OPINION NO. 56-186 CONSTITUTIONAL LAW; ELECTIONS—Proviso in Section 3, Article XV of Nevada Constitution rendered inoperative by women's suffrage amendment to Section 1, Article II.

Carson City, July 11, 1956

Honorable Dwight F. Dilts, Assistant Superintendent of Public Instruction, Carson City, Nevada.

Dear Mr. Dilts:

In your letter of June 28, 1956, you ask the following question:

> Will you please advise whether this office is correct in assuming that we have the following residence requirements for candidates for the office of school trustee:
> For males—six months in the State and thirty days in the county.
> For females—one year in the State and six months in the county.

OPINION

The answer is in the negative.
Sec. 3, Art. XV of the Nevada Constitution provides as follows:

> Sec. 3. *No person shall be eligible to any office who is not a qualified elector under this constitution.* No person who, while a citizen of this state, has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this state, or who has acted as second, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel, shall be allowed to hold any office of honor, profit or trust; or enjoy the right of suffrage under this constitution. The legislature shall provide by law for giving force and effect to the foregoing provisions
>
> of this section; *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.* (Italics added.)

This section provides initially that qualified electorship is the essential requisite to the right to hold office. Thus, if one is entitled to vote he is, if otherwise qualified, entitled to hold office. Sec. 1, Art. II of the Nevada Constitution sets forth the essential qualifications of an elector. One of these qualifications is a required residence of six months in the State together with thirty days in the district or county. According to this article (Article II), any person, otherwise qualified, having six months residence in the State and thirty days residence in the district or county is a qualified elector entitled to vote. Then, according to the first sentence of Sec. 3, Art. XV, above

quoted, it would follow that any person with the requisite six months and thirty days residence, being otherwise qualified, is an elector and qualified to hold any office.

However, the proviso of the above quoted section as italicized provides that women, who are otherwise qualified, having a residence of one year in the State and six months in the county and district are eligible to the offices of superintendent of public instruction, deputy thereof, school trustee, and notary public. This appears to require a longer residence requirement in the case of women for eligibility to those particular offices. In other words, if the proviso is viewed in this light, a certain restriction by way of an added eligibility requirement is placed upon the women as distinguished from the men.

We will first treat this proviso in Sec. 3, Art. XV as though it was in fact intended, when added to the Constitution, to place such restriction or added requirement upon the women.

Now, this proviso in Sec. 3, Art. XV was added to this section of the State Constitution by the people in 1912. In 1914 the people amended the suffrage section, Sec. 1, Art. II, making the women qualified electors. In 1920 the people of the United States added Amendment XIX to the Federal Constitution which provides as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation.

Under a constitutional or statutory provision which does nothing more than require that a person be an elector in order to be eligible to hold office, it appears settled that the amendments to the State and Federal Constitutions permitting women the right to vote expanded those provisions to also make women eligible to hold office. *In Re* Opinion of the Justices, 240 Mass. 601, 135 N.E. 173; *Parus v. District Court*, 42 Nev. 229, 174 P. 706; *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567; 71 A.L.R. 1333.

However, it is to be noted that the principle of these cases extends only to the proposition that the granting of suffrage also carries with it the right to hold office when the only prerequisite to hold office is that of the right to vote or electorship. An entirely different result could follow in a case wherein there is an express restriction in the law bearing upon eligibility to hold office. In the Opinion of the Justices, cited above, the court said, "if there were express prohibition in the constitution against the eligibility of women for office, a quite different question would arise." The reason for this is, as stated by the same court, that the right to hold office is not necessarily coextensive with the right to vote. *See also* 71 A.L.R. 1333. It follows, therefore, that because the State has granted women's suffrage and the Federal Constitution has prohibited the denial of their suffrage, it is not to say that express prohibitions of restrictive qualifications in the law were by those amendments made inoperative.

It may be concluded, therefore, that if the proviso in Art. XV, Sec. 3 of the Nevada Constitution was intended for the purpose of placing an added requirement upon the women in order that they be eligible to hold the particular offices named therein, such would be the mandate of the law unaltered by the women's suffrage amendments to the State and Federal Constitutions.

This brings us to what this office considers the true construction to be placed upon the proviso in Art. XV, Sec. 3 of the State Constitution.

We consider it absolutely necessary to view this proviso in light of the period of time during which it was added to the Constitution and the positive development of that period toward the modern concept of the women's place in governmental affairs.

It is to be observed that this proviso was added to the State Constitution in 1912. Prior to that time women were not eligible to hold public office for the reason that the Constitution had provided that only qualified electors were eligible, and at that time women were not electors. The proviso added in 1912 making women eligible for certain offices was, therefore, an obvious expansion or extension of the women's privilege. It could not have been placed as a restriction on the eligibility of women to hold office because there was prior thereto nothing to restrict.

