoline, the 1931 Act has been superseded by the 1953 Act.

We are constrained to this view for the reason that both Acts are primarily designed and operate as regulatory measures; the safeguard of the public being the objective in both instances. This objective being single, it would be unreasonable to conclude that the Legislature intended that two different sets of standards should be extant for this purpose. It was the manifest purpose of the Legislature to prescribe the standard for the quality of gasoline in the 1953 Act.

The exclusion in the 1953 Act of the requirement that gasoline shall not contain in excess of 0.35 sulphur constitutes an annulment of that requirement. *Gill v. Goldfield Con. M. Co.*, 43 Nev. 1.

We feel it incumbent upon this office to make a further statement in connection with this matter. It is clear that the purpose of this legislation is to provide a safeguard against the

unprincipled practice of foisting inferior petroleum products upon the unwary public; yet, by the 1953 Act this very objective is in large part defeated by the deletion of the requirement limiting the sulphur content in gasoline. It is our thought that this matter should be given further consideration by the next legislative session. We are moreover constrained to suggest that the entire 1953 Act should be carefully examined for the purpose of clarification by amendment. This, to the end that it be made intelligible as to whether it was intended that the bulk of gasoline sold in this State is to be inspected under this Act. The Act belies its title.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-327. Taxation—Motor Vehicles—Military Personnel—Cars of Servicemen Used in Business Subject to Personal Property Tax—Tax Collection in Home State of Serviceman not Prerequisite to Tax Exemption in State of Temporary Residence.

CARSON CITY, April 16, 1954.

MR. ROBERT A. ALLEN, *Chairman, Public Service Commission, Carson City, Nevada*.

DEAR MR. ALLEN: We are in receipt of your letter dated April 6, 1954, requesting the opinion of this office on the following statement of fact and question as quoted from your letter.

STATEMENT

“The Motor Vehicle Division of the Public Service Commission is confronted with the problem of taxation as regards license plates only of motor vehicles used by military personnel.”

“In some instances we have found that the wives of servicemen used the cars in gainful employment within this State.”

This opinion should be read in connection with Opinion No. 314, dated February 3, 1954.

QUESTION

1. Would such use of the car otherwise exempt from other than plate license nullify the exemption?

2. To gain the exemption from the payment of personal property tax in this State and the resultant procurement of license plates for a five dollar fee, is it necessary that the serviceman show that he has paid personal property tax in the State of his permanent residence?

OPINION

Although you state that the Commission is confronted with the problem of taxation as regards license plates only, we conclude from your questions that you are interested in the ad valorem personal property tax.

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, provides, in part, as follows:

* * * provided, that nothing contained in this section shall prevent taxation by any state * * * in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction.

We interpret this to mean that if the automobile itself is used in the doing of a trade or business, it is then subject to the personal property tax irrespective of who is making use of the automobile in the trade or business.

It should be made clear that we are here discussing the vehicle of a serviceman. That is to say, a vehicle registered in his name as the legal owner. We are not discussing a vehicle owned by the wife of such a serviceman. That is to say, a vehicle registered in her name as the legal owner; for in such case the vehicle, owned by the wife, would be subject to the personal property tax if she is gainfully employed in the State whether the automobile is used in her work or not.

The vehicle, therefore, owned by the serviceman, who is here temporarily under military orders, is exempt as a subject of personal property taxation. However, if such vehicle owned by such serviceman is used in a trade or business, it is not exempt and is to be taxed. This, whether such vehicle is used by the serviceman or some other person in the conduct of a trade or business.

We do not wish to be understood that the use by the wife of the vehicle owned by her serviceman husband for the purpose of going back and forth to her place of employment is to be considered the use of the vehicle in a trade or business. The vehicle is not in such case being used in a trade or business and remains personal property tax exempt.

The answer, therefore, to question No. 1 is in the affirmative, if the vehicle owned by the serviceman is being used in a trade or business.

The answer to question No. 2 is in the negative.

It is our opinion that the United States Supreme Court opinion in the case of *Dameron v. Brodhead*, 73 S. Ct. 721, answers this question to the effect that the home State of the serviceman need not have levied and collected the personal property tax as a prerequisite to the personal property tax exemption in the State of temporary residence.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-328. Lander County; District Attorneys; Counties. District Attorneys Required to Maintain Office at County Seat.

CARSON CITY, April 22, 1954.

LANDER COUNTY GRAND JURY, *Box 26, Battle Mountain, Nevada*.

GENTLEMEN: This will acknowledge receipt of your letter dated April 12, 1954, requesting the opinion of this office on the following statement of facts and questions:

STATEMENT

The District Attorney of Lander County, with the approval of the Board of County Commissioners, maintains an office in Battle Mountain as well as in Austin; Austin being the county seat. He is available to the county on a 24-hour basis. He has the written approval of the Board of County Commissioners to absent himself from his office. He maintains a permanent residence in Battle Mountain.

This opinion should be read in connection with the letter of this office dated April 5, 1954, addressed to the Honorable John M. Barry, District Attorney, Battle Mountain, Nevada, relating to this same subject matter.

QUERY

1. Is it, or is it not, legal for the District Attorney to absent himself from the county seat?
2. Assuming the legality of the absence of the District Attorney, is there any stipulated length of time (for example, a percentage, 20 percent, 40 percent, 60 percent, 80 percent) that he may be absent?
3. Following the thought of Question No. 2 above, is the length of absence a matter of discretion on the part of the Board of County Commissioners?
4. We note, and quote in part from your letter of April 5: "The provision in Chapter 195, Statutes of 1945 * * * appears to intend a temporary absence rather than a permanent absence." Can you be more explicit on this point? The word "appears" in your statement emasculates the entire thought.
5. Is there anything illegal in the situation presented in the above set forth statement of facts?

OPINION

Section 2045, N.C.L. 1929, provides as follows:

The sheriffs, county recorders, county clerks, assessors, county treasurers and district attorneys shall keep an office at the county seat of their county, which shall be kept open on all days except Sundays and non-judicial days from nine o'clock a.m. to twelve o'clock m., and on all days except Sundays, non-judicial days and Saturdays from 1 o'clock p.m. to five o'clock p.m. for the transaction of public business; provided, that the provisions of this act shall not apply to the district attorney when called away from his office by official duties; provided that nothing contained herein shall be construed so as to interfere with any duty now required of any public officer under any of the election laws of this state.

Section 2046, N.C.L. 1929, as amended by Chapter 195, Stats. 1945, provides, in part, as follows:

* * * if any officer mentioned in Section 1 of this Act shall absent himself from his office, except when called away from his office by official duties, or except when expressly permitted so to do by the board of county commissioners or a majority of the members thereof in writing, or except when he first makes provision to leave his office open for the transaction of public business on the days and during the hours prescribed by Section 1 of this Act and in charge of a deputy duly qualified to act in his absence, there shall be withheld from his monthly salary * * *.

Section 2045 means what it says: that the District Attorneys shall keep an office open during the weekdays and during the morning on Saturdays at the county seat. It is clear that the requirement to keep an office open at the county seat is not complied with by keeping an office open at some other place than the county seat. Nor is it complied with by designating an office space at the county seat as the office of the district attorney which is kept open only a few days out of each month, or, if kept open, occupied by the District Attorney or a deputy only a few days out of each month.

Section 2046 authorizes the absence of the District Attorney from his office upon permission of the County Commissioners. This provision does not contemplate that such absence shall be a regular practice; nor are we able to find or read into the provision that during such absence the District Attorney is authorized to maintain the District Attorney's office in some other locality than that of the county seat. If such were contemplated, the primary object of the Act expressed in Section 2045 requiring the office to be maintained at the county seat during the designated hours would be nullified. We do not consider this to be the object of the provision. It is our opinion, therefore, that the provision authorizing absence upon permission of the County

Commissioners refers to and contemplates only such absence as is absolutely temporary to meet unforeseen circumstances or emergencies.

Answering Question No. 1, it is legal for the District Attorney to absent himself from the county seat when upon official duty or when so permitted by the County Commissioners. However, there is no authority to absent himself regularly for the major part of each month, nor regularly for any part of each month. It is our information that the major portion of the official duties of the Lander County District Attorney is concerned with the Battle Mountain area because the population is greater in the northern part of the county than in the southern part. This may well be, but, in order to comply with the law, the official duties of the Lander County District Attorney, as a regular practice, must be performed at the county seat, except when occasion requires temporary absence. The people of Battle Mountain will, if the law is to be complied with, have to come to the District Attorney's office in Austin rather than the District Attorney as a regular practice going to the people in Battle Mountain.

Answering Question No. 2, there is no stipulated percentage of time during which the District Attorney can be absent because such absence in accordance with a stipulated, predetermined percentage of time contemplates a regular absence. As pointed out above, such absence is not in accordance with the law.

Answering Question No. 3, the length of absence of the District Attorney is to be governed by the length of time required to complete the mission or object of his absence.

In answer to Question No. 4, we believe that the foregoing opinion sufficiently amplifies the thought expressed in our letter of April 5, 1954.

In answer to Question No. 5, this office is of the opinion that the situation existing in Lander County is not in accordance with the law.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-329. Contracts—Justice of the Peace Cannot Enter Into Any Contract With State, County, or Municipality.

CARSON CITY, April 30, 1954.

HONORABLE GROVER L. KRICK, *District Attorney, Douglas County, Minden, Nevada*.

DEAR MR. KRICK: This will acknowledge receipt of your letter in this office April 26, 1954, in which you request an opinion upon the following statement.

STATEMENT

The Douglas County Board of Commissioners is advertising for bids on building a courthouse and jail for Tahoe Township. The Justice of the Peace in Tahoe Township is a contractor and has asked you if he can lawfully make a bid on this contract. You call attention to Section 4827, N.C.L. 1929.

QUERY

Can a Justice of the Peace legally bid on a contract to build a courthouse and jail in the township in which he holds the office of Justice of the Peace?

OPINION

We are of the opinion that your question must be answered in the negative.

Section 1, Article VI, of the Constitution of Nevada provides: "The judicial power of this state shall be vested in a supreme court, district courts, and justices of the peace. * * *"

Section 8 provides that the Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State.

Section 9261, N.C.L. 1929, defines where Justices' Courts shall be held and that they shall have no term, but shall always be open. Concurrent jurisdiction with District Courts and Justices' Courts is given for the enforcement of mechanics liens, where the amount does not exceed three hundred dollars, and also for the recovery of money if the sum claimed does not exceed that amount.

Section 2201, N.C.L. 1929, as amended by Chapter 172, Statutes of Nevada, makes it the duty of the County Commissioners to fix the minimum compensation of township officers, and they may increase, but not decrease, such compensation during the term.

Section 4827, N.C.L. 1929, reads as follows:

It shall not be lawful for any officer of state, or member of the legislature, alderman, or member of the common council of any city in this state, or for the trustees of any city, town, or village, or for any county commissioners of any county, to become a contractor under any contract or order for supplies, or any other kind of contract authorized by or for the state, or any department thereof, or the legislature, or either branch thereof, or by or for the aldermen or common council, board of trustees, or board of county commissioners of which he is a member, or to be in any manner interested, directly or indirectly, as principal, in any kind of contract so authorized.

Section 4855, N.C.L. 1929, reads as follows:

No deputy, nor employee, of any state, county, or municipal officer of the State of Nevada shall in any manner, directly or indirectly, receive any commission or compensation of any kind or nature, inconsistent with loyal service to the people, resulting from any contract or other transaction in which the state, county, or municipality is in any way interested or affected.

Section 4857, N.C.L. 1929, makes all contracts prohibited by the Act void.

While the Justice of the Peace is not designated in Section 4827, *supra*, the section does specify any officer of State, and Section 4855, *supra*, designates any State or county employee, which in our opinion discloses the intention of the Legislature to prohibit contracts which are in opposition to public policy.

Obtaining of public contracts which are deemed contrary to public policy is expressed in 13 C. J., page 432, Section 371, that "Another class of agreements which are within the rule are those between a state, county or other municipal corporation for the doing of work or the furnishing of supplies with one of its own officers or with a company or body of men of which such officer is one, or in which he is interested."

Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case. 13 C.J., page 427, note 49.

We are of the opinion, therefore, that under the laws of Nevada a Justice of the Peace cannot enter into any contract with the State, a county or municipality, and consequently the Justice of the Peace of Tahoe Township cannot enter into a contract with the County Commissioners of Douglas County for the construction of the building in question.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

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

OPINION NO. 1954-330. Insurance—Insurance Against Loss or Damage by Strikes Authorizes Under Nevada Insurance Act.

CARSON CITY, May 4, 1954.

MR. PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada.*

DEAR MR. HAMMEL: This will acknowledge receipt of your letter of March 26, 1954, in which you request the opinion of this office regarding the following questions:

1. Is a loss to an employer resulting from a strike by employees an insurable event or risk?
2. Whether or not such a type of insurance company might properly be organized under the authority of Sec. 5 of Article 1 with particular reference to Class II (h) of the Nevada Insurance Code.
3. Whether or not the issuing of such a type of insurance would be contrary to the public interest.

OPINION

The Nevada State Legislature has, by virtue of Chapter 189, 1941 Statutes of Nevada (Sections 3656-3656.166, N.C.L. 1929, 1931-1941 Supplement), as amended, entitled the "Nevada Insurance Act," exercised the unquestioned power of the State to regulate insurance companies and the method of conducting an insurance business. (See Appleman, *Insurance Law and Practice*, Vol. 19, Section 10321.) Such being the case, the answers to your questions must first be sought in the State law before turning, if necessary, to the General Insurance Law.

Section 3656.04, N.C.L. 1929, 1931-1941 Supp., being Section 5 of the Nevada Insurance Act, provides, in part, as follows:

Classes of Insurance. Insurance and insurance business shall be classified as follows:

Class 3. Fire and Marine, Etc.

(c) War, Riot and Explosions. Insurance against loss or damage by bombardment, invasion, insurrection, riot, *strikes*, civil war or commotion, military or usurped power, or explosion. (Italics supplied.)

It is the opinion of this office that the above-quoted section expressly authorizes the issuance of insurance against loss or damage by strikes, and we have no reason to believe that the Legislature intended the word "strike" to mean anything other than labor strikes according to the general usage of the term.

Accordingly, your first and third questions are answered as follows:

Question No. 1: A loss to an employer resulting from a strike by employees is an insurable event or risk.

Question No. 3: The issuance of an insurance contract insuring an employer against loss or damage by strikes is not contrary to public interest. In answering this question we presume, as we must, that the Legislature has in mind at all times the interest and welfare of the public, and that such was considered at the time of the enactment of the Nevada Insurance Act.

In your second question you ask whether or not an insurance company can properly be organized under Section 5 of the Nevada Insurance Act (Section 3656.04, N.C.L. 1929, 1931-1941 Supp.) to insure against the loss or damage by strikes, and you refer particularly to Class 2(h), which provides as follows:

(h) Other Casualty Risks. Insurance against any other casualty risk not otherwise specified under classes 1 or 3, which may lawfully be the subject of insurance and may properly be classified under class 2.

It is our opinion that the organization and operation of such an insurance company is expressly authorized under Subsection (c) of Class 3 of the above-cited section. Subsection (h) of Class 2 is a general provision which is indicative of the broad liberal view adopted by the Legislature with regard to the insurance business. The counterpart of Subsection (h) of Class 2 is found in Subsection (g) of Class 3. Since there is an express provision, reliance on a general provision is unnecessary.

While we have examined the general law on the subject of strike insurance and found it to be consistent with the foregoing, we do not feel that a discussion of it at this time will either add to or detract from our opinion.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: JOHN W. BARRETT, *Deputy Attorney General*.

OPINION NO. 1954-331. Insurance—Insurance Agent May Not Be Concurrently Licensed as an Insurance Adjuster.

CARSON CITY, May 4, 1954.

MR. PAUL A. HAMMEL, *Insurance Commissioner, Carson City, Nevada*.

DEAR MR. HAMMEL: Some time ago you requested the opinion of this office regarding the following question:

Should Section 11 of the Nevada Insurance Adjusters' Act, Chapter 333, 1953 Statutes of Nevada, be interpreted so as to authorize the concurrent licensing of an insurance agent as an insurance adjuster?

OPINION

Section 11 of Chapter 333, 1953 Statutes of Nevada, provides, in part, as follows:

1. On behalf of and as authorized by an insurer, for which he is licensed as an agent, an agent may from time to time act as an adjuster without being required to be licensed as an adjuster, except that no agent may act as an adjuster for a company with whom he has a retrospective contract on losses incurred under policies written by him.

Although it might be contended that said Section 11 implies that an insurance agent for one company can be licensed to act as an adjuster for other insurance companies, we think such an interpretation would be strained and unrealistic. It is our opinion that the language of Section 11 is clear and unambiguous and for that reason not subject to interpretation, and that the Legislature intended no more nor less than is indicated by a plain reading of the section.

We are further of the opinion that, as a matter of public policy, an insurance agent should not be concurrently licensed as an insurance adjuster. As a practical matter, it is difficult for us to conceive how an agent for one insurance company could possibly expect to be retained as an adjuster for another company, if the latter company were aware of such fact.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.
By: JOHN W. BARRETT, *Deputy Attorney General*.

OPINION NO. 1954-332. Counties. No Statutory Authority to Issue General Obligation Bonds of County for Construction of Public Swimming Pool.

CARSON CITY, May 11, 1954.

HONORABLE JON R. COLLINS, *District Attorney, White Pine County, Ely, Nevada*.

DEAR MR. COLLINS: This will acknowledge receipt of your letter in this office May 10, 1954, requesting an opinion upon the following subject.

STATEMENT

The citizens of White Pine County allegedly desire to build a swimming pool. Numerous efforts have been made to produce the desired result but they have failed. It is proposed that a swimming pool be constructed in Ely and financed by general obligation bonds of the county. Your search of the law for authority for a county to issue general obligation bonds for a purpose of that kind has failed to find such authority.

QUERY

Does a county of the State of Nevada have authority to issue its general obligation bonds to pay for the construction of a swimming pool to be devoted to general use by the people of the county?

OPINION

We agree with your conclusion, and in our opinion such power is not specifically granted by statute, nor necessarily implied as may be incidental for the purpose of carrying into effect the powers granted.

The statutes specifically authorize counties to incur bonded indebtedness to construct suitable buildings, hospitals, airports, electric plants, railways, telephone lines and high schools.

Section 2049.01, N.C.L. 1931-1941 Supp., provides that the County Commissioners of the several counties having a population of 15,000 or more, in addition to the powers now conferred upon them, are authorized to operate, improve and maintain all public parks, golf courses, and other public recreation centers and areas, the construction of which has either been initiated or completed, and the title to which is held by the county.

This Act was passed in 1939, and applies to recreation centers which have been initiated or completed, and in which title vests in the county.

Section 2049.11, N.C.L. 1943-1949 Supp., provides for the acquisition by Boards of County Commissioners in counties having more than 10,000 population, to procure parcels of land for park, recreational and memorial purposes. Payment for the same is authorized out of unexpended moneys remaining in any county fund, except bond and interest funds, and may be included in the budget.

Section 1942, as amended by Chapter 363, Statutes of Nevada 1953, is an Act creating a Board of County Commissioners and defining their duties and powers. There is no authority conferred in this Act to issue bonds to construct and maintain public swimming pools, and it cannot be implied as authorizing other Acts as may be lawful and strictly necessary to the full discharge of powers and jurisdiction conferred on the board, under the thirteenth paragraph of Section 8 of the Act.