In 1914 the people of the State amended Sec. 1, Art. II of the State Constitution qualifying women as electors. From 1914 on, the general restriction upon women to hold office, that of the lack of electorship, was eliminated. It is with the advent in 1914 of women's suffrage, expressed in Art. II that the proviso in Art. XV takes on the appearance of a restriction rather than an expansion of the women's rights.

It would most certainly be a strained construction of the State Constitution to say that the people, by their approval of the amendment to Art. II in 1914 providing women's suffrage, intended, by leaving unchanged the proviso in Art. XV, to automatically change that which was originally an expansion of women's rights to become a restriction thereon. In light of the trend of the period toward modern concepts of women's privileges, such a strained construction would make neither good sense nor comport with the established rules of constitutional or statutory construction. *See* in this connection 16 C.J.S. 81 "Constitutional Law" Sec. 19, and the cases cited therein.

One of the cardinal principles in constitutional interpretation is that there is no justification for any construction whatsoever of clear and unambiguous language, but where doubt and ambiguity exists, construction should comport with the intention of its framers. *See* 16 C.J.S. 72 "Constitutional Law" Secs. 16, 19 and cases cited therein.

Because of the possible interpretation of the proviso in Art. XV pointing to a restriction of women's rights and leading to the absurdity that women, to become eligible for any other office in the State, if otherwise qualified, need have only the six months and thirty days residence

requirement, but for eligibility to hold the office of school trustee there must be an added residence requirement, we feel there is good cause for construction of the proviso.

With this in mind, we are also of the opinion that it was not the intention of the framers of this proviso in question to change that which was initially an expansion of women's rights to become a restriction by reason of the inclusion of the women's suffrage provision. We are rather of the opinion that the people by the adoption of the women's suffrage provisions in Art. II intended that he expansion of the women's right to hold certain offices as prescribed in Art. XV was further expanded to permit women to hold any office when otherwise qualified.

We therefore conclude that the people, by their adoption of the women's suffrage amendment to Art. II did by that action render the proviso in Sec. 3, Art. XV inoperative, and that there is no different or longer residence requirement for women to become eligible to hold the office of school trustee than that required of men.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-187 FOREST FIRE PROTECTION DISTRICT; SURVEYOR GENERAL—Special tax levied for support of forest fire protection district not within $5 constitutional tax limitation. All real property including improvements thereon lying within any such district subject to said tax.

Carson City, July 19, 1956

Honorable Louis D. Ferrari, State Forester Firewarden, Capitol Building, Carson City, Nevada.

Dear Mr. Ferrari:

Your letter of the 11th requests our official opinion on certain aspects of the Forest Fire Protection District Act, the questions you have submitted being in substance as follows:

1. Is a special tax levy on property lying within a forest fire prevention district within the $5 limitation provided for in the Nevada State Constitution?
2. Is all real property and improvements thereon lying within any such district subject to said tax?

OPINION

Pursuant to the provisions of Chap. 149, Stats. 1945, as amended by Chap. 248, Stats. 1949, the Carson-Clark-McNary Forest Fire Protection District was created, including the area lying between the California-Nevada state line on the west and U. S. Highway 395 on the east, and extending from a point just north of Peavine Mountain on the north to a point approximately five miles south of Carson City on the south, except the areas within the city limits of Reno and Carson City, and being partly in Washoe, Ormsby and Douglas Counties. Certain property

owners within the district oppose the payment of the tax levied for the reasons implied in the above questions.

Sec. 5(b) of the amended Act provides in part:

> The state forester firewarden, with the approval of the state board of fire control, shall prepare a budget estimating the amount of money which will be needed to defray the expenses of the district organized * * * and shall determine the amount of a *special tax* sufficient to raise the sum estimated * * *. When so determined the state forester fire warden shall certify the amount * * * to the county commissioners in the county or counties wherein said district or a portion thereof is located and the board of county commissioners may, at the time of making the levy of county taxes for that year, levy the tax certified or a tax certified by said board of county commissioners to be sufficient for the purpose upon *all the real property together with the improvements thereon in the district within its county.* Said tax if levied shall be entered upon the assessment roll and collected in the same manner as state and county taxes. The tax herein provided for, when collected, shall be deposited in the state treasury in the forest protection fund * * * and shall be used for the sole purpose of the prevention and suppression of fires in such organized districts. (Italics ours.)

Art. X, Sec. 2, Constitution of Nevada, places the following limitation on taxes to be levied within the State:

> The total tax levy for all *public purposes,* including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation. (Italics supplied.)

This office, in Attorney General's Opinion No. 46 (April 19, 1951), held that a special tax levy provided for in the Mosquito Abatement Act of 1951, is not to be included in this limitation. The ruling was made on the grounds that such tax is for the administration of a particular Act with no part of the money derived therefrom going to the support of the State Government. (*See also* Attorney General's Opinion No. 342, August 14, 1946.)