The general Act relating to public securities, Sections 6085-6092, N.C.L. 1929, provides for an election as to the issuance of bonds, defines certain provisions in the bonds, regulates the sale, and provides for a tax levy to redeem bonds and pay interest.

The first section refers to bonds issued under lawful authority by any county, city, town, school district or municipal corporation.

As held by the court in *State ex rel. King v. Lothrop*, 55 Nev. 405, it is well settled that County Commissioners have only such powers as are expressly granted, or as may be necessarily incidental for the purpose of carrying such powers into effect.

The court construed paragraph 11, Section 1942, N.C.L. 1929, which gives the power to repair a courthouse or other public building, but held that the power to issue bonds for such purpose is not conferred by that section.

A search of the statutory provisions reveals that Boards of County Commissioners have authority to issue bonds only in certain specified and defined instances.

We are unable to find express or implied authority to issue general obligation bonds of the county to pay for the construction of a public swimming pool.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

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

**OPINION NO. 1954-333. County Officers—Prisons and Jails—Courts—Sheriffs
Obliged to Follow the Order of the Court as to the Place of Confinement of
Prisoners.**

CARSON CITY, May 12, 1954.

HONORABLE JOHN BARRY, *District Attorney, Lander County, Battle Mountain, Nevada.*
Attention: Frank Weinrauch, Secretary, Lander County Grand Jury.

DEAR MR. BARRY: In accordance with our telephone conversation of May 4, 1954, the following opinion is sent to you in answer to a letter addressed to this office from the Lander County Grand Jury dated April 30, 1954, requesting the opinion of this office on the following statement of facts and questions.

STATEMENT

The Justice of the Peace at Battle Mountain sentenced a person to a term of imprisonment and expressly stated in the order of commitment that the prisoner was to be imprisoned in the Lander County jail at Austin. The Sheriff refused to imprison the person in the county jail, giving no reason for the refusal.

QUERY

The following questions are quoted from the letter from the Grand Jury:

1. Who has the primary authority to say where a prisoner shall be confined, the Sheriff or the Justice of the Peace?
2. We understand that the Sheriff has complete control over prisoners already confined to the county jails. In this instance he did not accept the prisoner. Is he encroaching on the power of the judiciary by attempting to force upon said body a decision which they may not or cannot make?

3. A precedent has been set. If the Sheriff can refuse a prisoner remanded to a specific jail by a Justice of the Peace, what law is to prevent him from taking the same action against a District Judge, or any other judge?

OPINION

Section 11531, N.C.L. 1929, concerning the establishment of branch county jails, provides as follows:

The board of county commissioners of the several counties of the State of Nevada are hereby authorized to establish, by an order to be entered in their minutes, a branch county jail in any town in such counties, whenever in their judgment the public needs require it, and to provide that persons charged with or convicted of a misdemeanor in such town or other town or townships mentioned in the order shall be imprisoned in such branch county jail instead of in the county jail at the county seat; provided, that nothing in said order shall prohibit any judge or justice of the peace before whom such conviction may be had from ordering any such prisoner to be imprisoned in the county jail at the county seat of the county wherein such conviction may be had where the public safety or the safety of such prisoner may require it.

It is clear from the above-quoted section that it was the intention of the Legislature that as a general practice the branch county jails are to be used to imprison persons sentenced to jail from the district wherein the branch county jail is located. However, the proviso to the section is very explicit to the effect that discretion is lodged in the Judge or Justice of the Peace to order that the convicted person be imprisoned in the county jail at the county seat if the safety of the prisoner or of the public requires it. By this section this discretion is lodged in the Judge or the Justice of the Peace and not in the Sheriff. It is true that the section permits the exercise of this discretion for safety purposes, and it may be that good practice would require that the Justice of the Peace or Judge should include a statement in the commitment papers to the effect that the incarceration in the jail at the county seat is required for the purpose of safety to either the public or the prisoner; however, the section does not require such statement. In any event, it is not the Sheriff's prerogative to countermand the law and take it upon himself to alter or obstruct an order of the Judge or Justice, particularly when the issuance of such order by the Judge or Justice is specifically authorized by law.

It is true that the Sheriff has custody of the jails of his county and control of the prisoners. But this is not to say that he can refuse to accept a prisoner committed to his jail; nor is it to say, in light of the above-quoted section, that he can refuse to accept a prisoner in one of his jails contrary to court order and imprison the prisoner in some other jail better suited to his convenience. The Sheriff is no more authorized to carry on such practice than he is to turn the prisoner loose who is sentenced to confinement, until properly discharged.

In the event there is any question in the mind of any Sheriff as to the extent of his authority in this regard, he would do well to observe the following quoted sections:

Section 10044 N.C.L. 1929-

Every officer who, in violation of any legal duty, shall wilfully (willfully) neglect or refuse to receive a person into his official custody or into a prison under his charge, shall, in a case where no other punishment is specifically provided by law, be guilty of a gross misdemeanor.

Section 4820 N.C.L. 1929-

If any sheriff, public administrator, keeper of a jail, constable, or other officer, shall wilfully refuse to receive or arrest any person charged with criminal offense,

such sheriff, public administrator, jailer, constable, or other officer, so offending, shall, on conviction thereof, be fined in any sum not less than one thousand nor exceeding five thousand dollars, or imprisonment in the state prison not exceeding five years, and removed from office.

Section 2158 N.C.L. 1929-

When any prisoner shall be committed to the county jail for trial, or for examination, upon conviction for a public offense, or for disobedience to any writ, mandate, process or order of any court, such prisoner shall be actually confined in the jail until he is legally discharged; and if he be permitted to go at large out of the jail, except by virtue of a legal order or process, it shall be an escape, and the sheriff or jailer permitting it shall be deemed guilty of a misdemeanor, and may be fined in any sum not exceeding ten thousand dollars.

In answer to Question No. 1, we assume that the branch jail in Battle Mountain was established by the County Commissioners and that in accordance with Section 11531 N.C.L. 1929, it was provided that persons convicted in the Battle Mountain area shall be imprisoned in that jail. In such case, and in the absence of a specific order by the Justice of the Peace to the effect that the prisoner is to be confined in the county jail at the county seat, it is clear that the prisoner is to be confined in the branch jail in Battle Mountain. However, where the Justice of the Peace at Battle Mountain specifically orders that the prisoner be confined in the county jail at the county seat, it becomes obligatory upon the Sheriff to see to it that the prisoner is confined in accordance with that order. Therefore, the authority to say where a prisoner shall be confined is found in the statute and order of the County Commissioners, except when the Justice exercises his authority, based upon the statute, to require confinement in the county jail at the county seat.

In Question No. 2, while the Sheriff has control over prisoners confined to his jail, this does not mean that he can do anything he chooses with the prisoners. He is bound by statutory provisions. There is no question of encroachment by the Sheriff upon the power of the judiciary, for the failure of the Sheriff to perform the duties of his office does not constitute an encroachment upon the power of the judiciary, rather it is an encroachment upon the right of the public to have the Sheriff perform the duties for which he is paid.

In answer to Question No. 3, there has been no precedent set here. A county officer does not, by failing in his duty, thereby establish the authority to continue to fail in his duty. Insofar as the Sheriff's failure to comply with proper orders of the District Court is concerned, he is not only governed by the sections of the law already quoted but is also governed by Section 2149, N.C.L. 1929, which provides, in part, as follows:

It shall be the duty of the sheriff to attend in person, or by deputy, at all sessions of the district court in his county, and to obey all lawful orders and directions of the same.

A lawful order of the District Court would be a sentence to the county jail upon conviction of a gross misdemeanor. In our opinion, the above-quoted Section 11531, N.C.L. 1929, concerning branch county jails, contemplates and includes orders of a District Judge as well as of a Justice of the Peace. The terms "any judge or justice of the peace" are used in the proviso. This indicates that the Legislature in its use of the word "misdemeanor" in this section was using the word in its general or generic sense and includes gross misdemeanor. Therefore, the Sheriff is required by law to obey an order of the District Court issued by virtue of Section 11531, N.C.L. 1929, and to obey any other lawful order of the District Court.

We are obliged to point out that the framework of our law, both statutory and constitutional, which the people through their elected representatives have enacted, is designed, insofar as the judicial branch of government is concerned, to require that the court shall issue the orders within the scope of its authority and the Sheriff shall carry them out. Thus the people have elected the

Judge to issue lawful orders and have elected the Sheriff to carry out those orders. The people have not elected the Sheriff to act as Judge, nor to usurp the authority of the Judge, nor to obstruct the legal processes by refusing to carry out the lawful orders of the court.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-334. Taxation—Possessory Interests of Lessees Under Title 8 of National Housing Act Concerning the Commonly Known Wherry Projects are Subject to State Ad Valorem Taxation.

CARSON CITY, May 13, 1954.

DIRECTOR, FEDERAL HOUSING ADMINISTRATION, *Lunsford Building, Reno, Nevada*.

DEAR SIR: Reference is hereby made to your recent correspondence requesting an opinion of this office as to whether the possessory interest of the lessees in the commonly known Wherry projects is subject to taxation in Nevada.

STATEMENT

Under Title 8 of the National Housing Act, the Federal Government leases land owned by it within the State for the purpose of erecting housing near military installations. It is our understanding of the process that the lessee constructs the project and in turn sublets the dwellings; that the improvements become, upon construction, a part of the real estate owned by the Federal Government in accordance with paragraph 11 of the lease.

QUERY

Is the interest of the lessee subject to ad valorem property taxation in Nevada?

OPINION

The answer is in the affirmative.

Section 6418, N.C.L. 1929, provides, in part, as follows: "All property of every kind and nature whatsoever, within this state, shall be subject to taxation except: All lands and other property owned by the state, or by the United States."

Section 6419, N.C.L. 1929, which defines real estate for the purpose of taxation, provides, in part, as follows:

The term "real estate," when used in this act, shall be deemed and taken to mean and include, and is hereby declared to mean and include * * * the ownership of, or claim to, or possession of, or right of possession to any lands within the state, and the claim by or the possession of any person, firm or corporation, association or company to any land, and the same shall be listed under the head of "Real Estate."

The power of the State to tax possessory interests of persons or companies in lands owned by the United States was upheld in *State v. C.P.R.R. Co.*, 21 Nev. 247. This decision was affirmed by the United States Supreme Court, 162 U.S. 512.

Unless there is some impediment placed in the way of such taxation by the United States Government, there is no alternative, under the mandatory provisions of the Nevada statutes, than to assess the interests of the lessees concerned in the "Wherry Projects."

Any impediment to State taxation, which may be thought to exist by reason of exclusive Federal jurisdiction which may have been acquired, is, in the opinion of this office, removed by Section 6 of the Wherry legislation (C. 493, Sec. 6, 61 Stats. 775) which provides, in part, as follows:

The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to state or local taxation.

We are of the opinion that the lessee's interest is subject to Nevada ad valorem taxation.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-335. Elections—Vacancy in Nomination After Primary Election When Only Nominee for Partisan Office was an Independent Candidate.

CARSON CITY, May 27, 1954.

HONORABLE L. E. BLAISDELL, *District Attorney, Mineral County, Hawthorne, Nevada*.

DEAR MR. BLAISDELL: This will acknowledge receipt of your letter in this office May 24, 1954, requesting an opinion upon the following statement and questions.

STATEMENT

The County Auditor and Recorder of Mineral County died May 20, 1954. He was the incumbent, and had filed for reelection as an independent candidate without opposition.

QUERY

1. May the County Republican or Democratic, or both parties, nominate a candidate for this office?
2. If candidates may file as Independents, is there any limit to the number of Independent candidates whose names could appear on the ballot in November?
3. If Independent candidates may file, what would be the number of electors whose signatures would be required on the certificate of nomination, i.e., would it be 5 percent of the total vote cast for Representative in Congress at the last general election?

OPINION

Question No. 1 is answered in the negative.

Question No. 2—Independent candidates may file. No limit.

Question No. 3—The number of electors required to sign the petition is five percent of the entire vote cast at the last preceding general election in Mineral County.

Section 25 of the Primary Election Law, as amended by Chapter 145, Statutes of 1947, relates to vacancies after primary and how filed.

The first paragraph reads:

Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district or state, as the case may be. Such action shall be taken not less than thirty days prior to the November election.

The remainder of the section deals with vacancies in nonpartisan nominations for nonpartisan offices, the number of electors required on a petition, the time in which to file, and payment of required fee.

The facts in the situation presented are that the office is partisan and no party candidate filed at the primary. The only person who filed for the office was the incumbent, and he filed as an Independent. He died after he was entitled to be certified as a candidate and only nominee for the office. The time in which a person may have his name placed on the primary ballot as a candidate for either political party has expired. The time for filing a certificate of nomination as an Independent candidate has also expired.

There is no direct provision in the election statute to meet the contingency presented in the questions submitted.

The question as to the right of a political party to fill a vacancy occurring after the holding of a primary, under statutes similar to that of Nevada, has been decided in a number of jurisdictions.

In *Anderson v. Cook*, 130 P(2) 278, the court held that the authority of a party committee to act in filling a vacancy occurring between primary and general election is contingent upon the primary nomination followed by a vacancy in that nomination. Where a primary has been held in which there were no candidates for nomination for office, the court said that the condition of Section 40 has not been fulfilled and the committee is without power to act. No vacancy on the ticket has occurred between any primary election and general election.

Section 40 mentioned, provided: "Vacancies on the ticket occurring between any primary election and general election shall be filled by the party committee of the county, district or state as the case may be."

District Party Committee of Republican Party v. Ryan, 106 P(2) 261, held: Where a candidate for Judge filed for Democratic nomination and Republican Party did not nominate a candidate against him and candidate died after holding primary, and thereafter the Republican and Democratic Committees named candidates to fill vacancy on respective tickets, Secretary of State properly refused to certify name of Republican party committee nominee, since statute provided for filling of vacancies occurring after holding a primary by party committee applies only to vacancies in nominations made at the primary.

Same principle in *Watson v. Witkin*, 22 A(2) 17.

In *State v. Wilson*, 40 Nev. 131, the court referred to the filling of vacancies occurring after any party convention by the party committee. The question, however, was on the lack of authority of the executive board to issue the certificate rather than the county committee.

Attorney General's Opinion No. 373, dated September 30, 1946, held where there was a vacancy on the Republican ticket after the primary election, the vacancy could be filled by the Republican party, but as no Democrat had filed prior to the primary, such party had no standing in the matter.

We are therefore of the opinion that neither the Republican nor Democratic Committee may file a certificate of nomination for a candidate or candidates under the circumstances presented in the question submitted.

FILLING VACANCY WHERE ONLY CANDIDATE IS INDEPENDENT

Attorney General's Opinion No. 138, dated June 8, 1934, was relative to the placing of names of Independent candidates on the primary election ballot. The opinion held that under the primary law the intent of the Legislature was that party candidates were to be nominated at the primary election and that also certain nonpartisan candidates were to be nominated at such primary. The intent of the Legislature was declared to be clear as to party candidates and nonpartisan candidates, but the primary law does not provide for the nomination of Independent candidates by an election; but provides for the nomination of Independent candidates by means

of a petition signed by electors. That when such a petition is filed with the proper officer, then such Independent candidate has the right to have his name placed on the ballot at the November election.

The case of *Riter v. Douglas*, 32 Nev. 401, decided the constitutionality of the primary law. On page 429, the court held that the primary law is not mandatory in compelling candidates who may desire to get on the official ballot to submit themselves to the primary election. They have the privilege of running independently if they desire.

The intention of the Constitution and the Election Law is that all officers whose election is provided for shall be chosen by the electors.

A general principle expressed in 20 C.J., Elections, page 126, Section 143, is that where a statute prescribes an exclusive mode of making nominations, but contains no provision for filling vacancies occurring after nominations have been made, such vacancies cannot be filled except in the manner prescribed for making original nominations.

In the present situation there is no nomination for the office of County Auditor and Recorder, due to the death of the only candidate for such office, who was nominated by petition as an Independent candidate.

It therefore follows that such vacancy should be filled in the manner prescribed for making the original nomination.

Independent candidates are not nominated at the primary election, and there is no limit as to the number of nominations by petition that may be made.

State Ex Rel. *King v. Hanson*, 294 N.W. 453.

The court held that the statute does not expressly prescribe a method for selection and elimination among the candidates, where more than one petition is presented to fill a ballot vacancy.

The Legislature might, as the court said, make such a provision for selection and elimination in such cases, but if the court were to hold that the first petition presented filled the ballot vacancy, we should be improvising for the Legislature. It would leave the race to fill the ballot vacancy to the swift alone, which is hardly a commendable exercise of democratic process. But, more than this, it would leave the situation stalemated if two or more persons should undertake to present petitions to the County Clerk at the same time.

We are therefore of the opinion that the vacancy on the ballot of County Auditor and Recorder in Mineral County should be filled by petition as provided in Section 31 of the Nevada Primary Law. The number of petitions cannot be limited. The number of electors whose signatures would be required on the certificate of nomination is at least 5 percent of the entire vote cast in Mineral County at the last general election.

Such petitions must be filed on or before 30 days prior to the November election in 1954.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

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

OPINION NO. 1954-336. Blind Persons—Aid to by State Welfare Department. Treatment to Prevent Blindness or Restore Vision to Qualified Persons is Authorized in Act to Aid the Blind. Changes Needed in Allotment of Funds to Facilitate Such Work Program Controlled by Budget Act.

CARSON CITY, June 18, 1954.

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 June 10, 1954, relative to use of appropriated funds for aid to the blind.

STATEMENT

During the fiscal year of the current biennium, a balance has accumulated in the appropriation of State funds for aid to the blind, occasioned by the fact that the number of persons in the State receiving a monthly allowance under Section 39 of the Act to aid blind persons has not reached the number originally estimated.

The State Welfare Department on May 21, 1954, adopted a policy, effective July 1, 1954, whereby up to \$5,000 of the money now in the fund would be used throughout the next fiscal year to provide for treatment to prevent blindness, or restore vision to applicants or recipients. All applications for such aid would be first reviewed and approved by the supervising ophthalmologist for the Department.

The plan is to make payment direct to hospitals and doctors providing treatment, thus making better control of the funds and secure more favorable rates than if reimbursement for such expenses was made to the individual applicant or recipient.

The Board anticipates that the expenditure of available funds for treatment and prevention of blindness will trend to saving in funds for general aid, as well as assisting such persons in becoming self-supporting.

QUERY

Is it legally possible to use the balance of funds in the State appropriation for aid to the blind to pay for treatment or operations to prevent blindness or restore vision as proposed under the policy adopted by the State Welfare Board?

OPINION

We are of the opinion that the proposed policy of the State Welfare Department to use the unexpended balance in the legislative appropriation to pay for treatment or operations to prevent blindness or restore vision, and to make payment directly to hospitals, doctors and other persons for such services is authorized by statute.

The change in the original allotment of funds permitting use of the balance of such fund for the fiscal year beginning July 1, 1954, however, is controlled by the provisions in the Budget Act.

Chapter 369, Statutes of 1953, is an Act to provide aid to blind persons.

Section 1 of the Act declares its purpose in the following language:

The purpose of the provisions of this Act is to relieve blind persons from the distress of poverty and to encourage and assist blind individuals in their efforts to render themselves more self-supporting.

Section 2 reads: "Aid to the blind' means money payments to blind individuals."

Section 3 reads: "The provisions of this Act shall be liberally construed to effect its objects and purposes."

Attorney General's Opinion No. 300, dated November 5, 1953, construed blind person as used in the Act as any person who by loss or impairment of eyesight is unable to provide himself with the necessities of life.

Section 28 reads as follows:

The Nevada state welfare department may provide for treatment or operation to prevent blindness, or restore vision to applicants for, or recipients of, aid to the blind who request and make written application for such treatment or operation.

The Nevada state welfare department shall reimburse the eye patient for all necessary expenses incurred with the diagnosis and treatment. Necessary expenses shall include the costs of guide service, maintenance while the patient is away from his home, transportation to the eye physician or hospital and return to his home, and the cost of nursing home care when such care is necessary.

Section 29 contains provisions that the rules and regulations of the Department shall recognize that the needs and problems of blind persons are special to them and may differ materially from the needs and problems of other classes of aid recipients. The statute specifically provides for treatment for operations to prevent blindness, or restore vision to applicants for assistance as proposed by the Welfare Department.

The proposal to make payment for such services directly to hospitals or doctors, instead of reimbursing the recipients, involves a construction of the statute.

Section 28 uses the language: "The Nevada state welfare department shall reimburse the eye patient for all necessary expenses incurred in connection with the diagnosis and treatment."

As held in *Ferro v. Bargo Min. & M. Co.*, 37 Nev. 319: 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 Legislature directed that the provisions of the Act shall be liberally construed to effect its objects and purposes.

The applicants for, and recipients of, aid are needy people, and it would not be feasible to require them first to pay the expenses.

The word reimburse is not used in a technical sense.

A term which is not technical in its meaning should, especially when used in a remedial statute, be liberally construed in favor of those entitled to its protection. *Tobin v. Gartiez*, 44 Nev. 179.

Direct payment to the hospital or doctor and others providing treatment and care would not be repugnant to the statute.

The availability of the unexpended balance of the appropriation for the proposed purpose is determined by the Act making the appropriation.

The Legislature under Chapter 294, Statutes of 1953, Section 64, made a blanket appropriation of \$102,758 for "Aid to the blind."

Section 65 of this Act provides that the funds herein appropriated shall be expended in accordance with the allotments, transfer, work program and budget provisions of that certain Act, referring to the Budget Act under Chapter 299, Statutes of Nevada 1949.

Section 12 of the Budget Act provides that not later than June 1 of each year the Governor shall require the head of each department of the State Government to submit to him through the Director of the Budget a work program for the ensuing fiscal year. This program shall show the requested allotment of the appropriation by quarters for the fiscal year.

The Governor with the assistance of the Director shall review the requested allotments with respect to the work program of each department, and shall, if he deems it necessary, revise, alter or change such allotments before approving the same.

The Appropriation Act must be read together with the Budget Act on the same matter.

The court, in *State v. Eggers*, 36 Nev. 364, page 376 said: "But the language used in the appropriation bill is not the only language that is considered in determining the legislative intent. In the general appropriation bill, appropriations are made in concise language, usually intended to be supplemented by more definite, existing statutes, and for the purpose of meeting the expenses of the state government in accordance therewith."

This rule is expressly applicable since the Legislature in making the appropriation to aid the blind has directed that the expenditure of the allotted fund shall be in accordance with the provisions of the Budget Act.

If the work program of the Welfare Department was submitted as required by the Budget Act, we must conclude that the change in allotment of the unexpended balance, to carry out the policy of the Welfare Department, rests entirely with the Governor and the Budget Director.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-337. Nevada National Guard—State Guard is an Organization of the State and its Civilian Employees are Employees of the State. Opinion No. 298, dated September 24, 1953, Concerning the Interpretation of Chapter 103, Stats. 1953, Hereby Modified.

CARSON CITY, June 21, 1954.

MR. HARRY A. DEPAOLI, *Executive Director, Employment Security Department, P.O. Box 602, Carson City, Nevada.*

DEAR MR. DEPAOLI: This office is in receipt of your letter dated June 3, 1954, requesting our opinion as to the employment status of the civilian employees of the Nevada National Guard.

QUERY

We quote your question from your letter as follows:

I am requesting that you submit your opinion as to whether or not the civilian employees of the Nevada National Guard are employees of the Federal government or are employees of the State of Nevada, and hence eligible for Federal old age and survivors insurance coverage, as provided in Chapter 103, Laws of Nevada 1953.

OPINION

This office is of the opinion that the civilian employees of the Nevada National Guard are employees of the State of Nevada. We are of this opinion because we are also of the opinion that the Nevada National Guard is an instrumentality of the State of Nevada, and not, at present, an instrumentality of the Federal Government.

The authorities appear to be practically unanimous to the effect that the National Guard of the several States are State organizations, which do not become a part of the United States Army, and consequently not an organization of the Federal Government, until the Federal Government demands their services in time of emergency. *Satcher v. U.S.*, 101 F. Supp. 919; *Baker v. State*, 156 S.E. 917; *State v. Johnson*, 202 N.W. 191; *State v. Moore*, 88 S.W. 881. See also 57 C.J.S. "Militia," Section 8, p. 1085; 36 Am. Jur. "Military," Section 42-49.

The position of the Nevada National Guard, for the purpose of this question, is in no wise dissimilar to the various other State Guards. The Nevada Constitution in Article I, Section 11, provides that the military shall be subordinate to the civil power; Article V, Section 5, provides that the Governor shall be the commander-in-chief of the military forces of the State except when called into the service of the United States; Article XII, Sections 1 and 2, provide that the Legislature shall provide by law for the organizing and disciplining of the State Militia and that the Governor shall have the power to call out the State Militia to execute the laws of the State. Sections 7115 through 7264, N.C.L. 1929, as amended, set forth the State laws pertaining to the Nevada National Guard.

Nor do we understand that the status of the National Guard is altered by the enactment of the Armed Forces Reserve Act of 1952, Chapter 25, Title 50 U.S.C.A. In our contemplation, this Act does no more than facilitate a means of drawing on the State Guard in times of emergency by creating such reserve organizations as the National Guard of the United States and the Air National Guard of the United States composed of the various Federally recognized State Guards.

Having determined that the Nevada National Guard is a State organization, it follows that civilian employees of the Nevada National Guard are employees of the State of Nevada.

However, we have assumed her that the group of civilian employees involved in this problem are employees of the Nevada National Guard. We contemplate that you also wish to know whether or not the particular civilians in question are actually employed by the Nevada Guard. The answer to such a question will entail an analysis of each particular employment.

The law is to the effect that the true determining element as to whether the employer-employee relationship exists is whether or not the employer has the right to control the manner in detail as to how the work shall be done. There are other factors which are determinative, such as the power to employ, the power to discharge (which is, of course, closely connected with the power to control), and the factor of the obligation to pay the salaries. These latter factors are helpful in determining the relationship, but are not conclusive. It appears to be the factor of the right to control the manner or method of doing the work which is the ultimate element without which the relationship does not exist. See 56 C.J.S., Section 2, page 29, and the decisions cited therein.

The statement set out immediately above is quite general in its nature, and is designed simply to set forth a standard to aid in determining this question. Each employment should be considered in light of the standard or measure herein referred to.

It is our understanding that the civilian employees in question are under the control, insofar as the supervision of their work is concerned, of the Office of Adjutant General, and that this control is either direct or through delegation of authority. We also understand that some of these employees are paid directly by the Federal Government and not by the State of Nevada. Undoubtedly there are other factors involved. This office is of the opinion that those civilian employees, over whom the Adjutant General has control or the right to control as to the manner and method of their work as he shall see fit, are employees of the Office of the Adjutant General and, therefore, employees of the State of Nevada. This, irrespective of the fact that they are compensated by the Federal rather than the State Government, and irrespective of the fact that some of them may or may not be controlled insofar as their hiring and firing is concerned by the Federal Civil Service System.

We are also of the opinion that this may well be considered a situation wherein there is a dual employment. That is to say, the employee is serving two separate employers at the same time as to one act. There is an exception to the rule that one cannot be the employee of two employers at the same time. As stated in the Restatement of the Law of Agency, Section 226, "A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other." See, also, *Meridian Taxicab Co. v. Ward*, 186 So. 636; 56 C.J.S., Section 2, page 37. Both the State and the Nation have a vital interest and money in the Nevada National Guard. Moreover, it appears to us that those civilian employees who are doing work, for example, in furthering the training of the Guard so that the Guard members may, upon some emergency in the future, be used by either the State or the Nation, are by that very work serving dual purposes and are thereby serving two employers at one time whose interests are not conflicting.

Therefore, even though the State of Nevada may not be the exclusive employer in this matter, it is nonetheless an employer of the civilians who meet the foregoing test as to what constitutes an employment relationship. As was pointed out in the written opinion dated May 26, 1954, by George L. Vargas, Legal Counsel for the Nevada Employment Security Department, and with which opinion this office is in accord on this question, there are certain civilian employees engaged as unit caretakers of the Federal property used by the State Guard who are by decision of a Federal court determined to be employees of the Federal Government apparently to the exclusion of the State. As to these individuals your problem is resolved by those decisions.

Chapter 103, Statutes of Nevada 1953, and the Federal Social Security Act, Title II, Section 218, provides the means whereby employees of a public agency may be covered by the Federal Old-Age and Survivors' Insurance System.

A public agency is defined by Chapter 103, Statutes 1953, as, among other things, the State or any instrumentality thereof.

The Nevada National Guard, being an organization or instrumentality of the State is, therefore, a public agency within the meaning of the State statute. It follows that the employees of such public agency are eligible for coverage by the Federal Old-Age and Survivors' Insurance System provided the other requirements are met.

Concerning the interpretation of Chapter 103, Statutes of Nevada 1953, and the Federal Social Security Act, Title II, Section 218, as to what constitutes a "coverage group" and the governing body thereof, it appears that the definition of a coverage group as set forth in the Federal Act is controlling, and that Act appears to contemplate a coverage group to consist of all of the State employees. It follows that as to such coverage group, the Governor of the State is the governing head of such group. The opinion of this office, No. 298, dated September 24, 1953, is hereby modified to this extent.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-338. Fish and Game. Fishing the Waters in Irrigation Ditches When Permitted is Under the Jurisdiction of the Fish and Game Commission. Placing Chemicals or Other Substances Deleterious to Fish in Irrigation Ditches is a Violation of the Statutes.

CARSON CITY, June 24, 1954.

HONORABLE JACK STREETER, *District Attorney, Reno, Nevada*.
Attention: William J. Raggio, Assistant District Attorney.

DEAR MR. STREETER: This will acknowledge receipt of your letter in this office June 22, 1954, submitting your preliminary opinion on the question of jurisdiction of the Fish and Game Commission over violations of the fish and game laws which may occur in irrigation ditches, and what constitutes pollution of waters in such ditches.

You conclude that illegal fishing methods in such ditches can be prohibited by the Fish and Game Commission, and that dumping toxics into such ditches to clear them of algae which results in the killing of large numbers of trout constitutes pollution of the waters.

QUERY

You request an opinion from this office as to whether violation of the fish and game laws, such as illegal fishing methods or excessive limits can be enforced with reference to fish taken from such ditches, and what constitutes pollution of waters affecting fish.

OPINION

We concur in your opinion that the Fish and Game Commission of the State has jurisdiction over violations of the fish and game laws which occur in irrigation ditches, and that substances placed in irrigation ditches which cause the death of fish is a pollution of such waters and in violation of the statutes.

Section 45 of the Nevada Fish and Game Act, as amended by Chapter 357, Statutes of 1953, uses the language: "It shall be unlawful for any person to fish in or from any of the waters of the State of Nevada for any fish of any species whatever with seine, net, spear, set line, set hooks, grab hooks, trot line, or snag line, or in any other manner known as snagging, or with any weir fence, trap, giant powder or any other explosive compound, or in any manner other than with hook and line attached to a rod held in the hands and in the manner known as angling;" carp and coarse fish may be taken by seine. The balance of the section deals with the number of hooks, attractors and certain bait. Other sections and regulations define the limit of fish to be taken.

Section 21 (Section 3035.21, N.C.L. 1943-1949 Supp.) divides the State into districts. In designating the districts the language used is, "shall consist of all the waters and lands" in the named district.

Chapter 356, Statutes of 1953, amends Section 20 of the Act, and provides for the dividing of the State in distinct districts, "for the protection and preservation of fish and game on the land and in the water."

Section 3035.30, N.C.L. 1943-1949 Supp. (Section 30 of the Act) provides that any person, firm, or corporation owning in whole or part of any canal, ditch, or any artificial watercourse, taking or receiving its waters from any river, creek or lake in which fish have been placed or may exist, shall place and maintain at the intake of such ditch a grating, screen or other device to prevent any fish from entering such canal or ditch.

Section 3035.08, N.C.L. 1943-1949 Supp., declares that fish in this State not domesticated and in their natural habitat are part of the natural resources belonging to the people of the State of Nevada.

Section 7890, N.C.L. 1929, Section 1 of the water law reads: "The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public."

There is no absolute property in the waters of a natural stream, and the only right one may acquire thereto is by diverting the waters for usufructuary purpose, and a water right, to be available, must be attached to the land and become in a sense appurtenant thereto by actual application. *Prosole v. Steamboat Canal Co.*, 37 Nev. 154.

The fish and game laws specifically provide for the establishment of private breeding and fish hatcheries for the propagation, culture and maintenance of fish. All fish in their habitat belong to the people of the State to be taken as provided by law.

Fishing in irrigation ditches is not a public right as the element of trespass is involved, but when fishing is allowed, such fishing must comply with the fish and game statutes, and regulations by the Fish and Game commission.

POLLUTION OF WATER

Section 10552, N.C.L. 1929, provides a penalty for depositing in any of the waters of the lakes, rivers, streams and ditches a poison or deleterious substance which affects the health of persons, fish or livestock.

Section 3135, N.C.L. 1943-1949 Supp., Section 28 of the fish and game laws, makes it a misdemeanor to place chemical and other substances into any of the waters of this State deleterious to fish.

When it is established that a chemical substance is placed in the waters in irrigation ditches and such substance is highly injurious or causes death of game fish, such practice is in violation of the law.

Therefore violations of the fish and game laws which occur in irrigation ditches come within the jurisdiction of the State Fish and Game Commission and the County Game Management Boards.

The pollution of waters in irrigation ditches deleterious to fish is not only prohibited by the fish and game laws, but is specifically prohibited by the criminal laws of the State.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-339. Fish and Game—State Fish and Game Commission does not have authority to obligate funds in advance of their collections for a specific purpose. Expenditure of available funds comes within the Budget Act and authorization by the Legislature.

CARSON CITY, July 2, 1954.

MR. FRANK W. GROVES, *Director, Fish and Game Commission, 51 Grove Street, Reno, Nevada*.

DEAR MR. GROVES: This will acknowledge receipt of your letter in this office June 29, 1954, requesting an opinion on the following subject:

STATEMENT

The Commission at this time has the opportunity to purchase a fish hatchery already constructed for \$250,000, and it has been suggested that they purchase it on a contract basis of \$50,000 a year until paid for.

QUERY

Has a commission such as the State Fish and Game Commission the authority to obligate funds in advance of their collection for a specific purpose? If not, what steps should the Commission take to make provisions for the construction or purchase of a fish hatchery costing well over the \$100,000 mark?

OPINION

Section 10 of the Fish and Game Act, Section 3035.10, 1929 N.C.L. 1949 Supp., as amended by Chapter 309, Statutes of 1951, and Chapter 360, Statutes of 1953, which defines the powers and duties of the Fish and Game Commission contains among its provisions the following language, "The commission shall have the exclusive power to expend and disburse all funds of the State of Nevada acquired for the protection, preservation, or propagation of fish and game, and arising from state appropriations, gifts, license fees, or otherwise, in the manner provided in this act."

Section 9, Section 3035.09, 1929 N.C.L. 1949 Supp., creates the State Board of Fish and Game Commissioners. In paragraph two of this section the procedure for expending funds is defined in the following language, "All accounts for expenditures made or incurred by said board of fish and game commissioners, or by the executive board, or by any commissioner pursuant to the provisions of this act, shall be approved by the said executive board and, upon being further approved by the state board of examiners, warrants for the respective amount shall be drawn on the state treasurer."

Section 11, Section 3035.11, 1929 N.C.L. 1949 Supp., creates the Fish and Game Fund kept in the State Treasury. The section defines the purposes for which the funds may be used. Among those purposes as expressed is, "and for the cost of acquisition, construction and maintenance of fish hatcheries in the state."

Section 9, which requires the approval of the State Board of Examiners, brings the expenditures within the general provision for payment as other claims against the State are paid.

The Legislature, under Chapter 299, Statutes of 1949, adopted the State Budget Act. Section 11 of this Act, quoting from the language deemed relevant, provides. "On or before October first

of the even-numbered years, all departments, institutions, and other agencies of the state government, and all agencies receiving state funds or fees or other moneys under the authority of the state, including those operating on funds designated for specific purposes by the constitution or otherwise, shall prepare, on blanks furnished them by the director of the budget, and submit to said director estimates of their expenditure requirements, together with all anticipated income from fees and all other sources, for each fiscal year of the biennium compared with the corresponding figures of the last completed fiscal year and the estimated figures for the current fiscal year. The expenditure estimates shall be classified to set forth the date of funds, organization units, character, and objects of expenditures; * * *.”

The Budget Director, as provided in Section 9, is made ex officio clerk of the Board of Examiners, and shall assist the board in examination, classification, and preparation for all claims required to be presented to said board.

The Fish and Game Act relative to the expenditures of the Fish and Game Fund and the Budget Act are in concord.

“Legislative acts should be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish the result.” *Nye County v. Schmidt*, 39 Nev. 456.

The Legislature, by Chapter 287, Statutes of 1953, indicated a policy to further control the expenditures by various departments, boards, commissions and agencies of the State Government, when it provided for expenditures of moneys not appropriated from the General Fund. The various departments are named and the amount of money authorized to be expended is set out under each title, and the expenditures are in association with the Budget Act.

Referring again to the Budget Act, Section 12, each department, institution and agency of the State Government, not later than June first of each year, shall submit to the Governor, through the Director of the Budget, a work program for the ensuing fiscal year, such program shall include all appropriations or other funds from any source whatsoever made available to a department, institution or agency for its operation and maintenance, and for the acquisition of property, and show the requested allotments. The section further provides that, “The aggregate of such allotments shall not exceed the total appropriation or other funds from any other source whatsoever made available to said department, institution, or agency for the fiscal year in question.”

In addition to the lack of authority as disclosed by the statutes, the obligation of funds by the Commission, for a specific purpose in advance of their collection, may rightly be construed as a violation of Section 4, Article IX of the Nevada Constitution, which declares that the State shall never assume the debts of any county, town, city, or other corporation whatever,

The State Fish and Game Commission is not an incorporation, but it is a body politic authorized and established by law of the State from consideration of public policy. Its existence, its capacities and its powers are all conferred by law for some real or supposed public benefit to result from it. It is a political institution of the State. 14 C.J. page 49.

It is, therefore, the opinion of this office that the State Fish and Game Commission does not have authority to obligate funds in advance of their collection for the purpose of entering into a contract for the purchase of the fish hatchery in question.

The procedure for the expenditure of available funds should follow the provisions of the Budget Act for submission to the Legislature for authorization.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-340. Taxation—Veterans—Residence synonymous with domicile in veteran’s tax exemption statute. For purpose of veteran’s tax exemption, absence because of military service does not alter residence of a Nevada resident.