The same reasoning applies with equal force with regard to the assessment of a special tax under the Act with which we are here concerned. It is a tax imposed for the protection and benefit of only those persons owning property within the district involved. No part of any tax collected pursuant to the Act may be applied toward the maintenance or operation of either state, county, municipal or township government, but "shall be used for the sole purpose of the prevention and suppression of fires in such organized district(s)." This use is for a special rather than a public purpose as that term is commonly used.

Art. X, Sec. 1, Constitution of Nevada, provides in part: "The legislature shall provide by law for a *uniform* and equal rate of assessment and taxation * * * for taxation of all property, real, personal and possessory * * *." (Italics supplied.)

The Act under discussion, in providing for the creation of fire protection districts and the assessment and collection of taxes for their support follows this constitutional mandate in providing for the taxation of "all real property together with improvements therein" in any district established pursuant thereto. This language cannot be accorded any other meaning than that which is obvious on its face, and, therefore, admits of no exceptions as to the property subject to the special tax.

In our opinion, question number one must be answered in the negative and number two in the affirmative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-188 ELECTIONS; OFFICERS—1. Person elected to fill county office by an interim biennial election to assume office on first Monday in January following election. 2. When two Assemblymen are to be elected from an undistricted county and more than two Democrats and only one Republican have filed, there are only two Democratic nominees to be placed on the general election ballot. 3. Candidate for partisan office permitted to withdraw candidacy prior to nomination—no refund of filing fee upon withdrawal.

Carson City, July 24, 1956

Honorable Roscoe H. Wilkes, District Attorney, Lincoln County, Pioche, Nevada.

Dear Mr. Wilkes:

The following is in answer to your letter of July 18, 1956, requesting the opinion of this office on three election questions. Our answers will follow each statement of your questions and the facts involved in each question where necessary.

Facts in Question No. 1

Vacancy in the office of Sheriff of Lincoln County occurred in 1955. Appointment to fill the vacancy until the next biennial election was made. Several candidates have filed for election to this office in the forthcoming 1956 election.

Question No. 1 as quoted from your letter:

Will the candidate, who is eventually elected to fill the unexpired term of a county officer, take office *immediately* after his election and qualification, or will he take office after qualification on the first Monday of the January next following the general election? This question is submitted because of the wording of Section 4813 N.C.L. 1929 as amended which reads in part "until the next ensuing biennial election."

Opinion to Question No. 1

Sec. 4813 N.C.L. 1931-1941 Supp. Provides as follows:

> When any vacancy shall exist or occur in any county or township office, except the office of district judge, the board of county commissioners shall appoint some suitable person to fill such vacancy until the next ensuing biennial election.

Prior to 1939 this section had provided for the filling of such vacancies "until the next general election." This had been construed by the Supreme Court in *ex rel. Bridges v. Jepsen*, 48 Nev. 64, 227 P. 588, to mean the next general election at which the office was regularly to be filled, and not necessarily the next ensuing biennial election. In 1939 the Legislature amended this section to its present form for the purpose of changing the rule laid down in the Bridges case.

Grant and McNamee v. Payne, 60 Nev. 250, 107 P.2d 307.

It was for this purpose, then, that the 1939 amendment to this section was made and not for the purpose of providing, in addition, that the tenure of office shall begin at the time of the "next ensuing biennial election." Prior to 1939 and under the rule in the Bridges case, an appointee would hold the office until the regular four year term of office would expire. In such event, Sec. 4781 N.C.L. 1929 would be the guide to the proposition that one elected at such regular election

would assume the duties of office on the first Monday of January following election. Sec. 4781 provides as follows:

> County clerks, sheriffs, county assessors, county treasurers, district attorneys, county surveyors, county recorders, and public administrators, shall be chosen by the electors of their respective counties at the general election in the year nineteen hundred and twenty-two, and at the general election every four years thereafter, and shall enter upon the duties of their respective offices on the first Monday of January subsequent to their election.

See also, in this connection, *Cordiell v. Frizell*, 1 Nev. 130.

Having in mind then that Sec. 4813 was amended in 1939 for the one purpose as declared in the Grant case, this office is of the opinion that it was not the intention of the Legislature to apply a different time for the beginning of office tenure simply because the vacancy is to be filled by election at an interim biennial election. We are, therefore, of the opinion that the successful candidate in the forthcoming 1956 General Election will take office on the first Monday in January 1957; that the appointment of the incumbent should be construed in accordance with this opinion to the end that he shall hold office, under his present tenure, until the first Monday in January 1957.

Question No. 2 as quoted from your letter:

> When two Assemblymen will be elected in the general election and when there are six Democratic candidates in the primary election and one Republican candidate in the primary election, how many Democratic candidates are entitled to nomination and the placement of their names on the general election ballot in November?

Opinion to Question No. 2

There seems to be no question that your position is correct that two Democratic candidates are to be placed on the general election ballot and not three.

The case of *Cline Ex Rel. v. Payne*, 69 Nev. 127, 86 P.2d 26, without doubt covers this question.

Facts in Question No. 3

Several candidates have filed for the Democratic nomination to the office of Assembly. One such candidate for nomination desires to withdraw his candidacy, the closing date (July 16, 1956) having passed.

Question No. 3 as quoted from your letter:

> May a candidate for nomination at the primary election withdraw his candidacy after the closing date for filings has passed and, if so, is he entitled to the return of his filing fees?

This question is answered by the court in *State v. Brodigan*, 37 Nev. 458, 142 P. 520, to the effect that withdrawal is permitted at any time prior to nomination. As we understand this decision, nomination is effected either by primary election or nomination by operation of the Primary Election Law, as, for example, where only one candidate has filed for party nomination and he is to be certified as the nominee at the close of the filing period. Under the circumstances presently existing in Lincoln County, the candidate desiring to withdraw is a candidate for Democratic nomination. He, being one of several other candidates for nomination by that party, can, under the reasoning of the Brodigan case, withdraw at any time prior to nomination by the primary election. The Brodigan case places no limitation on withdrawal with respect to the date of printing the primary ballot. That case states that there is no limitation in the statute other than the oath taken that withdrawal shall not be made after nomination. The court was in that case construing the 1913 Election Law, and that law, as does the present law, contained a date prior to the election at which the official ballot was to be printed. We take it, then, that the court did not consider the printing of the ballot and the date thereof to be an obstruction to

withdrawal prior to election; although it appears to us that difficulties would surely arise in respect to a withdrawal after such printing.

Concerning the question of refund of the filing fee after withdrawal, the Brodigan case is also in point. Under the reasoning there set forth, such fee is taken for the act of the clerk in filing the candidacy. That act having been performed, there is no basis for refund. Therefore, refund is not allowable.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Attorney General

OPINION NO. 56-189 NEVADA STATE BOARD OF HEALTH—State Board of Health authorized to promulgate regulations defining what constitutes public and private swimming pools. Health laws and regulations liberally construed. Also, board empowered to determine from extent of use of any swimming pool whether health problems created justify board's jurisdiction over same.

Carson City, July 24, 1956

Mr. W. W. White, Director, Division of Public Health Engineering, Nevada State Department of Health, 755 Ryland Street, Reno, Nevada.

Dear Sir:

You have requested the opinion of this office as to what constitutes a public swimming pool and bathhouse as contemplated under Secs. 5313.01-5313.06 N.C.L. 1931-1941. It is specified that the pool and bathhouse in question are located on premises privately owned and used by the family residing thereon, together with some 25 additional families in the course of their activities as members of a riding club located on said premises, and also overnight guests occupying rooms in a motel operated in connection therewith.

OPINION

Under Sec. 5313.01 of the above mentioned statute "The state board of health is given supervision over sanitation, healthfulness, cleanliness and safety of *public swimming pools and bathhouses* * * * and is empowered to make and enforce such rules and regulations pertaining thereto as it shall deem necessary to carry out the provisions of this act." (Italics supplied.)

If the qualifying word "public" were accorded a strict definition as given it by the lexicographers and other authorities, many swimming pools and bathhouses in this State used extensively by certain classes of the public would be excluded from the purview of said Act. We need to look further than on its face and into its purpose. The primary purpose of this type of legislation is to assure the protection and safety of public health. The legislative body, in passing the Act, was not in a position to anticipate all the menaces to public health and safety which might arise in connection with the operation of swimming pools and bathhouses, so as to enumerate and specify them. Consequently, a determination as to what constitutes such menaces was left to the State Board of Health through its power to promulgate rules, regulations and bylaws, to be carried out by its trained personnel. The power of a health board is such as is conferred upon it by statute or by necessary implication. 25 Am.Jur. 293, Sec. 11. The rules, regulations and bylaws of such boards are liberally construed in order to effectuate the purposes of their enactment. 25 Am.Jur. 291, Sec. 8. And generally, courts will not interfere with acts of health authorities except in cases of palpable abuse of the discretion conferred upon them. 25 Am.Jur. 301, Sec. 22.

Pursuant to the power conferred upon it by the section of the statute above quoted, the State Board of Health, has, under Regulation 1, adopted April 29, 1937, after defining "bathing places," provided that "The regulations apply to commercial pools, real estate and community

pools, pools in hotels, resorts, auto camps, apartments, clubs and in private and public schools." We feel that there can be no doubt but what this wide range of application includes a swimming pool having the variety of uses hereinabove specified, and justifiably so. Because of the extensive uses made of it, we feel that it is taken out of the category of a private or family bathing place and that it is for all interests and purposes at least semipublic. Sharing in its use are overnight guests at the motel, who presumably pay for accommodations, which denotes a commercial and public rather than a private purpose. Furthermore, health problems are nonetheless existent in a pool restricted to use by the persons mentioned than one to which all classes of the public are admitted. In fact, they may be even more so because the construction of the pool itself and the conditions under which it is operated may fall far below the standard requirements prescribed by the state board as essential for the protection of the public health.