CARSON CITY, July 12, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor, Executive Chamber, Carson City, Nevada.*

DEAR GOVERNOR RUSSELL: This office is in receipt of your letter dated June 11, 1954, requesting advice upon the following question. We quote the question from the letter as follows:

QUERY

If a person established residence in Nevada in March of 1950; was called into the armed forces in September 1950 and remained in service until July 1952, would that person be eligible to receive Veteran's Exemption when applying for a 1954 Nevada Motor Vehicle License and applying on the personal property tax on the vehicle being licensed.

OPINION

It is our further information that the veteran referred to in the question returned to Nevada immediately upon honorable discharge and has remained here since that date.

Section 1, Chapter 13, Statutes of Special Session 1954, at page 30, provides, in part, as follows:

Section 1. All property of every kind and nature whatsoever within this state shall be subject to taxation except: * * *

Sixth * * * The property of any person who has served a minimum of 90 days on active duty (unless sooner discharged or retired by reason of service-incurred disability) in the armed forces of the United States in time of war, the definition of service in time of war to be determined from the dates of beginning of wars as determined by presidential proclamation or by act or resolution of congress, or who has served in the armed forces of the United States after June 1, 1950, and prior to such date as shall thereafter be determined by presidential proclamation or by act or resolution of congress, and upon severance of such service has received an honorable discharge or certificate of service from such armed forces, or who, having so served, is still serving in such armed forces, shall be exempt from taxation to the extent of one thousand (\$1,000) dollars assessed valuation of such property; provided, however, that for the purpose of this section the first one thousand (\$1,000) dollars assessed valuation of property in which such person has any interest shall be deemed the property of such person. Such exemptions shall be allowed only to claimants who shall make an affidavit annually, on or before the second Monday in November for the purpose of being exempt on the tax roll; provided, however, that said affidavit be made at any time by a person claiming exemption from taxation on personal property. Said affidavit to be made before the county assessor to the effect that they are actual bona fide residents of the State of Nevada and have been an actual bona fide resident of the State of Nevada and established his residence for a period of more than 3 years immediately preceding the making of said affidavit, that such exemption is claimed in no other county within this state; * * *.

Under the terms of the above-quoted law, if this veteran's time in the service can be counted in his favor as time during which he did not lose his Nevada residence, he has, then, acquired the residence required to avail himself of the tax exemption.

The term "residence" in tax statutes means domicile, and is used synonymously with the term "domicile." See 51 Am. Jur., "Taxation," Section 447; see also *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823. Domicile is more than mere presence. It is the intent to make a permanent abode in a certain place coupled with actual presence there. If, however, the domicile is once established,

absence from it for no matter how long does not change the domicile unless there is an intention to abandon it in favor of another. See 17 Am. Jur., "Domicile," Sections 14, 16 and 28.

Therefore, if, in this case, the veteran originally established his domicile in Nevada, and had no intention of abandoning it, he did not lose his domicile or residence while away in the service. As a consequence he would be eligible for tax exemption.

Moreover, as a general proposition of law, the domicile of a person is in no way altered because he is away in the military service. See 17 Am. Jur., page 634.

This conclusion is also supported by Section 6405, N.C.L.1929, which defines legal residence in this State as follows:

The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, 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 the 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.

Here again intention is the important element. Many things may evidence the intent. For example, where did the person vote, where did he maintain his address and so forth. This is, of course, a question of fact, but the mere fact of absence during military service does not change a person's domicile or in this case residence.

It is our information that the veteran in question came to Nevada and lived here for some six months prior to entrance in the service; that he entered the service from Nevada and that, directly upon discharge, he returned to Nevada and has been here since. With nothing to the contrary, we conclude that the intent to make Nevada his home for more than three years past is clearly established. Therefore, upon the basis of our information, and his residence having been established in accordance with the requirement of the statute, he is entitled to the exemption.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-341. Taxation; Public Lands. An applicant under contract to purchase State land is divested of his contract rights by a sale of said land at a tax sale. The purchaser at the tax sale can obtain the State patent in his own name.

CARSON CITY, July 16, 1954.

HONORABLE LOUIS D. FERRARI, *Surveyor General, Carson City, Nevada*.

DEAR MR. FERRARI: This is in response to your request for an opinion on the following facts and questions:

STATEMENT OF FACTS

X is in the process of purchasing land from the State of Nevada under a contract for that purpose. Having become delinquent in the payment of his taxes on this land, the land was deeded to Y by the Humboldt County Treasurer pursuant to a tax sale. Notwithstanding the tax sale, X has continued to make payments to the State under his contract.

QUERY

1. Is Y entitled to the patent from the State upon the payment of the balance of the contract price?
2. Is Y entitled to a patent issued in his own name upon the payment of the balance of the contract price?

OPINION

The answer to both questions is in the affirmative.

Section 6448, Nevada Compiled Laws Supplement 1943-1949, provides that, upon tax delinquency and notice, the tax receiver will issue a certificate authorizing the County Treasurer to hold the taxable property as trustee for the State and county for a period of two years; that, upon the expiration of two years if not redeemed, the title to the property shall vest in the county for the benefit of the State and county.

Section 6462, N.C.L. Supp., 1943-1949, provides that after two years a deed shall be executed to the County Treasurer. Thereafter, upon order of the County Commissioners, the property will be sold.

Section 6449, N.C.L. Supp., 1931-1944, referring to the deed to be issued to an individual at a tax sale, provides, in part, as follows:

Such deed conveys to the purchaser the absolute title to the property described therein, free of all incumbrances (encumbrances), except any lien for any taxes or assessments heretofore or hereafter levied by any irrigation or other district for irrigation or other district purposes, and except interest and penalties on the same, *except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession accrued as of the date of the deed to the purchaser.* (Italics added.)

Section 6463, N.C.L. 1929, provides that the balance of any money received from tax sales after taxes and costs are paid shall be paid into the General Fund of the county.

It is clear from the foregoing law that a person who loses his property by reason of tax delinquency is completely divested of his beneficial interest in that property. All his right, title and beneficial interest is taken from him. It is equally clear that where the State holds legal title to the land, the county does not acquire that legal title. That is to say, the State is not divested of its title by reason of the tax delinquency and sale procedure.

Under the law set forth above, the result is that the tax delinquent is divested of all his rights in the property, which in the present problem are the rights under the contract with the State. In the subsequent purchase by Y at the tax sale, only those property rights which the county acquired could be transferred, which were the contract rights. This constitutes what is in effect a forced assignment of the contract rights from X to Y.

The fact that X made payments to the State, after the tax sale, under his contract with the State, does not in any way operate to reinvest him with the interest of which he had been divested; nor does it operate to divest Y of the interest which he acquired by reason of the tax sale.

This brings us to a consideration of the second question. Section 5527, N.C.L. Supp., 1931-1941, concerning the procedure to purchase State lands, provides in part, as follows:

The title of the State to any lands sold under the provisions of this act shall be conveyed by patent, free of charge, to the applicant and none other, except as may be otherwise ordered by a competent court having jurisdiction; provided, that a patent may be issued to an assignee or successor in interest of the original applicant upon the furnishing to said registrar by the successor in interest a good and sufficient deed of conveyance of the original applicant's right, title and interest to

him or her in and to said contract and the land mentioned therein, which said deed has theretofore been duly recorded in the county wherein the said land is situate.

Inasmuch as Y can produce a good deed of conveyance of the interest of X in the contract, he is entitled to a patent in his own name.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-342. Motor Vehicles—Person who registered automobile under Chapter 213, 1953 Statutes of Nevada, eligible for refund under Section 8, Chapter 18, Statutes of Nevada, Special Session, if he can comply therewith.

CARSON CITY, July 29, 1954.

HONORABLE R. A. ALLEN, *Chairman, Public Service Commission, Carson City, Nevada*.
Attention: Richard A. Herz, Director, Motor Vehicle Division.

DEAR SIR: You have requested the opinion of this office as to whether a person who registered a motor vehicle in compliance with the provisions of Chapter 213, 1953 Statutes of Nevada, and who thereafter removes the motor vehicle from this State and sells it in a foreign state, still has the right to claim a refund under the provisions of Section 8 of Chapter 18, 1954 Statutes of Nevada, Special Session of the Legislature.

OPINION

Chapter 213, 1953 Statutes of Nevada, provided, in part, as follows:

Notwithstanding any other provision of law, all motor vehicles registered and all license plates issued for the calendar year 1954, shall be registered and licensed until June 1, 1955. The county assessors of each of the several counties, in reregistering and relicensing motor vehicles for the year 1954, shall collect one and one-half times the license fee, and one and one-half times the personal property tax which he would collect under law were it not for this act; provided, however, that in registering and licensing motor vehicles for the first time in this state he shall collect on the basis of the months remaining before June 30, 1955.

Chapter 18, 1954 Statutes of Nevada, Special Session of the Legislature, repealed Chapter 213, 1953 Statutes of Nevada, and after making provision for refunds from the County Assessors and issuance of validating devices when refunds not claimed, provides, in part, in Section 8 thereof, as follows:

SEC. 8. Refunds for Vehicles Removed From the State or Destroyed.

1. Any person who registered a vehicle in compliance with the provisions of Chapter 213, Statutes of Nevada 1953, prior to the effective date of this act and who has not applied for a refund of license fees and personal property taxes as herein provided, and who subsequently removes the vehicle permanently from the State of Nevada, or whose vehicle, being so registered and no refund sought, has been destroyed or rendered useless may, prior to February 1, 1955, secure a refund of one-third of the license fees paid and a sum of money equal to the personal

property taxes collected for the 6-month period commencing January 1, 1955, and ending June 30, 1955, by;

(a) Executing and filing an affidavit with the motor vehicle division of the public service commission that such vehicle has not been operated within the State of Nevada since December 31, 1954.

(b) Surrendering to the motor vehicle division of the public service commission the license plate, or license plate and identifying device, issued to the owner of record.

Since the language of the quoted portion of said Section 8 is clear and unambiguous, it is not subject to interpretation, and we think such is true even as applied to the question about which you inquire.

It is the opinion of this office that a person who registered an automobile in accordance with the provisions of Chapter 213, 1953 Statutes of Nevada, and who was later issued a validating device because he made no timely claim for refund, and who has since removed the automobile from the State and sold it, can, after December 31, 1954, and before February 1, 1955, make application for refund provided he can and does, comply with the provisions of Section 8, 1954 Statutes of Nevada, Special Session of the Legislature. However, although such person may be able to execute the affidavit provided for in subsection 1(a) of said Section 8, it perhaps would be impossible, as a practical matter, for him to comply with subsection 1(b).

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.

By: JOHN W. BARRETT, *Deputy Attorney General*.

OPINION NO. 1954-343. Corporations—A foreign corporation which transacts a substantial part of its ordinary business in a continuous manner, and not as a casual transaction, is doing business in Nevada.

CARSON CITY, August 2, 1954.

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

DEAR MR. KOONTZ: This will acknowledge receipt of your letter in this office, July 14, 1954, requesting an opinion as to a foreign banking corporation doing business in this State.

STATEMENT

A mutual savings bank of New York contemplates the purchase of mortgages or deeds of trust secured by real property situated in this State, and desires to extend into Nevada only its investment activities through the services and cooperation of a foreign corporate agent qualified to do business in this State.

QUERY

Would such foreign mutual savings bank be doing business in this State in such manner as to obligate it, if possible, to qualify in this State under the provisions of the Nevada statutes requiring foreign corporations to qualify before carrying on business in this State?

OPINION

We are of the opinion, from the facts presented, that the foreign banking corporation would be doing such business in this State as to obligate it to qualify under the laws of Nevada.

Chapter 228, Statutes of 1949, is an Act to amend Section 1 of the Act to require foreign corporations to qualify before carrying on business in this State. The section provides that every corporation organized under the laws of another state, territory, the District of Columbia, a dependency of the United States or foreign country, which shall hereafter enter this State for the purpose of doing business therein, must, before commencing or doing any business in this State, file in the office of the Secretary of State of the State of Nevada a certified copy of its articles of incorporation, or of its charter, or of the statute or legislative, executive, or governmental acts, or authority by which it was created.

Section 747.46, 1929 N.C.L. 1941 Supp., provides that no person, firm, company, corporation or association, except banks doing business under the laws of the United States, shall engage in the banking business in this State without first obtaining from the Superintendent of Banks a license authorizing such person, firm, company, corporation or association to use the name and transact the business of a bank. The transacting of any banking business without such authority shall constitute a gross misdemeanor. Transacting the business of a bank would include the purchase of mortgages or dealing with deeds of trust and the making of loans.

Section 3 of the Act requiring the qualification of foreign corporations (Section 1843, N.C.L. 1929) provides penalties for foreign corporations which fail to comply with the provisions of the Act. One penalty is expressed in the following language, “* * * and shall not be allowed to commence, maintain, or defend any action or proceeding in any court of this state until it shall have fully complied with the provisions of this act * * *.”

Chapter 63, Statutes of 1943, provides that no banking, or other corporation, unless it is organized under the laws of and has its principal place of business in this State, or is a national banking association, the principal place of business of which is located within this State, or any officer, employee, or agent of such corporation acting in its behalf, shall hereafter be appointed to act as executor, administrator, guardian of infants or estates, receiver, depository, or trustee under appointment of any court or by authority of any law of this State.

The statutes do not define the term “doing business.”

In *Butler Bros. Shoe Co. v. United States Rubber*, 156 F. 1, the court, in speaking of authorities on the question of doing business said, “They are numerous, various and conflicting, and any attempt to reconcile them must fail. Authorities all agree, however, on one point, namely, that each case depends on its own facts.”

The case of *Begole Aircraft Supply v. Pacific Airmotive Corp.*, 212 P(2) 860, held that there is a distinction between doing business by a foreign corporation such as would subject it to the jurisdiction of court, not of its domicile and doing business of the character that would subject it to the power of the State to impose regulations upon its activities.

Brandtjen v. Kluge & Nanson, 115 P(2) 731—Whether a foreign corporation is doing business in Washington does not depend upon the number of transactions it has in Washington, but upon the nature and character of the business transactions.

The case of *Proctor Trust Co. v. Pope*, 12 So.(2) 724, presents facts similar to the subject matter in the instant question. Plaintiff, Proctor Trust Company, brought an action on a note secured by mortgage on real property in Louisiana. Plaintiff did a general banking business at its domicile in Vermont, which included the making of loans, purchasing notes and other commercial paper secured by mortgages against real estate. Plaintiff acquired from a mortgage company in Louisiana a number of notes which were secured by mortgages on real estate in Louisiana. This activity continued over a number of years. In affirming a dismissal in the lower court the appellate court held, when determined that a foreign corporation is doing business in the state within statutes prohibiting such corporation from presenting a judicial demand before the state courts, they must have complied with state law. Such corporation is doing business in the state whenever an important combination of functions is being performed. When a corporation transacts a substantial part of its ordinary business in the state as regards its corporation’s rights to maintain suits it must have complied with the state statute, and the court referred to the state statute which carried similar provisions as Section 3 of the Nevada Corporation Act. The court said, in affirming the judgment of dismissal in the lower court, that thus it has been declared that a foreign corporation may safely be said to be doing business

whenever an important combination of functions is being performed, such as the ownership, possession, or control of property, dealing with others in reference to the property, the exercise of discretion, the making of business decisions, and the execution of contracts.

The Supreme Court of Nevada adopted this definition of “doing business” in *Pacific States Sec. Co. v. District Court*, 48 Nev. 53. On page 57, the court said: “It seems to be the consensus of opinion that a corporation, to come within the purview of most statutes prescribing conditions on the right of corporations to do business within the state, must transact therein some substantial part of its ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligations. Hence, it may be laid down as a general rule that the action of a foreign corporation in entering into one contract or transacting an isolated business act in the state does not ordinarily constitute ‘the carrying on or doing of business’ therein.”

We are, therefore, of the opinion that the East Brooklyn Savings Bank of New York would be performing a substantial part of its ordinary business, continuous in nature, and of such character as to give rise to some form of legal obligations.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-344. Bonds of East Ely Sanitary District, White Pine County, are legal and binding obligations of said district.

CARSON CITY, August 16, 1954.

HONORABLE GRANT L. ROBISON, *Secretary, State Board of Finance, Carson City, Nevada*.

DEAR MR. ROBISON: We have examined the copy of the transcript of proceedings in the matter of the East Ely Sanitary District, White Pine County, Nevada, General Obligation Sewer Bonds, Series July 1, 1954, in the principal sum of \$150,000, issued under the provisions of Chapter 252, Statutes of 1953, and Acts amendatory and supplemental thereto.

The question submitted at the election noted that the bonds should not extend more than 30 years after their date; however, the bonds actually issued mature within the 20-year period, as provided in Section 23 of the Act, and bonds 79 to 150, both inclusive, are subject to call for redemption.

We are, therefore, of the opinion that the proceedings comply with the relevant valid statutes of Nevada under which the securities are issued, and that said issue of bonds in said amount is a legal and binding obligation on the East Ely Sanitary District in White Pine County, Nevada.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-345. Bonds—East Ely School District, White Pine County Bonds.

CARSON CITY, August 16, 1954.

HONORABLE GRANT L. ROBISON, *Secretary, State Board of Finance, Carson City, Nevada*.

DEAR MR. ROBISON: We have examined a copy of the transcript of the record of proceedings preliminary to and in the issue of East Ely School District General Obligation Building Bonds, Series April 1, 1954, in the principal amount of \$122,000, and find that all necessary steps and proceedings creating the bonds were duly and legally taken and had.

We are of the opinion that the said bond issue creates a legal debt and obligation to the East Ely School District, White Pine County, Nevada.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-346. Bonds—Consolidated School District No. 3, Washoe County, Nevada.

CARSON CITY, August 16, 1954.

HONORABLE GRANT L. ROBISON, *Secretary, State Board of Finance, Carson City, Nevada*.

DEAR MR. ROBISON: We have examined the transcript of the record of the proceedings preliminary to and in the issue of Consolidated School District No. 3, Washoe County, Nevada, General Obligation Building Bonds, Series May 1, 1954, in the principal sum of \$90,000, and find that all necessary steps and proceedings creating the bonds were duly taken and had.

We are of the opinion that the said bond issue creates a legal and binding obligation of the Consolidated School District No. 3 of Washoe County, Nevada.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-347. Bonds—Home Gardens School District, Washoe County, Nevada.

CARSON CITY, August 17, 1954.

HONORABLE GRANT L. ROBISON, *Secretary, State Board of Finance, Carson City, Nevada*.

DEAR MR. ROBISON: We have examined a copy of the record of the proceedings in the issue of Home Gardens School District No. 2, Washoe County, Nevada school bonds in the principal sum of \$24,000, Series May 1, 1954.

We are of the opinion that the acts and proceedings of the district for and in the issuance of said bonds have been regularly and legally performed, and that said bonds constitute the valid and legally binding obligations of the Home Gardens School District No. 2, Washoe County, Nevada.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-348. Bonds—Smith Valley Consolidated School District No. 1, Lyon County, Nevada.

CARSON CITY, August 17, 1954.

HONORABLE GRANT L. ROBISON, *Secretary, State Board of Finance, Carson City, Nevada.*

DEAR MR. ROBISON: As requested, we have examined a copy of the transcript of the record of proceedings covering the authorization and issue of Smith Valley Consolidated School District No. 1, Lyon County, Nevada, General Obligation Building Bonds, Series April 7, 1954, in the aggregate principal sum of \$70,000.

We are of the opinion that said proceedings show lawful authority as prescribed by the relevant statutes of Nevada, and that the said bonds constitute a valid and legally binding obligation of the Smith Valley Consolidated School District No. 1, Lyon County, Nevada.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*
By: GEORGE P. ANNAND, *Deputy Attorney General.*

OPINION NO. 1954-349. Motor Vehicle—Nonresident lessee of motor vehicle gainfully employed in Nevada subject to provisions of Act requiring registration of motor vehicles.

CARSON CITY, September 9, 1954.

HONORABLE ROBERT A. ALLEN, *Chairman, Public Service Commission, Carson City, Nevada.*

DEAR MR. ALLEN: This will acknowledge receipt of your letter of May 24, 1954 and subsequent correspondence requesting the opinion of this office as follows:

STATEMENT

A mining company operating in California and Nevada leases an automobile, bearing California license plates, from a California automobile rental company, said automobile being used in Nevada by the manager of the company for the transportation of persons and property, all of said persons being gainfully employed in Nevada. The leasing company relies for its operation of the vehicle on reciprocity between California and Nevada.

QUERY

You ask the following questions:

1. Does the rental operation nullify our right to collect registration fees and personal property tax on cars using our highways?
2. Does the use of the motor car rental system as now being operated in other states keep Nevada authorities from collecting motor vehicle license fees and the Assessors from collecting personal property tax?

OPINION

Section 4435.16, N.C. L. 1949 Supp., as amended by Chapter 120, Statutes of 1951, Section 17(a), provides, except as otherwise provided in the section, a nonresident owner of a vehicle subject to registration under the Act requiring registration of motor vehicles, which has been

duly registered for the current year in the State or other place of which the owner is a resident, and has such registration plates displayed, may operate *or permit* the operation of such vehicle within this State without registration in this State.

This permits nonresidents to travel throughout this State when properly registered in the state of residence.

An exception to this authority is that it shall not be construed to permit the use of manufacturers' or dealers' licenses in this State by nonresidents.

The next exception is that a nonresident owner of a vehicle of such type who, while residing in this State, accepts gainful employment within this State or who comes into this State for the purpose of being gainfully employed therein, shall for the purpose and subject to the provisions of the Act, be considered a resident of this State and pay such registration fees as provided for in this Act.

The licensee of a vehicle under the circumstances presented in the inquiry must be considered the owner for the purposes of this exception; and if lessee accepts gainful employment in this State, then he also must be considered a resident of this State and the vehicle is subject to the licensing provisions of the Act.

The latter part of the section refers to the Motor Carriers' Act, and reads as follows: "* * * provided further, nothing in this subparagraph shall be construed to require registration of vehicles of a type subject to registration under this act operated by nonresident common motor carriers of persons and/or property, or private motor carriers of property as stated in subparagraph (b) of this section."

Subparagraph (b) requires all nonresident owners or operators of vehicles of a type subject to registration under the Act, and operating as common motor carriers of persons or property or both, contract carriers of the same or private motor carriers of property, shall be governed by and pay the fees required by the provisions of such laws with respect to the operation of such vehicles in any of such carrier services.

Sections 4437.02-4437.25, 1949 Supp., contain the law and regulations as to all motor vehicle carriers.

If the use of the leased vehicles comes within the definitions of carriers of persons or property under the Motor Vehicle Carriers' Act, *supra*, it is subject to the provisions and the payment of fees under the Act.

The Motor Vehicles Carriers' Act contains a reciprocity section, subject to the discretion of the Public Service Commission.

The reciprocity provision in subparagraph (b) of Section 17 of the Act requiring the registration of motor vehicles applies only to the class of motor carriers named in the subparagraph. The reciprocity on motor vehicles existing between this State and California is governed by the language in paragraph 3 of subsection (b), Sections 17, of the registration of motor vehicles which reads as follows:

3. The vehicle commissioner of the public service commission of Nevada is hereby authorized, empowered, and directed to enter into agreements and formal compacts with appropriate officials of other states for the purpose of establishing rules and regulations governing registration, conduct and operation of motor vehicles coming within the provisions of subparagraph (b) above, including mutual agreements leading to the revocation of reciprocity of persistent violators of laws concerning motor vehicles.

Authority to enter into reciprocal agreements by the Vehicle Commissioner is confined to motor vehicles coming within the provisions of subparagraph (b), *supra*.

The leased motor vehicle in question, if not eligible for licensing under the Motor Vehicle Carriers' Act, is subject to registration license fees and payment of personal property tax in this State.

Respectfully submitted,

W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-350. United States Senator—Filling of vacancy in office of.

CARSON CITY, October 1, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor, Executive Chamber, Carson City, Nevada*.

DEAR GOVERNOR RUSSELL: Reference is hereby made to your letter of September 29, 1954, wherein you request the opinion of this office upon the following inquiries.

1. Is there now a vacancy in the office of United States Senator, to be filled by election of the people at the general election on November 2, 1954?
2. If your answer to question 1 is "yes" then how and in what manner is an election to be held and the nominations made for the office?

Your request is brought about by reason of the unfortunate and untimely death of our senior United States Senator McCarran on the evening of September 28 at Hawthorne, Nevada. The inquiries present the question and the problem of filling of the vacancy in the senatorial office so long and so ably filled by the late Senator. Senator McCarran's term of office has some two years to run, expiring on January 3, 1957. The regular general election of State and county officers is to be held November 2, 1954, according to law. The primary election for the ensuing November election at which candidates for public office are nominated has long since been held. The paramount question then is, shall the vacancy in said office be now filled on November 2 by an election by the people, or by you as Governor of the State. Supplementing my letter to you of September 30, 1954, expressing my conclusions in the matter, we submit the following:

OPINION

The applicable constitutional provisions and statutory law governing the instant question are as follows:

Article XVII, Constitution of the United States, providing for the popular election of United States Senators, reading:

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Sections 2592 and 2593, Nevada Compiled Laws, 1929, providing:

SEC. 2592. Certificates of nominations of candidates for United States senator shall be filed with the secretary of state of Nevada, who shall certify the names of all candidates as shown therein to the various county clerks as now required by law in case of candidates for state officers, and the several county clerks in preparing the ballots to be voted for at any such general election, shall place thereon the

names of all such candidates under the words "U. S. Senator—Vote for One." and there shall be a margin at the right-hand side of these names at least one-half inch wide, where the voter may indicate his choice of said candidates by marking a cross or X.

SEC. 2593. In case of a vacancy in the office of United States senator caused by death, resignation, or otherwise, the governor of Nevada may appoint some qualified person to fill said vacancy, who shall hold office until the next general election, and until his successor shall be elected and qualified.

Section 8, Article V, Constitution of Nevada empowers the Governor to make appointments in certain cases, by providing:

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.

Section 25, Primary Election Law, as amended at 1947 Statutes 478, so far as applicable here, provides:

Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district, or state, as the case may be. Such action shall be taken not less than thirty days prior to the November election.

The amendment of 1947 simply added the 30-day clause. The other portion was placed in the law at its enactment in 1917.

Section 30 of said Primary Law, as amended at 1949 Statutes 14, provides, "Party candidates for United States senator and representative in Congress shall be nominated under the provisions of this act, and in like manner, as state officers are nominated."

The power and authority enabling the respective states to provide for the election of United States Senators stems from and is based solely upon the Seventeenth Amendment to the Constitution of the United States. It was and is that amendment that empowered the Nevada Legislature to enact the above-mentioned state statutes dealing with the election of United States Senators, and we think that the answer to the inquiry presented here is to be based upon the conclusions to be drawn from the language contained in the state statutes as governed by the consent thereto embraced in the Seventeenth Amendment, and not necessarily as like statutes pertaining to purely state matters are construed.

The Seventeenth Amendment first provides that in the event of a vacancy in the office that the executive authority of the State shall issue writs of election to fill such vacancy. This certainly is evidence that the framers of the amendment sanctioned elections to fill the vacancy even to the extent of special elections. The proviso contained in the amendment empowers the executive of the State *to make temporary appointments* until the people fill the vacancy by election as the Legislature may direct. Most certainly the framers of the amendment by the use of the term "temporary appointments" never intended that an undue or prolonged vacancy should be filled by appointment. We submit that the language employed in the proviso cannot reasonably be construed to mean a general election at which a United States Senator would be elected for a new term of office, in the usual course of events, as it may be claimed Section 2593, Nevada Compiled Laws, warrants such a construction, necessitating an appointment by the Governor for the entire remainder of the unexpired term in question. We dissent from such view or contention. We submit if such a construction had been placed upon the proviso contained in the Seventeenth Amendment and also upon Section 2593, Nevada Compiled Laws, upon the death of Senator Pittman, November 10, 1940, some five days after the general election wherein the Senator was reelected for a six-year term, that there would have been no need for the subsequent elections to fill the vacancy in the then existing term of office beginning January 3, 1941. The record is clear

that an appointment to fill the vacancy in the term ending January 3, 1941, was made by the Governor and another appointment for the two-year period of the new term was also made. It is also a most clear record that in the general election of 1942, Honorable James G. Scrugham and the appointee Senator Bunker were candidates for the remainder of the unexpired term of the late Senator Pittman, Scrugham being elected to full out the term expiring January 3, 1947, dying in office in June 1945. Governor Carville was appointed to fill the vacancy. It is clear that thereafter in the 1946 primary Governor Carville and the then Representative Bunker filed for the new term of Senator, Bunker defeating Carville and in turn being defeated by Senator Malone for the new term. Certainly this record alone is ample precedent for the election to fill vacancies in the office of United States Senator at the next ensuing general election held in the State and most materially departs from the rule that the term "general election" in all cases means the election at which the officer would be regularly elected regardless of any vacancy therein. It must be remembered that Senator Pittman died immediately after the general election was held in November 1940, and no further general election would then be held until November of 1942, with a primary election therefor in September of that year. Here the death occurred prior to the next general election by the people after the primary election therefor had been held.

On November 25, 1940, the then Attorney General, the late Gray Mashburn, at the request of Governor Carville, rendered his opinion relative to the filling of the vacancy caused by the death of Senator Pittman, such opinion being Number B-20, reported in the Biennial Report of the Attorney General, 1940-1942, page 243. It will be noted in the opinion that reference is there made to a letter opinion of November 14, 1940. This letter opinion was a brief opinion outlining the views of the Attorney General and later incorporated in the opinion of November 25, 1940.

In the course of the opinion the Attorney General had occasion to discuss the Seventeenth Amendment and its relation to temporary appointments and the relation of Section 2593, Nevada Compiled Laws 1929 thereto, saying:

That the Governor of Nevada is and will be legally empowered to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman, under and by virtue of the provisions of Section 2593, Nevada Compiled Laws 1929. Said section 2593 is a part of an Act of the Legislature of this State expressly enacted by it in 1915 pursuant to the permissive power granted the Legislature by the Seventeenth Amendment to the United States Constitution, for the very purpose not only of providing a law for the election of United States Senators, but also to provide for the filling of vacancies temporarily in such offices when necessary. Section 2593 being enacted by express permission of Congress as expressed in the Seventeenth Amendment, we think it most necessarily follows that said section must be construed in the light of the language contained in such amendment, and not construed in the light of expressions of the Supreme Court of Nevada in cases dealing with purely local and State offices governed by the Constitution of Nevada. The Seventeenth Amendment, as quoted in my opinion of November 14, provides that the Legislature may empower the executive of any State to make "temporary appointments until the people fill the vacancy by election as the Legislature may direct." Any expression in a State law authorizing its executive to appoint a United States Senator, we think, must be qualified and limited by the term "temporary appointments."

Later in the opinion he referred to the report of the Committee on Privileges and Elections of the United States Senate reported by such committee on the seating of Senator Gerald P. Nye, in Senate Election Cases, 1913-1940, being Senate Document No. 147, 76th Congress, 3rd Session, wherein a North Dakota statute enacted prior to adoption of the Seventeenth Amendment was drawn in question. The committee said:

Nowhere is express reference made to the Constitution of the United States, and, nowhere in said act does language used indicate that the Legislature of the State of

North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, *supra*, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, *supra*, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the executive of that State the power, as the seventeenth amendment provides, to make a *temporary appointment* only, until the people should fill the vacancy by election. (Italics ours.)

Attorney General Mashburn also called attention to the appointment and subsequent election of Charles B. Henderson to fill the vacancy in the United States Senate caused by the death of Senator Newlands in 1918, saying:

Further, a precedent for such temporary appointment is found in this State. It must be borne in mind that section 2593 Nevada Compiled Laws 1929 was approved March 6, 1915. The records in the archives of the office of Secretary of State show that on January 12, 1918, Honorable Charles B. Henderson was, by the Governor, appointed United States Senator to fill the vacancy caused by the death of Senator Francis G. Newlands, whose term had some three years yet to run. Senator Henderson received the following certificate of appointment, omitting the formal parts:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nevada, I, Emmet D. Boyle, the governor of said State, do hereby appoint Charles B. Henderson a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of Francis G. Newlands is filled by election, as provided by law.

The record shows that Senator Henderson filed for election for the *remainder* of the *unexpired* term at the November 1918 election, was elected at such election and served the *remainder* of such term. This is a sufficient precedent. (Italics ours.)

Certainly neither the Seventeenth Amendment nor Section 2593 authorizes more than a temporary appointment to fill a vacancy in the office of United States Senator. There being no law in this State authorizing a special election for that purpose, and a general election for the selection of state officers by the people being scheduled by law for Tuesday the second day of November, 1954, we submit that under the circumstances of this case that such election meets the requirements of Section 2593 as construed in *pari materia* with and authorized by the Seventeenth Amendment.

We concur in and adopt the foregoing opinion of Attorney General Mashburn upon the ground that it fully states the law on the subject of temporary appointments to fill vacancies in the office of United States Senator.

We come now to the policy of the law with respect to the filling of the vacancy in the office of United States Senator, a vacancy that will extend to January 3, 1957 from and after January 3, 1955. We think that the instant case with respect to the right of the people to now hold an election on November 2, 1954, for the purpose of electing a United States Senator to fill the vacancy existing in that office, is controlled and governed by the decision of the Supreme Court of Nevada in the case of *Ex Rel. Penrose v. Greathouse*, 48 Nevada 419, decided February 19, 1925.

Briefly the facts were that T. C. Hart was elected District Judge of the Eighth Judicial District at the general election in November 1922, for a 4-year term beginning January 1, 1923. He died on October 12, 1924, leaving some two years and more of the term remaining to be served. On October 14, 1924 the Governor appointed George Kenny of Churchill County to fill the vacancy

in the office, citing in the commission of appointment that the appointment was to continue until the vacancy shall be supplied at the next general election.

The 1924 primary election was held in September 1924 and prior to the death of Judge Hart. The Primary Election Law of 1917 then and as it does now, provides:

Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district, or state, as the case may be.

In the event of vacancies in nonpartisan nominations, the vacancy shall be filled by the person who received the next highest vote for such nomination in the primary for such office. If there be no such person then the vacancy may be filled by a petition signed by qualified electors equal in number to five per cent of the total vote cast for representative in Congress at the last preceding general election in the county, district or state as the case may be. Such petition shall be filed on or before fifteen days before the November election.

In 1947, the time in which the nominating petition was required to be filed prior to the November election was amended to provide 30 days instead of 15 days prior to such election. 1947 Stats. 478.

A petition of qualified electors of the judicial district nominating Clark J. Guild as a candidate for District Judge to fill the vacancy was presented to the Secretary of State, who refused to accept such petition upon the ground that there was no vacancy in the office which could be legally filled at the then ensuing November election to be held November 4, 1924. Mandamus was sought in the Supreme Court by petition filed October 18 in behalf of Clark J. Guild. Upon the hearing the Supreme Court ordered the preemptory writ of mandamus to be issued directing Guild's name to be placed upon the ballot as a candidate to fill the vacancy in the office of District Judge, as prayed in the petition for the writ.

The Supreme Court in deciding the question before it quoted and construed Section 22, Article XVII, Constitution of Nevada, and Section 2812, Revised Laws, 1912, now Section 4812, Nevada Compiled Laws 1929.

In course of the opinion the Court said, at pages 421-422:

The substance of the entire argument on the part of the secretary of state is that the existing primary law makes no provision for a nomination to fill a vacancy by petition, occurring, as in this case, within 22 days of the general election.

1. Section 22, Article 17 of the constitution and section 2812 of the Revised Laws of Nevada furnish a complete answer to this contention when read in connection with section 25 of the primary election law (Statutes 1917, p. 276).

Section 22, Article 17 of the constitution provides that—

In case the office of any justice of the supreme court, district judge or other state officer shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the governor until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

Section 2812 of the Revised Laws of Nevada provides that—

Whenever any vacancy shall occur in the office of justice of the supreme court or district judge, or any state officer, the governor shall fill the same by granting a commission, which shall expire at the next general election by the

people and upon the qualification of his successor, at which election such officers shall be chosen for the balance of the unexpired term.

These provisions of the organic and statute law show that the legislative policy of the state is to fill the vacancy for the office of district judge by election as soon as practicable after the vacancy occurs.

The 1924 general election, it is clear, was not a general election at which a successor of Judge Hart would have commonly been elected, yet, notwithstanding the inclusion in the constitutional provision and said Section 2812, the term "next general election," the court held that the name of Clark J. Guild should appear on the November election ballot, and this on October 22, 1924.

In passing upon the matter the court said, at page 423:

The ground upon which the respondent sought to justify the position he assumed in refusing to file the nomination petition of Clark J. Guild was that section 25 did not reach the case, because the word "vacancies" used in this section has reference only to vacancies upon the nonpartisan ticket nominated at the September primary, and to no other vacancies, and there was no vacancy upon the ticket for the office of district judge, because that office at the date of the primary was not an office to be filled, and there could be no legal election to fill the unexpired term at the ensuing November election.

Our answer to this contention is that section 25 neither repeals nor limits the particular provision of section 2812, Revised Laws, touching the conduct of an election to fill a vacancy in an office occurring shortly before the general election. In *State v. Hostetter*, 137 Mo. 636, 39 S.W. 271, 38 L.R.A. 208, 59 Am. St. Rep. 515, it is said that a special provision (nearly identical in terms with that of section 2812, Revised Laws) governing the filling of a vacancy in a particular office should be obeyed, even as against a later law on the same general topic, unless the court finds ground to conclude that the later general law was intended to repeal or limit the more particular provision of the prior law.

2. We quite agree with the learned attorney-general that the word "vacancies" as used in section 25 with respect to nonpartisan nominations means a vacancy in some such nomination. But, as said in *State v. Hostetter*, supra, where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which some one to fill the office for the unexpired term should be chosen, and no one has been nominated to said office (as in this case), there is a vacancy in the nominations within the meaning of the election law, and such vacancy may be supplied, at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law. This ruling of the court is followed in *State v. McClure*, 299 Mo. 688, 253 S.W. 743.

Applying the foregoing language of the court to the situation as disclosed by the facts in the instant case, it is clear that the decision of the court is most pertinent and conclusive authority for holding that an election to fill the vacancy in the senatorial office at the November election is and will be according to law.