For the reasons given, it is the opinion of this office that the use of the pool specified in your inquiry brings it within the classification of a public or semipublic pool and therefore subject to the health regulations prescribed by the State Board of Health for the operation and use of such pools.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By: C. B. TAPSCOTT, *Deputy Attorney General.*

OPINION NO. 56-190 OMITTED FROM RECORD.

OPINION NO. 56-191 NEVADA STATE MUSEUM—Money appropriated for use by Directors of Nevada State Museum "to be used for the payment, in whole or in part, of the costs of construction of the additional building and garage" cannot be used to construct uncompleted

buildings. Any construction different or less than that within the purview of the legislative intent would constitute a diversion of the money appropriated.

Carson City, July 30, 1956

Honorable Clark J. Guild, Chairman, Board of Directors, Nevada State Museum, Carson City, Nevada.

Dear Sir:

The opinion of this office is requested in your letter of July 20, wherein you have submitted certain facts and questions as follows:

FACTS

Under the provisions of Chap. 411, Stats. of Nevada 1955, the sum of $50,000 was appropriated for payment "in whole or in part" of the costs of construction of an addition to the Nevada State Museum to provide space for the McCarran Memorial Room and a garage for housing the Museum's motor vehicles. This sum, together with private donations made toward that purpose, and certain promised contributions of material, are insufficient to meet the estimate submitted for costs and additional materials necessary for construction of the type of structures deemed suitable for the purposes mentioned.

QUESTIONS

(a) Can the Trustees-Directors of the Nevada State Museum expend the legislative appropriation of $50,000 to start construction of the addition to the Museum building before sufficient funds are available to complete the same?

(b) May we pay from said state appropriation of $50,000 the architects' fee for preparation of plans and specifications?

(c) May we purchase building materials and pay for same from said appropriation (after, of course, advertising for bids according to law) and store or hold the same for construction when we have sufficient funds for such purpose?

OPINION

In our opinion, each of the foregoing queries should be answered in the negative.

The purpose of the Act above cited is unequivocally stated in its title, it being designated as "An Act appropriating $50,000 to the Nevada state museum, to be used for the construction of an

additional building * * * and a garage * * *." And we feel that from the language employed the Legislature attempted to carry out this purpose as is revealed in Sec. 1 of the body of the Act, the pertinent part of which reads, "* * * for the period ending June 30, 1957, there is hereby appropriated out of any funds in the state treasury of the State of Nevada, not otherwise appropriated, the sum of $50,000 for the Nevada state museum *to be used for the payment, in whole or in part, of the costs of construction of the additional building and garage."* The title may limit the scope of an Act, but the Act cannot

be extended by construction beyond the scope of the title. 82 C.J.S. 734, Sec. 350. We therefore look to the portion of the Act italicized, along with certain intrinsic aids, to determine the legislative intent.

The prefatory explanation to the Act shows that at the time of its passage public subscriptions were being taken by a committee to assist in raising funds for the "additional building." There is, however, nothing to indicate that any money had actually been raised or what portion of the estimated costs of the construction in mind might be raised through that source. The Legislature was apparently aware of this situation for it allowed a "leeway" in case funds raised through public subscription were made available. Provision was made for payment of the costs of construction *"in whole or in part"* from the $50,000 appropriated for the purpose. To us, the words italicized indicate a legislative intent that in case nothing was realized through public subscriptions, then the *whole* costs of construction of the building and garage would be limited to the amount of the appropriation, but in case additional funds were made available through such subscriptions, then the costs of such construction could be increased to include both the sum appropriated and the amount raised by subscriptions, in which case the former sum would constitute only *part* of such costs.

Still a further restriction has been imposed in the Act by the Legislature as to the use to be made of the money appropriated, it being limited to payment of the costs of *construction* of the buildings therein mentioned. Black's Law Dictionary, p. 386, defines construction as "The act of fitting an object for use or occupation in the usual way, and for some distinct purpose." From this definition it is readily deducted that the construction contemplated in the Act has not been achieved until said buildings have been fully completed.

In our opinion it was the legislative intent that for the appropriation made, when spent either alone or along with other funds raised through public subscriptions, the State was to realize two fully completed buildings, viz., (1) an addition to the present Mint building, and (2) a garage. Anything different or less than these would constitute a diversion of the fund appropriated to other purposes than that intended. When money is appropriated for a specific purpose, it cannot be used for any other purpose, either permanently or temporarily, until the purpose for which it was intended has been fully accomplished. 42 A.Jur. 775, Sec. 79; 92 A. 116 (Conn.); 8 P.2d 591 (Cal.); 77 S.W.2d. 27 (Ky.). A priori, use of any part or all of the sum appropriated for any one or more of the purposes mentioned in the queries hereinabove propounded, would, in the opinion of this office, be contrary to the legislative intent as expressed in the Act and therefore unauthorized.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-192 STATE FUNDS; BOARD OF FINANCE—Construction of Chap. 191, Stats. 1943, listing securities in which state funds may be invested, as amended. State Board of Finance not authorized to loan the general fund of the State.

Carson City, July 31, 1956

Mr. Grant L. Robison, Superintendent of Banks, Carson City, Nevada.

Dear Mr. Robison:

Receipt of your request for opinion as to whether the State Board of Finance is authorized to invest surplus general funds of the State in 91-day treasury bills is herewith acknowledged.

OPINION

This office is of the opinion that the State Board of Finance is not authorized to make such investment of the general fund.

Sec. 1, Chap. 339, 1953 Stats., provides, in part, as follows:

> Any law of this state to the contrary notwithstanding, the following bonds and other securities, or either or any of them, are and hereby are declared to be proper and lawful investments of *any of the funds of this state*, and of its various departments, institutions, and agencies, and of the state insurance fund, except such funds or moneys as the investment of which is governed by the provisions of the constitution of the State of Nevada, such moneys for the benefit of the public schools of this state and for other educational purposes derived from land grants of the United States, escheat estates, gifts, and bequests for educational purposes, fines, and from other sources, as provided for in Article XI, section 3 of the constitution of this state (Nevada Compiled Laws 1929, Section 148); and except also such funds or moneys thereof as have been received or which may hereafter be received from the federal government or received pursuant to some federal law and the investment of which is governed thereby: * * *. (Italics supplied.)

Following the above quoted matter the section provides the type of securities in which investment can be made. It is to be noted that, as indicated by the italic wording, the section refers to any of the funds of this State. This would seem to indicate that any funds, including the general fund, may be invested in the named securities.

Now, aside from the question of whether 91-day treasury bills are such securities as are contemplated by the section, and aside from the question of whether the use of the words "any of the funds" contemplates the inclusion of the general fund, we are unable to say that this Act, from which the above quotation is taken, authorizes the State Board of Finance to make investments under it. A portion of Sec. 2 of that Act found in Chap. 191, Stats. of 1943, provides as follows:

> Before making any investment in the bonds and other securities hereinbefore designated, the Nevada industrial commission, state board of finance, or state board of education, or other board, commission, or agency of the state, if any, contemplating the making of any such investments shall
>
> make due and diligent inquiry as to whether the bonds of such federal agencies are actually underwritten or payment or payment thereof guaranteed by the United States, * * *.

Sec. 3 of the same Act provides as follows:

> Except as otherwise provided in this act, the said Nevada industrial commission, state board of finance, or state board of finance, or state board of education, or such other state agency, if any, shall proceed in the same manner as the law relating to each of them requires in the making of such investments, the purpose of this act

being merely to designate the classes of bonds and other securities and loans in which the above mentioned funds may be lawfully invested and the other matters relating thereto as hereinbefore specified.

By inference, it is true that these sections could be construed to the effect that the agencies therein named have been given the authority to invest any of the state funds in the named securities, but when it is considered that the purpose of the Act, as expressed in its preamble, is simply to clarify the types of securities in which investments can be made, we are unable to say that it was the intention of the Legislature to, by this Act, place authority in those agencies to make investments. In our opinion, the purpose of the Act was to list the securities in which by other statutes the state agencies are expressly authorized to invest certain funds. As stated in *Storen v. Sexton*, and Indiana case, 200 N.E. 251, "In the absence of a statute authorizing it, no public agency has the right to loan the public funds."

Our opinion is further supported by the fact that, insofar as the general fund is concerned, the only statute expressly bearing upon the disposition of that fund, other than the Appropriation Acts, is found in Sec. 7030-7041 N.C.L. 1929 authorizing deposit of funds in the State treasury in certain banks.

In light of the foregoing, it follows that we must look elsewhere in the law of the authority of the State Board of Finance to invest the general fund of the State. Such authority this office is unable to find.

However desirable such short term investments of the general funds may be, this office is not prepared, in the absence of a more clear cut expression of the Legislature, to say that the State Board of Finance is authorized to loan the general funds of the State.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-193 COUNTIES; BOARDS OF COUNTY COMMISSIONERS— Authority granted boards of county commissioners to erect courthouses, jails and such other public buildings as may be necessary, includes the power to build or construct additions to already existing county buildings.

Carson City, August 3, 1956

Honorable Wayne O. Jeppson, District Attorney, Lyon County, Yerington, Nevada.

Dear Mr. Jeppson:

This acknowledges receipt of your letter of July 25, 1956, submitting certain facts and requesting the opinion of this office on the following question:

QUESTION

> Does the Board of Lyon County Commissioners have the authority to construct an addition to the Lyon County courthouse which it is expected will house the office of sheriff and provide additional facilities for a county jail?