There can be no question but that the Seventeenth Amendment goes no further than to provide the Governor of the State with constitutional power to make temporary appointments only. Section 2593, Nevada Compiled Laws 1929, contains no provision extending the Governor's power beyond temporary appointments, even if the Legislature possessed the constitutional power to so provide. Such legislative enactment is clearly to be construed in the light of and controlled in its entirety by the court's decision in the *Penrose v. Greathouse* case. Further, it cannot be well said that the term "next general election" incorporated in Section 2593, has greater potency than the same term as incorporated in Section 22, Article XVII, Constitution of Nevada and Section 2812, Revised Laws.

It is our considered opinion that query No. 1 is to be answered in the affirmative, with the qualification that you, as Governor, have the power to make a temporary appointment to fill the existing vacancy, the term of which will continue to and end January 3, 1955.

Answering query No. 2, it is our opinion that party State Central Committees may each nominate one candidate for United States Senator, and cause proper declarations of candidacy and acceptance thereof to be filed with the Secretary of State not less than 30 days prior to November 2, 1954. The Secretary of State to certify the names of such candidates to the respective County Clerks. Thereafter the regular election procedure to be followed.

The right to extend or amplify this opinion is hereby reserved should the need therefor arise.

This opinion completed October 5, 1954.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-350(a). Supplemental to Opinion 350.

CARSON CITY, December 1, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor, Executive Chamber, Carson City, Nevada*.

DEAR GOVERNOR RUSSELL: Receipt is hereby acknowledged of your letter of December 1, 1954, received in this office at 1 p.m. this date, wherein you request the opinion of this office as to whether Alan Bible, the now United States Senator elect, is qualified to take his seat in the United States Senate at this time, preferably today. In view of the fact that Senator Brown was appointed by you on October 1, 1954, in an appointment containing the following language:

I, Charles H. Russell, the Governor of said State, do hereby appoint Ernest S. Brown a Senator from said State to represent said State in the Senate of the United States until the vacancy therein, caused by the death of Patrick A. McCarran, is filled by election, as provided by law.

he is actually filling the office of United States Senator in the United States Senate. The quoted part of the appointment was taken from page 14714 of the *Congressional Record*, dated November 8, 1954. Mr. Bible is at present in Washington, D.C., and this office is most reliably informed that Mr. Brown is willing and will surrender his office to Mr. Bible upon his qualifying as United States Senator.

You quote from my opinion of October 1, 1954, as follows:

It is our considered opinion that query No. 1 is to be answered in the affirmative, with the qualification that you, as Governor, have the power to make a temporary appointment to fill the existing vacancy, the term of which will continue to and end January 3, 1955.

And your request goes to the point of whether the quoted part of the opinion governs at the present time or whether the fact that the Supreme Court of the State of Nevada, on October 8, 1954, held that candidates for the office of United States Senator could be placed upon the ballot for the November election held November 2, 1954, to fill the vacancy for the unexpired term of the late Senator McCarran.

At the time of the furnishing of my official opinion to you concerning the question of filling the vacancy caused by the death of Senator McCarran I could not, at that time, determine with certainty whether an election on November 2, 1954, would be held. I did know from the Constitution of the United States that a new session of Congress would come into being on

January 3, 1955, and that most certainly you, as Governor, had the power under the Seventeenth Amendment to the Constitution of the United States and Section 2593, N.C.L. 1929, to make a temporary appointment pending an election to fill the vacancy, if such be held, so that now it develops your appointment of Senator Brown certainly expresses the thought that the vacancy caused by the death of Senator McCarran could be filled by an election. The question boils down to this—that an election having been held and a Senator elected by the people of Nevada to fill the unexpired term of the late Senator McCarran, it appears that he can assume the office of Senator upon the certification by the board of canvassers that such person was duly elected to fill such vacancy.

It most certainly appears now that Mr. Bible has been declared elected to fill the vacancy existing in Nevada's representation in the United States Senate and that he is now in a position to qualify for such office. Applying the language in Section 2593, N.C.L. 1929, to the matter as it stands now, we are of the opinion that even that particular section of the law warrants the answer that Mr. Bible is now eligible to qualify as United States Senator. The language provided in said section in this connection reads: "and until his successor shall be elected and qualified."

The Supreme Court of this State having sanctioned the election by the people of the United States Senator to fill the vacancy in that office, and such election having been held, it is our considered opinion that Mr. Bible is now qualified to assume his duties in the United States Senate as of this date.

The foregoing opinion is in the form of a letter as time does not permit of a more formal opinion.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

OPINION NO. 1954-351. Recordation of written instruments—when mandatory.

CARSON CITY, October 29, 1954.

HONORABLE ROGER D. FOLEY, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. FOLEY: Receipt is hereby acknowledged of your letter of October 22, 1954, received in this office October 25, 1954, wherein you request the opinion of this office as to whether Writs of Attachment and Decrees of Distribution of estates should be filed or recorded.

In your letter you refer to certain Statutes of Nevada relating to the inquiry, to wit, Section 8708, N.C.L. 1929; Section 2112, 1929 N.C.L. 1949 Supp., and also Section 1496, N.C.L. 1929.

OPINION

An examination of the general law relating to the recording of instruments discloses that in its inception the recording Acts of the respective states first related to the recording of instruments conveying real property. The recording Acts, of course, are purely statutory and subject to such changes as the Legislature may desire to make therein. We agree that the sections of the law quoted in your letter are somewhat contradictory in their provisions insofar as interpretation thereof with respect to your inquiry is concerned.

It is clearly apparent that Section 2112, N.C.L. 1929, as amended at 1949 Statutes, page 84, makes it mandatory upon the Recorder to record the respective instruments therein specifically set forth. With respect to Decrees of Distribution, which are provided for in Section 9882.233, 1929 N.C.L. 1941 Supp., and therein required to be filed with the Recorder, naturally would impart notice of the contents thereof by examination of the file copy. However, this office is of the opinion that where a Decree of Distribution actually conveys title to real property that it then

could be classed as a judgment or decree within the purview of Section 2112. With respect to attachments, however, we think that is not mandatory that Writs of Attachment be recorded, save and except the same imparts notice of the attachment of real property. In that event, we are of the opinion that the same should be recorded.

However, the fact that an instrument is not required by statute to be recorded does not, in our opinion, prevent the recording thereof at the request of an interested party, even though such instrument could not be deemed to impart notice to a third-party purchaser without notice.

Many years ago the question was submitted to the then Attorney General concerning the application of Section 1035, Rev. Laws 1912, the same now being Section 1493, N.C.L. 1929. The question there propounded dealt with the recording of an instrument that was not acknowledged within the provisions of the said Section 1035. The Deputy Attorney General, Edward T. Patrick, a well-grounded attorney, wrote the opinion. Inasmuch as we think such opinion states the law, even with respect to the statutory law of recordation as it exists today, we are herewith setting forth, in full, such opinion:

129.

Carson City, December 5, 1917

HONORABLE G. J. KENNY, *District Attorney, Churchill County, Fallon, Nevada.*

DEAR MR. KENNY: I am in receipt of your favor of the 4th instant, asking construction of Rev. Laws, 1035, concerning recording of conveyances. Said section reads as follows:

A certificate of the acknowledgment of any conveyance or other instrument in any way affecting the title to real or personal property, or the proof of the execution thereof, as provided in this Act, signed by the officer taking the same, and under the seal of such officer, shall entitle such conveyance or instrument, with the certificate or certificates aforesaid, to be recorded in the office of the Recorder of any county in this State; provided, however, that any state or United States contract or patent for land may be recorded without any such acknowledgment or proof.

You inquire: Does the word "entitle," as herein used, prevent the Recorder from accepting, for record, instruments that are not acknowledged?

The word "entitle" is defined as "to furnish with grounds for securing a claim with success." If a deed is acknowledged according to law, and properly recorded, every person is bound to take notice of the contents thereof. Therefore the acknowledgment of such a deed furnishes it with grounds for securing a claim with success, in accordance with said definition.

This is as far as the rights conferred by Rev. Laws, 1035, go. There is nothing in the statutes concerning Recorders, or in the chapter on conveyances, which prohibits the County Recorder from accepting for record any instrument which may be tendered him for such purpose. He has no judicial powers and cannot refuse to record any instrument of any character whatsoever which is tendered him for that purpose if his legal fees are paid.

The question of the effect of such recording as to notice to the world of the contents of such instruments is entirely outside of this inquiry.

It is, therefore, the opinion of this office that County Recorders may accept, for recording, any instruments tendered for that purpose, whether or not the same have been properly acknowledged, and notwithstanding the character of the instrument.

It is the opinion of this office that a County Recorder is not precluded from recording any instrument submitted to him for recordation provided his fees therefor are paid according to the statutory amounts.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

OPINION NO. 1954-352. Fish and Game—Members County Game Management Boards required to take oath of office—Such members not specifically authorized to make seizures and arrests of game violators.

CARSON CITY, November 5, 1954.

FISH AND GAME COMMISSION, *51 Grove Street, Reno, Nevada.*
Attention: Frank W. Groves, Director.

GENTLEMEN: Reference is hereby made to your letter of October 28, 1954, received in this office November 3, 1954, wherein you request the opinion of this office upon the following question.

QUERY

Is it mandatory for County Game Management Board members to enforce the State Fish and Game laws and does their appointment as County Game Management Board members give them all the authority needed for the enforcement of such game laws, or should each member take the oath of office upon entering the office as such board member?

OPINION

County Game Management Boards were created under Section 13 of the State Fish and Game Act of 1947. Section 7 of the 1947 Act provides that County Game Management Boards of the respective counties shall have jurisdiction to enforce the provisions of the Act. Section 2, Article XV of the Constitution of Nevada, provides, "Members of the legislature, and all officers, executive, judicial, and ministerial, shall, before they enter upon the duties of the respective offices, take and subscribe to the following oath * * *." Then follows the constitutional oath of office required of all public officers upon taking office. In 1915 the Legislature of Nevada reenacted into a statute the constitutional provision above-quoted, setting forth there the form of oath. This Act is now Section 4925, N.C.L. 1929.

We think, without any qualification whatever, that members of County Game Management Boards are public officers and upon appointment are required, under the Constitution and Statutes, to take and subscribe to the constitutional oath of office.

Now, whether the members of such County Game Management Boards are required to expressly enforce the Fish and Game laws of the State is somewhat problematical insofar as strict enforcement by means of arrest of violators and such like is concerned. Section 39 of the 1947 Act specifically provides what commissioners and officers may take and seize game illegally taken, granted the power to make searches and seizures, and, in effect, strictly enforce the game laws. This section specifically mentions that the State Fish and Game Commissioners, the members of the Nevada State Police, and every Fish or Game Warden throughout the State, and every Sheriff and Constable in his respective county, is and are hereby authorized and required to enforce this Act, etc.

The Legislature having thus specifically provided for the enforcement of the Act by specially designated commissioners and officers, and having failed to include members of the County Game Management Boards therein, it is the opinion of this office that such members cannot well be required to act as police officers in the matter unless they consent voluntarily so to do.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

OPINION NO. 1954-353. Constitutional Law—Eligibility of Deputy County Assessor to serve as Assemblyman in Legislature.

CARSON CITY, November 24, 1954.

HONORABLE ROGER D. FOLEY, *District Attorney, Las Vegas, Nevada.*

DEAR MR. FOLEY: Reference is hereby made to your letter of November 19, 1954, received in this office November 22, 1954, requesting the opinion of this office as follows:

Mr. George Harmon, newly elected Assemblyman from Clark County to the 1955 Nevada State Legislature, has been offered an appointment by Assessor-elect, James Bilbray, as his Chief Deputy.

Will you please render an official opinion as to whether or not Mr. Harmon may hold both positions? Mr. Harmon suggests that he could take a leave of absence from his Deputy Assessor's job during the time the Legislature is actually in session.

Would it make any difference if the appointment as Deputy Assessor was not made until after the Legislature adjourned?

OPINION

At the threshold of this opinion we think it is apropos to point out that a county is a political subdivision of the State organized for governmental purposes of the State, i.e., "a county is a constituent part of the state government—a wholly subordinate political subdivision or instrumentality, created and existing with a view to the policy of the state at large and serving as an agency of the state for certain specified purposes." 14 Am.Jur. 186, Sec. 3. To same effect: *Schweiss v. District Court*, 23 Nev. 226; 15 C.J. 420, Sec. 53. In *State v. Marion County*, 85 N.E. 513, the court held squarely that a county is an involuntary corporation organized as a political subdivision of the State by the Legislature with certain delegated sovereign power solely for governmental purposes.

County Assessors have been provided for by law ever since territorial days, 1861 Territorial Laws of Nevada, 147, 295, with the power to appoint deputies. The Territorial Act was in effect reenacted by the State Legislature of 1865, being Sections 2050-2057, N.C.L. 1929, also designated as an officer required to be elected as provided in Section 4765, N.C.L. 1929, enacted by the Legislature of 1866. Section 4848, N.C.L. 1929, provides, inter alia, that "All * * * assessors * * * are hereby authorized to appoint deputies, who shall have power to transact all official business appertaining to said officers, to the same extent as their principals * * *." Section 4849 provides that bonds for the faithful performance of officials duties by such deputies may be required by their principals. Sections 4792 and 4850, N.C.L. 1929, each require deputies to take the oath of office. The oath required is the official oath provided in Section 2, Article XV of the Nevada Constitution.

Chapter 201, page 303, Statutes of 1951, provides the Clark County Assessor with the power to appoint a Chief Deputy Assessor with a salary of not to exceed \$4,200 per annum. That the position of Chief Deputy Assessor of Clark County is that of a public officer and his office a civil office of profit cannot well be doubted. Such officer is entrusted with the power to transact a most important part of the business of the sovereign State, that of the valuation and assessment of property within the State for the purpose of securing revenue for the support of the government thereof. The Supreme Court of Nevada in *State v. Cole*, 38 Nev. at page 221, among

many authorities there cited, quoted with approval from Mechem, and Wyman on Public Officers, as follows:

A public office is the right, authority, and duty, created and conferred by the law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. (Mechem of Pub. Officers, sec. 1.)

Professor Wyman of Harvard defines a public office to be:

The right, authority and duty conferred by law by which, for a given period, either fixed by law or through the pleasure of the creating power of government, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The warrant to exercise powers is conferred, not by contract, but by law. (Wyman, Pub. Officers, sec. 44.)

To same effect: *McCormick v. Pratt*, 30 Pac. 1091; *McDuffie v. Parkerson*, 173 S.E. 151; 42 Am. Jur. 882, Sec. 4.

Mr. Harmon, now being elected Assemblyman from Clark County, will take the oath of office as Assemblyman and take his seat in the Assembly at the convening of the next Legislature and will become a member of the Legislative Branch of the State Government and endowed with all the legislative powers and prerogatives of a member of such branch and subject to the constitutional restrictions pertaining thereto, and should such Legislature increase the emoluments of the office of Chief Deputy Assessor, Mr. Harmon could not legally be appointed to such office during his term of office (two years) nor for one year thereafter, by reason of Section 8, Article IV, Nevada Constitution, reading:

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.

We think that the appointment to a civil office of profit of an Assemblyman after the adjournment of the Legislature wherein transactions governed by the foregoing constitutional provision were had, could not legally be made.

Another phase of the instant matter that cannot well be ignored is the separation of the powers of State Government. Section 1, Article III of the Nevada Constitution provides:

The powers of 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 cases herein expressly directed or permitted.

We think it clear that the office of County Assessor as well as that of Chief Deputy Assessor is an office belonging exclusively to the Executive Department of our State Government. There can be no doubt but that the office of an Assemblyman is part and parcel of the Legislative Department. It necessarily follows that an Assemblyman in exercising the powers and duties of the County Assessor's office is undoubtedly exercising the functions of that office contrary to the constitutional prohibition.

A leading case on the above question is *State ex rel. Black et al., v. Burch*, State Auditor, 80 N.E.2d 294 (Ind.). The case concerned the actions of three Assemblymen and one Senator, members of the Indiana Legislature who were elected to office in 1944 and served during the

1945 and 1947 sessions of the Legislature. They were appointed to certain positions in the Executive Departments in 1945 after the adjournment of the 1945 session. Thereafter in January of 1947 they resigned other employments and served as Legislators in the 1947 session, and thereafter were reappointed to the employments upon adjournment of the 1947 Legislature. The action was brought to compel the payment of their salaries in the appointive positions. The court denied relief upon the ground that they had violated Section 1, Article III of the Indiana Constitution which is identical with Section 1, Article III of the Nevada Constitution. In course of the opinion the court said:

In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if section 1 of Article 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the N.Y. and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

Certainly if a duly elected member of our legislative body and who exercises the powers and prerogatives of a member of the Legislative Department of the State Government accepts an appointment to an office in the Executive Department and performs the duties thereof that then there is an ignoring of if not in fact a violation of the constitutional prohibition. Such a proceeding we think is against the public policy of this State as so pertinently expressed in the above constitutional provision.

Whether the appointment to the office in question here after the adjournment of the 1955 session of the Legislature would continue to be ineffective we express no opinion at this time.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

OPINION NO. 1954-354. Welfare Department—Authority of Budget Director, with approval of Governor, to transfer to and from fund allotments.

CARSON CITY, December 3, 1954.

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 29, 1954, requesting an opinion as to the statutory authority of the Budget Director to make transfers of funds.

STATEMENT

A summary of the facts are that you were notified by the Legislative Auditor that while the General Appropriation Bill appropriates blanket sums, and while it is permissible to make transfers, with the approval of the Governor and Budget Director, from one category to another,

the amount appropriated has been unofficially allocated by the Legislature in its deliberation into items of salary, travel, operating expense, equipment and old-age assistance.

It is anticipated that there will be a balance in the allotment for old-age assistance. This balance is due to the increase by the Federal Government of old-age assistance which resulted in a reduction of State and county matching funds. If this had not occurred, there would be no surplus balance in the state fund.

The Department has approved an increase in old-age assistance to the extent of the ability of the various counties to finance the counties' 45 percent of the new maximum allowance. Even with the increased allowance, it is anticipated that a balance will remain in the state allotment for old-age assistance.

The Advisory Personnel Commission has made a resolution in accord with adjustment of salaries in the Welfare Department increasing the same if funds are available. The surplus in the old-age allotment is more than necessary to meet this required salary increase.

QUESTION

Do the Budget Director and Governor have statutory authority to approve a transfer of the amount required from old-age assistance allotment to the allotment for salaries?

OPINION

We are of the opinion that there is a statutory authority to make the transfer requested.

Chapter 46, Statutes of Nevada 1953, amended Sections 14 and 15 of the Act providing for old-age assistance. Section 14 provides that the counties of the State shall provide necessary funds to pay old-age assistance and expenses required to be paid under the Act to the extent of 45 percent of the nonfederal share of old-age assistance, after deducting federal matching to be paid in that county. The money is placed in the State Treasury in a fund designated Old-Age Assistance Fund of the respective counties.

Section 15 provides that the funds to pay for the State's participation in old-age assistance shall be provided by direct legislative appropriation from the General Fund sufficient to produce enough money to pay the State's 55 percent of the nonfederal share of assistance payments.

Administrative expenses shall be paid out of funds provided by appropriation by the Legislature from the General Fund, the money so appropriated to be deposited in the fund known as the State Welfare Fund. Disbursements shall be upon claims, approved by the Director of the State Welfare Department, and allowed in the same manner as other moneys in the State Treasury are disbursed.

The County Fund is acquired by budget estimate and a tax levy sufficient to provide the money needed, and is not readily adjustable for administration.