OPINION

You cite *State ex rel. King v. Lothrop*, 55 Nev. 405, as standing for the proposition that county commissioners in the State have no power to make an addition to a county building. We do not so interpret it. The case held that county commissioners had no authority under Sec. 1991-1993, N.C.L. 1929 (which have since been repealed), to issue bonds for repairing or remodeling buildings for county purposes. But the decision also recognizes the existence of the power of county commissioners to repair a courthouse or other public buildings under par. 11, Sec. 1942, N.C.L. 1929. Although this section has since been amended in certain respects, the last being in Chap. 363, Stats. 1953, the pertinent part of said par. 11, reads as follows:

> To cause to be erected and furnished a courthouse, jail and such other public buildings as may be necessary, and to keep the same in repair * * *.

We look to these provisions for a determination of the question submitted. In doing so, we conclude that the powers therein conferred on county commissioners are sufficiently broad to include the construction in addition to existing buildings as well as the erection of new buildings in their entirety. Obviously, the intent of the Legislature was to empower the county commissioners of the various counties to provide necessary buildings for county use, either by erecting new ones or adding to or enlarging old ones. Oftentimes the latter course is not only the more economical but also the more practicable. The County Commissioners of Lyon County have exercised their discretion in deciding that additional facilities are needed for a county jail and that the county sheriff's office should be housed in any building constructed. And, presumably, it has been decided that an addition to an already existing building is feasible and would be suitable for these purposes. It is noted that the above section in the paragraph as quoted,

provides that county commissioners are specifically empowered to erect a "jail, and such other buildings as may be necessary." A sheriff's office would certainly be included in this last provision. These

are both necessary buildings in any county of the State, and we can find no restriction in the power granted which would prevent constructing an addition to the county courthouse for these purposes, rather than erecting a new building altogether. For all intents and purposes, construction of such addition is equivalent to erecting a new building, and we believe, within the purview of the authority granted by the Legislature.

This interpretation finds support in par. 13 of the above mentioned section which lists as additional powers of boards of county commissioners, the following:

> To do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board.

In effect, the provisions of this paragraph have been applied in determining the power of boards of county commissioners in this State. In *Sadler v. Eureka County*, 15 Nev. 39, the court said:

> The law is well settled that county commissioners can only exercise such powers as are especially granted, *or as may be necessarily incidental for the purpose of carrying such powers into effect.* * * *. (Italics supplied.)

It is therefore the opinion of this office that the Board of Lyon County Commissioners have the authority under the law, to construct the addition to the county courthouse for the purposes contemplated.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-194 ELECTIONS—Nonpartisan declaration of candidacy for office of constable creates no candidacy for that office.

Carson City, August 6, 1956

Honorable Peter Breen, District Attorney, Esmeralda County, Goldfield, Nevada.

Dear Mr. Breen:

In your letter of August 1, 1956 you request the opinion of this office upon the following facts and questions:

In Esmeralda County an individual filed a nonpartisan declaration of candidacy for the office of constable on July 16, 1956 for the purpose of having his name placed upon the primary election ballot.

QUESTIONS

Is such person a candidate for nomination to the office of constable?
Can such person be placed on the ballot for the November General Election?

OPINION

The answer to both questions is in the negative.

The designation in Sec. 4 of the Primary Election Law (Chap. 155, 1917 Stats. as amended) of judicial and school offices as nonpartisan offices, by inference, excludes other elective offices from that classification. *See* in connection with the rule of statutory construction to the effect that an expression of one, by inference, excludes the other, Sutherland Statutory Construction, 3rd ed., Sec. 4915.

The office of constable is neither a judicial or a school office and is therefore not a nonpartisan office.

Sec. 5 of the same law provides that the name of no candidate shall be printed on the ballot to be used at a primary election unless he shall qualify by filing a declaration of candidacy, or by an acceptance of a nomination and by paying a fee as provided in this Act. Thereafter in this section follows the form of declaration of candidacy for office and requiring a statement of party affiliation. Immediately following this, the section provides that no candidate for a judicial office or a school office shall certify as to his party affiliations.

Thus the law expressly enjoins the printing of the name of any candidate on the primary ballot unless he has filed his declaration as provided by the Act. The person in question having failed to file his declaration of candidacy in proper form on or before July 16, 1956 cannot be placed upon the primary ballot as a candidate, and is therefore not a candidate.

It goes without reference to authority that if he is not nominated in accordance with the law his name cannot appear on the general election ballot as a candidate.

Had he desired nomination for office as an independent candidate, he would have had to follow the procedure set forth in Sec. 31 of the Primary Election Law.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-195 FISH AND GAME COMMISSION—Puerto Ricans who are citizens of the United States and residents of Nevada entitled to purchase and use hunting license in the State, and are subject to same requirements in that connection as other persons.

Carson City, August 7, 1956

Mr. Frank W. Groves, Director, Fish and Game Commission, 51 Grove Street, Reno, Nevada.