Prior to 1953 the State Fund for matching federal share and administration expenses was provided by legislative appropriation segregating assistance and administration.

The Legislature in 1951, Chapter 279, Section 51, appropriated for the State Welfare Department \$1,345,000, apportioned as follows:

Old-age assistance, benefit payments.....	\$1,075,000
Administration, State Welfare Department.....	270,000

Section 61 of the chapter provided that upon application of a department head concerned, with the written consent of the State Board of Examiners, the State Controller was authorized to transfer not to exceed 25 percent of any item apportioned to any other item, save and except no transfer should be made to or from the sums appropriated for salaries and traveling expenses.

In order to make a transfer of funds not provided for in legislative appropriations, it required a special Act of the Legislature—example, Chapter 193, Statutes of 1949, an Act authorizing and directing the State Controller and State Treasurer to transfer certain sums from a specified item in the Nevada State Police Fund to other specified items in said fund.

The Legislature, under Chapter 299, Statutes of Nevada 1949, adopted the State Budget Act. Section 8, paragraph 7 of this Act gave the Director of the Budget authority to recommend transfers between appropriations under the provisions of law to become effective upon approval by the Governor. This, and other parallel authority in relation to the administration of public revenues, was in conflict with Section 61 of the General Appropriation Act for the support of the civil government.

In order to make the appropriations readily adjustable to conditions as they might arise in the administration of the various departments, the Legislature under Chapter 294, Statutes of Nevada 1953, made appropriations without segregation into items. The appropriation for the State Welfare Department under Section 47 reads as follows: "State Welfare Department. For the support of the state welfare department \$1,176,507.25." Section 65 of this Appropriation Act removes the restriction as to transfers from one item to another and reads as follows: "The funds herein appropriated shall be expended in accordance with the allotment, transfer, work program and budget provisions of that certain Act entitled, 'An Act providing for a state budget, creating the position of director of the budget, making an appropriation, repealing certain acts and parts of acts in conflict herewith, and other matters relating thereto,' approved March 29, 1949, and being Chapter 299, Statutes of Nevada 1949." The section specifically refers to allotments and transfers under the Budget Act.

The policy of the Legislature in the enactment of blanket appropriations to the various departments was to provide some degree of flexibility through the Budget Act to meet or anticipate and dispose of contingencies that otherwise would require special legislation to supply deficiencies or authorize transfers in funds.

It is necessary for the Legislature, in consideration of the budgets submitted for the various departments, to have tentative allotments for various items of expenditures in order to make the over-all appropriation.

Chapter 34, Statutes of Nevada 1947, required elective officers and every head of every department to render a financial statement to the Legislature biennially.

In 1949, under Chapter 205, the Legislature provided that the Legislative Counsel Bureau shall appoint a Legislative Auditor. Among the duties of the Legislative Auditor is to determine whether all revenues or accounts due have been collected or properly accounted for and whether expenditures have been made in conformance with law and good business practice. This Act repealed Chapter 34, Statutes of 1947.

Chapter 91, Statutes of 1949, authorizes the Legislative Counsel to make a survey of all offices and departments of State, with attention to respective functions and needs for money. The Legislative Auditor prepares segregated items of expenses for the information of the Legislature in making appropriations.

Section 11 of the Budget Act requires all departments and agencies of the State Government to furnish to the Director of the Budget, on forms furnished them, an estimate of their expenditure requirements, together with all anticipated income for each fiscal year of the biennium compared with the corresponding figures of the last completed fiscal year and the estimated figures for the current fiscal year.

This is required, together with other data, in order to set up the state budget to enable the Governor to submit his budget message to the Legislature.

After the appropriation is made, the provisions of Section 12 of the Budget Act become effective as to allotments, based upon a submitted work program for the ensuing year. The Governor, with the assistance of the Budget Director, shall review the segregated allotments, and if deemed necessary, may revise, alter or change such allotments before approving the same.

Section 13 provides that the head of any department, institution or agency of the State, whenever deemed necessary by reason of changed conditions, may submit a revised program to the Governor through the Director for revision of the allotments of the remaining quarters of that fiscal year. These allotments may be broken down into such classifications as the Director may require.

Section 8 of the Act gives the Director authority to recommend transfers between appropriations under the provisions of law, to become effective upon approval by the Governor.

It appears, therefore, that the allotments prepared for the information of the Legislature in making appropriations do not control the Budget Director, nor restrict his authority, with the approval of the Governor, to revise a work program, or make transfers from one classification to another within the total appropriation or other funds made available to the Department.

We are of the opinion, after consideration of the policy of the Legislature and the statutes, that the Budget Director, with the approval of the Governor, has authority to make the transfer requested. However, it appears from Section 13 of the Budget Act that the approval or disapproval by the Director and the Governor becomes final in such matters.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: GEORGE P. ANNAND, *Deputy Attorney General*.

OPINION NO. 1954-355. Public Employees Retirement—Pensions—Constitutional Law—Designated beneficiary at time of death of public employee is entitled to amount credited to employee's account in retirement fund irrespective of relationship between employee and beneficiary.

CARSON CITY, December 7, 1954..

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada*.

DEAR MR. BUCK: This will acknowledge receipt of your letter dated November 26, 1954, requesting the opinion of this office on the following statement of facts and question.

STATEMENT OF FACTS

A member of the Public Employees Retirement System had, in the year 1947, designated his wife, by name and relationship, as his beneficiary under the system. In the year 1954 this couple were divorced absolutely. The member had at no time designated a change of beneficiary prior to his death in 1954. Such change of beneficiary is simple and permissible under the system. He died while still an employee and before retirement.

Section 21 of the Public Employees Retirement Act, Statutes of 1947, page 634, provided, in part, that if a member died before retiring the amount credited to his account in the fund would be paid to the beneficiary designated by him. This section also provided that for this purpose he may designate as a beneficiary any person having an insurable interest in his life. Section 21 was amended by Statutes of 1951, Chapter 183, page 275. This amendment eliminated the provision requiring that the named beneficiary have an insurable interest in the life of the member, and now provides simply that the credited amount shall be paid directly to the beneficiaries which he designates. In light of the foregoing statement you ask the following question which we quote from your letter.

QUESTION

In view of the elimination of the "insurable interest" provision by the 1951 Legislature shall this office regard as the rightful beneficiary of a deceased member the person designated as beneficiary through the accepted practice of this office regardless of changes in personal relationships after such designation?

OPINION

This office is of the opinion that the person named as the beneficiary at the time of the member's death is entitled to receive the amount credited to the member's account irrespective of the existence of a personal relationship at the time of death.

The pension system as set up under the Nevada Public Employees Retirement Act creates no contractual relationship between the State and the employee-member. Thus, an amendment to the law affecting the membership relation does not constitute an impairment of contract within the meaning of the constitutional prohibition. Nor does the contributing member hold a vested right in the pension fund; the disposition of which may be altered by the Legislature as it sees fit.

See 40 American Jurisprudence "Pensions," Section 24, at pages 980-981, and cases cited therein.

In the instant case, therefore, there is no basis for saying that the particular member would be justified in relying upon his original designation of beneficiary as being a valid designation only if the person so designated continued to hold an insurable interest in his life.

Moreover, in the instant case, the member, although he could readily have done so, did not change his designation of beneficiary. This was his privilege exercised for reasons perhaps best known to himself.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: WILLIAM N. DUNSEATH, *Deputy Attorney General*.

OPINION NO. 1954-356. Aliens—Appointment to public office and employment in public works prohibited.

CARSON CITY, December 17, 1954.

HONORABLE PETER BREEN, *District Attorney, Esmeralda County, Goldfield, Nevada*.

DEAR MR. BREEN: Receipt is hereby acknowledged of your letter of December 14, 1954, received in this office December 16, 1954, wherein you request the opinion of this office as follows:

- (1) Is a person who is not a citizen of the United States of America eligible to the office of Deputy County Recorder and Auditor, or Deputy County Clerk and Treasurer in Nevada?
- (2) Can a person who is not a citizen of the United States of America be employed in any capacity by a county or town of Nevada?

OPINION

Answering query No. 1. Substantially the same inquiry was made to this office on November 7, 1941. On November 10, 1941, Opinion No. B-66, reported in the Biennial Report of the Attorney General, 1940-1942, page 309, was rendered, reading as follows:

A deputy in a public office is an officer. No person can be eligible to any office in this State who is not a qualified elector under the Constitution. Section 3, Article XV, Constitution of Nevada. A qualified elector is a citizen of the United States of the age of twenty-one years and over who shall have actually resided in this State six months and in the district or county thirty days preceding any election. Section 1, Article II, Constitution of Nevada. It follows that in order for a person to be a qualified deputy or public officer, such person must be at least twenty-one years of age and a qualified elector of the State.

We concur in such opinion, there has been no constitutional change in the law since the issuance thereof. The inquiry is answered in the negative.

Answering query No. 2. This question presents a case falling within and controlled by an Act prohibiting employment of persons not citizens of the United States enacted in 1919, the same being now Sections 6173-6176, Nevada Compiled Laws 1929, as amended at 1921 Statutes 205, 1929 Statutes 89. Section 6173 provides:

Only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, or by any contractor with the State of Nevada, or any political subdivision of the state, or by any person acting under or for such officer or contractor, in the construction of public works or in any office or department of the State of Nevada, or political subdivision of the state, and in all cases where persons are so employed, preference shall be given, qualifications of the applicant being equal, first, to honorably discharged soldiers, sailors and marines of the United States who are citizens of the State of Nevada; second, to other citizens of the State of Nevada; provided, nothing in this act shall be construed to prevent the working of prisoners by the State of Nevada, or by any political subdivision of the state, on street or road work or other public work; nor to prevent the working of aliens, who have not forfeited their right to citizenship by claiming exemption from military service, as common laborers in the construction of public roads, when it can be shown that citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States are not available for such employment; nor to prevent the exchange of instructors between the University of Nevada and similar institutions of the North and South American countries; and provided, further, that any alien so employed shall be replaced by any citizen, ward, or ex-service man of the United States applying for employment.

Section 6175 provides:

No money shall be paid out of the state treasury, or out of the treasury of any political subdivision of the state, to any person employed on any of the work mentioned in section 1 of this act unless such person shall be a citizen or ward, or naturalized citizen of the United States, subject to the exception contained in section 1 of this act.

Section 6176 provides that any officer of the State of Nevada, or of any political subdivision, or any person acting under or for any such officer, or any contractor, or any other person violating any provision of the Act shall be guilty of a misdemeanor, and, upon conviction thereof, fined not less than \$100 nor more than \$500, or imprisoned not more than six months, or by both such fine and imprisonment.

It is clear that the prohibition against the employment of aliens by the State, its political subdivisions, officers and/or contractors on or in the construction of public works, or in offices thereof, is comprehensive in scope, save and except aliens may be employed on the construction of public roads under the proviso reading, "nothing in this act shall be construed * * * to prevent the working of aliens, who have not forfeited their right to citizenship by claiming exemptions from military service, as common laborers in the construction of public roads, when it can be shown that citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States are not available for such employment."

A county is a constituent part of the State Government, it is a wholly subordinate political subdivision or instrumentality, created and existing with a view to the policy of the State at large, and is an agency of the State for the convenient administration of its government. 14 Am.Jur. 186, Sec. 3; *Schweiss v. District Court*, 23 Nev. 226.

Cities and towns are defined as municipal corporations, constituting political subdivisions of the State.

Municipal corporations are bodies politic and corporate, created not only as local units of local self government, but as governmental agencies of the State. They are involuntary political or civil subdivisions of the State created as agents of the State to aid the administration of government. 37 Am.Jur. 620, Sec. 4.

Cities are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn at the pleasure of the legislature * * * City of Reno v. Stoddard, 40 Nev. at page 542.

Our attention has not been directed to and neither have we found any Act of the Legislature amending or changing any of the provisions of the above Act prohibiting the employment of aliens. We think that it follows that all of the provisions of the Act are now applicable to the State and its political subdivisions, and the officers thereof, including contractors on public works contracts.

In 1927 the then Attorney General in Opinion No. 271, dated July 29, 1927, reported in the Biennial Report of the Attorney General 1927-1928, page 25, had before him a similar question as submitted herein. The Attorney General construed Section 1 of the 1919 Act, which is now Section 6173 wherein is incorporated the provisions of the 1919 Act, in answer to the inquiry of the Superintendent of Public Instruction. We quote the inquiry and opinion:

The Board of School Trustees of Mina, Nevada, engaged one Anton Mandy to render services in connection with making improvements in School District No. 17. It appears that Mandy is not a citizen of the United States and a protest has been filed with the County Recorder of Mineral County, and an opinion is requested concerning the legality of this claim, in view of the fact that the party employed is not a citizen of the United States.

OPINION

Section 1, Stats. 1919, chap. 168, provides:

Only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, or by any contractor within the State of Nevada, or any political subdivision of the State, or by any person acting under or for such officer or contractor, in the construction of public works or in any office or department of the State of Nevada or political subdivision of the State * * * provided * * * nor to prevent to working of aliens, who have not forfeited their right to citizenship by claiming exemption from military service, as common laborers in the construction of public roads when it can be shown that citizens or wards of the United States * * * are not available for such employment.

If, under the circumstances, the party doing this work is an alien and has not forfeited his right to citizenship by claiming exemption from military service, and the work performed by him is the construction of public roads, and the further showing is made that citizens were not available for such employment, then, and in that event, he would come within the exception. However, if the work performed was on the construction of public works, or if citizens of the State were available to perform the work performed by the party in question, the claim is not a lawful claim and cannot be allowed or paid.

Section 3 of this Act provides:

No money shall be paid out of the State Treasury, or out of the treasury of any political subdivision of the State, to any person employed on any of the work

mentioned in section 1 unless such person shall be a citizen or ward or naturalized citizen of the United States, subject to the exception contained in section 1 of this Act.

We concur in the foregoing opinion. In our opinion, it correctly construes the law even as amended subsequent to the rendition of the opinion in 1927.

The term "public works" is one of broad and inclusive meaning. 43 Am.Jur. 743, Sec. 2. As used in Section 6173, N.C.L. 1929, it is given a broad scope by reason of the proviso therein permitting aliens to be employed in the construction only of public roads where they have not forfeited their right to citizenship by claiming exemption from military service, when it can be shown that citizens and wards of the United States were not available for such work.

Entertaining the views above set forth and by reason of the statutory law, it is the considered opinion of this office that aliens cannot legally be employed by the State, its political subdivisions, contractors on any public works contract, or by any officer or person in behalf thereof in any capacity, save and except that where it can be shown that the work performed by an alien is not such public work as contemplated by the statute. Each employment of an alien must stand upon its own set of facts.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-357. Constitutional Law—Leave of absence of State employees for purpose of serving as elective members of Legislature not sanctioned by Section 1, Art. III, of Constitution.

CARSON CITY, December 22, 1954.

MR. WORTH MCCLURE, JR., *Personnel Director, Nevada State Personnel Department, Carson City, Nevada.*

DEAR MR. MCCLURE: Receipt is hereby acknowledged of your letter of December 21, 1954 requesting the opinion of this office as follows:

This agency has received from the Highway Department two requests for leave of absence without pay from two of their employees seeking leave in order that they may occupy their seats in the 1955 Session of the Nevada State Legislature.

Mr. Baptista M. Tognoni, employed as a Senior Engineering Aide, is an elected Assemblyman from Eureka County. Mr. Edward C. Leutzinger, employed as a Senior Civil Engineer, is the elected State Senator from Eureka County. In each case the requested leaves are for sixty days, running from January 15, 1955, to March 15, 1955.

We have then, three questions on which we request your opinion.

1. Would the granting of leaves for this purpose violate the principal of the separation of the executive and legislative powers?
2. Can the Personnel Director approve leaves for this purpose?
3. If the approval of such leaves is not legal, could these employees resign their classified positions and be reinstated after the Legislature adjourns?

OPINION

Mr. Tognoni and Mr. Leutzinger being elected as members of the Assembly and Senate, respectively, each will undoubtedly take the oath of office and take his seat as Assemblyman and as Senator in the respective houses of the Legislature upon the convening thereof in January of 1955, thereby becoming members of the Legislative Branch of the State Government endowed with all the legislative powers and prerogatives pertaining thereto. In brief, each of them will then and there be charged with the constitutional exercise of the legislative power, and in so exercising such power their oath of office requires, among other things, that they "will support, protect, and defend the constitution and government of the United States, and the constitution and government of the State of Nevada * * *." Sec. 2, Art. XV, Const. Nevada.

Section 1, Article III, Constitution of Nevada, provides:

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

The Department of Highways of the State of Nevada is a department belonging to the Executive Branch of the State Government. It cannot be doubted that Mr. Tognoni and Mr. Leutzinger are and were employed by and exercising functions for and in behalf of such Executive Branch, and while so doing became elected to the Legislative Branch and proposes to obtain a leave of absence from the highway employment, serve as legislators and return to the highway employment and again assume the exercising of functions for the Executive Branch of the State Government. We think such practice would ignore if not in fact be violative of the above-quoted constitutional provision, and certainly against the public policy of this State as so expressed therein.

A leading case on the instant question is *State ex rel. Black et al., v. Burch, State Auditor*, 80 N.E.2d, 294 (Indiana). The case concerned the actions of three Assemblymen and one Senator, members of the Indiana Legislature who were elected to office in 1944 and served during the 1945 and 1947 sessions of the Legislature. They were appointed to certain positions in the executive departments in 1945 after the adjournment of the 1945 session. Thereafter in January of 1947 they resigned other employments and served as legislators in the 1947 session, and thereafter were reappointed to the employments upon adjournment of the 1947 Legislature. The action was brought to compel the payment of their salaries in the appointive position. The court denied relief upon the ground that they had violated Section 1, Article III, of the Indiana Constitution which is identical with Section 1, Article III, of the Nevada Constitution. The Indiana court exhaustively examined the authorities and reasons for the separation of the powers of government, quoting at length from the *Federalist* the work of Hamilton and Madison during the formative period of our constitutional government, and then concluded as follows:

In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if section 1 of Article 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the N.Y. and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department.

The foregoing *Burch* case followed a most enlightening case on the question, *Saint v. Allen* (Louisiana) 126 So. 548, construing a similar constitutional provision of Louisiana, as applied to facts substantially the same as appear here.

We are in accord with the language of the Indiana court “that section 1 of Article 3 of the Indiana Constitution is read exactly as it is written.” The same rule applies to Section 1 of Article III of the Nevada Constitution, above quoted. So that “If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is open to influence and control by the employing department.” It was this very influence and control that the framers of our constitutional scheme of government sought to prevent by the constitutional separation of the powers of government.

Answering Query No. 1. It is the opinion of this office that any legislative Act empowering any official or person to grant leaves of absence from employment in the Executive Branch of the State Government for the purpose of exercising powers belonging to the Legislative Branch would be beyond the constitutional power of the Legislature to enact. No officer or any person exercising duties and functions in the Executive Branch possesses power to grant such leaves.

Answering Query No. 2. It is our considered opinion that the Personnel Director has no power to grant such leaves.

Answering Query No. 3. Entertaining the views hereinbefore stated and by reason of the express language contained in Section 1, Article III, of the Constitution, it is our considered opinion that the resignation of employees of the Executive Department for the purpose of serving as members in the Legislative Department, with reinstatement thereafter in the Executive Department would be a manifest evasion of such constitutional prohibition, in brief a subterfuge evading the public policy of the State.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.

OPINION NO. 1954-358. Insurance—Membership fees exacted by mutual insurance company are premiums and subject to State total premium income tax.

CARSON CITY, December 29, 1955 [1954].

HONORABLE PAUL A. HAMMEL, *Insurance Commissioner, State of Nevada, Carson City, Nevada.*

DEAR MR. HAMMEL: Sometime ago you sought advice of this office as to whether the membership fees of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, an insurance company doing business in Nevada, are subject to the provisions of Section 59 of the Nevada Insurance Act, requiring the payment of an annual tax of two percent (2%) on the total premium income from business done in the State. Following a discussion of the matter with you, we advised that the membership fees of said company are subject to the tax. Thereafter you received and delivered to this office a memorandum on the subject prepared by the general counsel for the company. You now request our advice on the subject as viewed in the light of the aforementioned memorandum. Our opinion is as follows:

STATEMENT

The State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, is a foreign, mutual, insurance company qualified and licensed to do business in the State of Nevada. In the issuance of its policies of insurance the company makes an initial charge consisting of two components denominated “membership fee” and “premium.” The amount of the membership fee is determined by the types of coverage provided with the total amount of membership fee paid in individual cases varying accordingly. In an individual case the membership fee is paid only once for each type of coverage. The company, in submitting its annual statements to the Insurance Commissioner, sets forth its “membership fees” separate from its “premiums written” and has in the past paid the 2 percent total premium income tax on the premiums only and has not paid any

tax on the membership fees collected. The company contends that the membership fees should not be considered and taxed as premiums.

QUERY

Should the membership fees charged and collected by the subject company be included in total premium income and taxed as such?

OPINION

Section 59 of the Nevada Insurance Act, being Section 3656.58, N.C.L. 1931-1941 Supp., as amended by Chapter 314, 1951 Statutes of Nevada, provides as follows:

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

We have read the memorandum submitted by the subject company and the cases and authorities therein cited, but we are unable to agree with the conclusion reached, since our own research has indicated otherwise. Our conclusion and the reasons for it follow, and we do not propose in this opinion to write an answering brief.

It appears to us that the company relies principally upon *State Farm Mutual Automobile Insurance Company v. Carpenter*, Insurance Commissioner, 87 P.2d 867, a case decided in 1939 by the Supreme Court of California, and in which the court held that the membership fees collected in California were no part of the premium and hence not subject to the gross premium tax of that state. The premium tax law of California is similar to that of Nevada, with the language "gross premiums" corresponding to the language "total premium income" in the Nevada law.

In the *Duel* cases (*Duel*, Commissioner of Insurance v. *State Farm Mutual Automobile Insurance Company*, 1 N.W.2d 887; 2 N.W.2d 871, 324 U.S. 154) decided in 1942 by the Supreme Court of Wisconsin and affirmed on appeal by the Supreme Court of the United States, the question was before the court as to whether the membership fees of the subject company are included in premiums for the purpose of determining the amount of reserves which must be maintained. In brief, the court held that the membership fee is a part of the premium, and that the exaction of the membership fee constituted a splitting of the premium in violation of statutory reserve requirements.

We recognize that the question before us concerns the tax on total premium income rather than statutory reserve requirements, but we are of the opinion that the same reasons for holding the membership fee to be a part of the premium for reserve purposes apply equally with regard to total premium income. Some of the pertinent language used by the Wisconsin Supreme Court in the *Duel* cases, *supra*, is in 1 N.W.2d as follows: Pages 892-893:

* * * We are thus met at the outset with the fundamental dispute, whether the membership fee is a wholly separate and distinct matter, or in fact, nothing more than a splitting of the premium. We are of the view that plaintiff's contention is sound. The membership fee is the result of a separation by defendant of certain

expenses connected with the sale to, or acquisition by, the insured, and the recapture of this amount by a separate fee. The balance of the charge is denominated a premium and is concededly lower than the conference rate for similar protection. While it is claimed that other economies contribute to the low rate, it is not denied that a substantial factor is the exaction of the membership fee. It is claimed that the membership fee entitles insured to no insurance; that all insurance protection is in consideration of the separate premium. The fact remains that a person may not become insured without paying the membership fee and that the membership fee defrays expenses customarily allocated to premiums in the writing of insurance. We are unable to avoid the conclusion that such an exaction is a splitting of the premium as that term is used in the statutes. * * *.

And at page 893:

* * * Therefore, we hold that the premium must include the normal and usual expenses of furnishing insurance protection; that the statute requires that the consideration for the premium shall be insurance protection and not extraneous privileges of the sort here given by the membership fee. Thus, it is not only the statutory purpose to include in the term "premium" all sums which must be paid before insurance protection is granted and which are exacted to defray the cost of insurance protection, but it is contemplated that in return for this premium insurance protection be given which is susceptible of periodic measurement when the insurance is for a definite term. It cannot have been the statutory intent to permit insurance companies to allocate a portion of the expenses of doing business for some sort of privilege and to designate the rest of the cost of insurance a premium. To do this would put it within the power of insurers to set their own reserve requirements by re-defining "premium." The situation is not helped by so arranging the contract that the fee carries no insurance or other liability. This destroys the statutory scheme for reserves quite as effectively as any other plan for splitting the premium.

In addition to the foregoing considerations, it is conceded that for many of defendant's purposes and reports, membership fees are considered "premiums." Thus, they are included as gross premiums in several of its reports. Further than this, the membership fee to some extent varies according to the territory and type of risk involved. These circumstances seem to us of more than make-weight importance in deciding that the membership fee is simply a part of the premium arbitrarily separated and given a distinct name. * * *.

In addition to the foregoing, it is interesting to note that, while the subject company relies in Nevada upon a 1939 California case, *supra*, recent litigation involving the company has been settled by compromise and that the company is now paying the California gross premium tax on what it denominates as membership fees.

It is the opinion of this office that the membership fee exacted by the State Farm Mutual Automobile Insurance Company is a part of the premium, and should be included in total premium income and taxed as such under the provisions of Section 59 of the Nevada Insurance Act.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
By: JOHN W. BARRETT, *Deputy Attorney General*.

OPINION NO. 1954-359. Constitutional Law—Elections. Members of the Armed Forces of the United States required to register in order to vote in the State of Nevada, notwithstanding the provisions of Section 3, Article II, of the Constitution.

CARSON CITY, December 31, 1954.

The following opinion was written as a letter to J.W. Stryker, Captain, USN, Acting Director, Department of Defense, Office of Armed Forces Information and Education, Washington 25, D.C. The letter is now adopted as the opinion of this office dealing with the alleged proposition that members of the Armed Forces of the United States were not required to register in order to vote in Nevada elections by reason of the constitutional provision contained in Section 3, Article II of the Nevada Constitution. The information is set forth in a pamphlet compiled by the Department of Defense of the United States Government wherein was and is set forth at pages 36 and 37 the following requirements of the respective states of the Union. This pamphlet is known as DA Pamphlet 21-50 issued in 1954. It is stated therein with respect to Nevada as follows:

Qualifications for Voting

3. Must be a registered voter, except members of the Armed Forces, "certain Merchant Marine personnel," and "certain civilians" (attached to and serving anywhere with the Armed Forces).

Registration

1. Registration is permanent unless a person has failed to vote in person at any General Election or voted by absentee process in the last previous election. (These provisions do not apply to persons named in 2 below.)

2. Members of the Armed Forces, "certain Merchant Marine personnel," and "certain civilians" (attached to and serving anywhere with the Armed Forces) may vote in any election without being registered.

The Department of Defense was advised in our letter of December 10, 1954 that the proposition that members of the Armed Forces were not required to register to vote in Nevada was erroneous. This letter did not satisfy the Department of Defense, wherefore objections were made thereto and this office reexamined the question with the result that the hereinafter opinion was rendered on December 31, 1954.

J. W. STRYKER, *Captain, USN, Acting Director, Department of Defense, Office of Armed Forces, Information and Education, Washington 25, D.C.*

DEAR CAPTAIN STRYKER: Reference is hereby made to your letter of December 17, 1954 in reply to my letter of December 10, 1954 relative to the information regarding the registration of members of the Armed Forces from the State of Nevada which appears in DA Pamphlet 21-50 and specifically referring to voting information wherein this office pointed out errors appearing therein.

You include with your letter a copy of letter dated December 11, 1951 over the signature of John Koontz, Secretary of State, apparently relating to information concerning and construction of election laws of Nevada. You also include a copy of questionnaire No. 2 relative to election information for the year 1952. In your letter you inquire whether this office is aware of the fact that information contained in DA Pamphlet 21-50 was compiled by John Koontz, Secretary of State, State of Nevada. Frankly, I was not aware of any information being furnished by Mr. Koontz, in view of the fact that nothing appears on pages 50 and 51 of DA Pamphlet 21-50 indicating where the information was obtained. For the purpose of discussing the matter, we will agree that Mr. Koontz furnished the information contained in the copies of the letters above mentioned, but even so, we fail to find any provision therein which is diametrically opposed to by letter of December 10, 1954, save and except perhaps as it may concern the proposition that Section 3 of Article II of the Nevada Constitution does not provide for the registration of

members of the Armed Forces of the United States. It is agreed that Section 3 of Article II of the Nevada Constitution provides as follows:

The right of suffrage shall be enjoyed by all persons otherwise entitled to the same, who may be in the military or naval service of the United States; provided, the votes so cast shall be made to apply to the county and township of which said voters were bona fide residents at the time of their enlistment; and provided further, that the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting. Provision shall be made by law regulating the manner of voting, holding elections, and making returns of such elections, wherein other provisions are not contained in this constitution.

In construing the foregoing constitutional provision the thought must be kept in mind that during the period or rather the time and year in which such constitutional provision was enacted and adopted, that is, the year 1864, this country was in the throes of the closing days of the Civil War. Nevada was then a Territory of the United States, and history records the fact that many volunteers of the Nevada Territory enlisted in the Union Army and were far away from Nevada at the time that the election for the adoption of the Constitution was held.

It must further be borne in mind that the Nevada Constitution was only adopted at the authorization by Congress of the United States granted in an Enabling Act approved March 21, 1864, whereby the people of the Territory of Nevada were empowered to elect members of a Constitutional Convention and adopt a constitution. Section 3 of such Enabling Act contains, among other things, the following provision relating to the citizens entitled to vote on the Constitution, the language being, "and if any of said citizens are enlisted in the Army of the United States, and are still within said territory, they shall be permitted to vote at their place of rendezvous and if they are absent from said territory, by reason of their enlistment in the Army of the United States, they shall be permitted to vote at their place of service, under rules and regulations in each case to be prescribed as aforesaid."

It was in pursuance of the Enabling Act, or rather at the command of the Enabling Act, that Section 3 of Article II of the Constitution was placed therein.

When the Constitution was completely drafted, an ordinance was adopted by the Constitutional Convention and annexed to the Constitution for the purpose of placing it before the people for adoption, and in that ordinance was provided the necessary machinery whereby the vote of the soldiers then and there in the Armed Services of the United States could be taken, and complete machinery was set up whereby the Adjutant General of the Territory of Nevada and the Governor would ascertain and list names of the volunteers then in the Union Army and furnish the same to the respective officers in command of any and all such soldiers; in effect this part of the election machinery was nothing more or less than the registration of such soldiers, and it was by reason thereof that many of the volunteer soldiers of the Territory of Nevada were enabled to vote for or against the proposed Constitution.

It is interesting to note that Section 6 of Article II of the Constitution was adopted at the same time. This constitutional provision certainly is mandatory with respect to the registration of all qualified electors in the State, so that insofar as Section 3 of Article II is concerned, it was for one purpose only, and that was for the purpose of laying the foundation for the receiving of votes of the soldiers then in the service of the United States and absent from the territory. It must be borne in mind that at the time there was no railroad into or out of Nevada. The Central Pacific Railroad was not completed across Nevada until 1869. It must be apparent that the mode of transportation of persons and United States mail was in a precarious condition in 1864, which is not the fact today.

We further desire to point out that in 1898 during the war with Spain, a regular general election was held in the State of Nevada which was thereafter contested on the part of the candidates for Governor, which reached the Supreme Court in July of 1899 in the case of *State v. Sadler*, 25 Nev. 131. During the election in the month of November 1898 there was a troop of First Nevada Cavalry on board ship between the coast of California and the Hawaiian Islands,

and on election day in November an election was held aboard ship whereby the residents of Nevada, as members of the troop of cavalry, voted ballots to be used in such election in the State of Nevada. This said election was held pursuant to the election ordinance annexed to the Constitution of Nevada above pointed out. The Supreme Court held that in view of the fact that the election ordinance under which the election was held was for the purpose only of voting at the election of the adoption of the Constitution, there was no law under which the votes cast by the Nevada residents in the troop of cavalry could be counted. The court said:

The Soldiers' Votes: It was alleged by the complaint that Troop A, First Nevada Cavalry, in actual service in the United States army without the boundaries of the state, on the 8th day of November, 1898, on board ship on the high seas, between the coast of California and the Hawaiian Islands, who were citizens and electors of this state, held an election and cast their ballots in due form of law, and made due return thereof to the secretary of state; that the board of canvassers, consisting of the governor, chief justice of the state, and the United States district attorney, as provided in the election ordinances of the constitution of this state, and the present state board of canvassers, consisting of the chief justice and one or more of the associate justices, have each failed to open and canvass said soldiers' votes; that said votes, if opened and canvassed, will show 11 votes for the respondent and 24 votes cast for relator; and that said votes should be canvassed and counted by the court. Held, that said election ordinance applied only to the election held in pursuance of the mandate of congress, found in the enabling act, requiring the constitutional convention to submit for ratification or rejection the constitution to the people of the Territory of Nevada, including those in the army of the United States, both within and beyond the boundaries of the territory; that the provisions of said ordinance do not, and were not intended to, apply to future elections held under the constitution and state government, but only to the election therein specifically provided for, and to any future election that congress might for any reason order for resubmitting the constitution to the people of the territory, as congress did with reference to a constitution framed by a convention for Kansas a few years before; that there is no statutory provision regulating the manner of voting or holding elections by persons who may be in the military or naval service of the United States, beyond the boundaries of the state, or for making returns of such election; and that without such provisions no such election could be legally held.

So we have a situation whereby the Supreme Court of this State has in fact limited the effect of Section 3 of Article II of the Constitution.

Another matter to be considered in this connection is the effect of said Section 3. The very language thereof limits the use of such constitutional provision to persons in the military or naval service of the United States, who at the time of their enlistment or induction into such service were bona fide residents of the State of Nevada, so that if any application can be made of such constitutional provision today, it can only relate to those persons in the military service of the United States who were bona fide residents of the State of Nevada at the time of their enlistment or induction into the service and could not in any event relate to any such members of the Armed Forces who may acquire such residence in Nevada after their induction into the service.

Further, in connection with the right of members of the Armed Forces of the United States to vote in Nevada, we desire to point out that in 1899 the Legislature enacted a statute providing for the taking of soldiers' votes very similar to the election ordinance annexed to the Nevada Constitution. This Act was no doubt enacted for use during the closing days of the war with Spain. This Act did not remain in force and effect but a short while when it was repealed by the Legislature. In 1917 the Legislature by an amendment to the General Election Law, to wit, Section 101 of the General Election Law of 1917, provided that electors of the State of Nevada in the military service of the United States may, when called into such service, vote in

accordance with the provisions of the Act approved March 14, 1899. The Act of 1899 had been repealed. However, the Supreme Court in the case of Maclean v. Brodigan, 41 Nev. 468, held that a repealed Act could be revised by Act of the Legislature as shown in Section 101 of the 1917 Act. The records of this office do not disclose that any effective use of said Section 101 was ever accomplished.

In 1921 the Absent Voters' Law was adopted by the Nevada Legislature. In 1943 the Legislature made the Absent Voters' Law effective as to the members of the Armed Services of the United States. The Absent Voters' Law makes it mandatory that all persons desirous of voting by absent voters' ballots must be registered. Every facility is granted in the Absent Voters' Law whereby members of the Armed Forces may not only obtain absent voters' ballots but also obtain registration blanks and register by mail, and ample time is provided for such purposes.

In 1953 the Legislature repealed the above-mentioned Section 101 of the General Election Law so that at the present time unless the members of the Armed Forces desiring to vote in the Nevada elections vote by absent voters' ballots there is no law sanctioning any other method of voting, except by personal appearance at the polls, for the reason, as pointed out in the case of State v. Sadler, 25 Nev. 131, there is no other law sanctioning the voting of members of the Armed Forces except by absent voters' ballot.

For the foregoing reasons we are of the opinion that Section 3 of Article II of the Constitution of Nevada has served its purpose many years ago, and that today the provisions of Section 6 of Article III govern with respect to the ascertainment of the qualifications of all persons desiring to vote in the State of Nevada.

Referring to the proposition that even if Section 3 of Article II of the Constitution is to govern, it must be limited to those residents who were bona fide residents of Nevada at the time of their enlistment or induction into the service of the United States. We direct attention to the decision of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, entered April 29, 1954, whereby Section 2 of Article II of the Constitution, reading as follows, was construed.

For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the United States or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison.

This decision of the District Court clearly points out that it is only in special instances that persons in the Armed Forces of the United States desiring to register and vote in the State of Nevada and who were not bona fide residents of the State at the time of their enlistment or induction acquire a domicile here by many acts indicating an intention to make Nevada their home, and particular attention was drawn to the fact that members of the Armed Forces who were required to maintain their residence in military forts and quarters could not obtain such a domicile. A copy of such opinion is herewith enclosed.

Another phase of the matter that members of the Armed Forces desiring to vote in Nevada must be registered is that the Primary Election Law providing for election of candidates for public office was enacted many years after the adoption of the Constitution. The present primary law was enacted in 1917, as appears at 1917 Statutes, page 276. Such law has been amended from time to time thereafter, the last amendment being in 1953 as shown at page 19 et seq. pamphlet of Election Laws, 1954, a copy of which you no doubt have. An elector desiring to vote at a primary election must have theretofore furnished the registry agent his politics or political party to which he belongs before he can receive a ballot. Section 16 of the 1917 Act now provides:

No elector shall be entitled to vote a party ballot at primary elections unless he has theretofore designated to the registry agents his politics or political party to which he belongs and has caused the same to be entered upon the register by such registry agents; provided, however, that no elector shall be denied the right to vote a nonpartisan ballot for judicial and school offices at such primaries.

The registration law enacted at 1917, i.e., 1917 Statutes, page 425, and as amended thereafter as appears at page 6 et seq. of the 1954 pamphlet, provided and provides specifically for the party designation of all persons voting at primary elections. The qualifications of an elector for purposes of voting at a primary election are the same as required for a general election. See Section 15 of primary laws.

For the reasons hereinabove set forth we are of the opinion that Section 3, Article II, Constitution of Nevada has served the purpose for which it was placed in the Constitution, and that if effective for any purpose today, it will only be effective as to those members of the Armed Forces of the United States who were bona fide residents of the State at the time of their enlistment in or induction therein, and in order to enable such members to vote it will require new legislation by the Legislature providing therefor. We reiterate that the instructions for voting in Nevada that members of the Armed Forces, Marine personnel and certain civilians, as set forth at pages 36-37 of DA Pamphlet 21-50, are not required to register, is not in accord with Nevada law.

Respectfully submitted,
W. T. MATHEWS, *Attorney General*.