Dear Sir:

Your letter of July 31, 1956 states that Nevada fishing and hunting licenses are being sold to and used by persons of Puerto Rican origin who represent in their applications therefor that they are citizens of the United States and residents of the State of Nevada.

Based upon these facts, you have requested the opinion of this office on the following question:

QUESTION

May a Puerto Rican who now resides in Nevada lawfully purchase and use a resident Nevada citizen's license in view of the statement signed by every license applicant per the following: "I am a citizen of the United States and a bona fide resident of and have lived in the State of Nevada for a period of * * *.

OPINION

Under the provisions of an Act of Congress passed in 1941, 8 U.S.C.A. Sec. 1402,

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

Citizenship status of Puerto Ricans born prior to April 11, 1899, was determined by treaty terms entered into upon cessation of hostilities between Spain and the United States. Some of those persons remained Spanish citizens while others became American citizens. The above Act was passed to clarify the citizenship status of Puerto Ricans born in that country subsequent to April 11, 1899. It will be readily observed that all Puerto Ricans born subsequent to April 11, 1899, and many of those born prior thereto, who have not otherwise transferred their allegiance, are presently citizens of the United States.

Under these conditions, Puerto Ricans who are American citizens under either of the above situations and bona fide residents of Nevada are entitled to the same rights as other citizens and residents of the State as to purchasing and using fishing and hunting licenses. Where neither a citizen nor a resident, then they become subjected to the increased fee for such licenses as provided for in Sec. 50, par. 2 of the Fish and Game Laws of the State. The penalties provided for in Sec. 52 of said laws in connection with making false statements as to an applicant's residence or citizenship are likewise applicable to Puerto Ricans the same as other persons.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott

Deputy Attorney General

OPINION NO. 56-196 NEVADA STATE DEPARTMENT OF HEALTH—The state department is authorized to make rules respecting quarantine of certain enumerated communicable diseases, which could include forcible detention in a general hospital. There can be no forcible detention for mental ailments, except after judicial commitment.

Carson City, August 8, 1956

Daniel J. Hurley, M. D., Acting State Health Officer, Nevada State Department of Health, Carson City, Nevada

Dear Doctor Hurley:

We are in receipt of your letter of July 17, 1956, explaining a condition and asking for an official opinion. You desire legal advice on behalf of the Hospital Advisory Council.

It is believed to be desirable that a general hospital have authority to detain a patient against his will. Two specific situations in which this is believed to be desirable and for the benefit of society generally are mentioned, namely: "(1) The mental patient who must be held in the general hospital prior to commitment in a psychiatric hospital or (and) (2) The person suffering from a highly communicable disease who refuses hospitalization or who will not remain voluntarily hospitalized until the disease has been arrested."

QUESTION

May a general hospital licensed in the State of Nevada maintain and operate a locked detention ward for the detention of persons suffering from mental illness, or for the detention of persons with communicable diseases who refuse hospitalization or will not voluntarily remain hospitalized?

OPINION

Art. XIV, Sec. I of the Constitution of the United States, reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; *nor shall any state deprive any person of life, liberty or property without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws. (Italics supplied.)

The italic portion above constitutes a limitation upon the powers of the states.

Art. I, Sec. 8 of the Constitution of the State of Nevada, in part reads as follows:

> No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;*
> * * *. (Italics supplied.)

To forcibly detain one in a general hospital is to deprive him of his liberty. The right of detention forcibly, therefore, under such statutes as do exist, presents the question of constitutionality, and if this be found to be no impassable impediment then appears or will appear the question of the content and construction to be placed upon the Statutes leading to the answer to the question.

Ordinarily we think of the right and duty of society to forcibly detain one of its members as applied to crime, either as one who is suspected of commission, one who is charged with commission and held for trial, or one who has been duly convicted and serving a judicially imposed sentence. We do not usually think of forcible detention as a means of prevention of public injury. But, to a lesser extent numerically, it also has this aspect. Under the police powers of the State, an indispensable quality and attribute of sovereignty, the State may enact statutes to promote order, safety, health, morals, and the general welfare of society within constitutional limits. 16 C.J.S. Constitutional Law-Police Power, Art. 174, p. 889. Matters of public health and public safety are of prime importance in the invocation of the police power of a state, 16 C.J.S. pp. 919, 921. Respecting constitutional limitations it has been said: “Health regulations enacted by a state under its police power and providing even drastic measures for the elimination of disease, whether in humans, crops, or cattle, in a general way, are not affected by constitutional provisions, either of the state or national government, nor is the state’s police power limited by enactments for the reasonable restriction of the use of property.” 16 C.J.S. Art. 196, p. 951. In brief the police power for these purposes is very far reaching when enactments are for the protection and preservation of the public health and public safety, and designed to that end, and the conclusion is therefore inescapable that despite constitutional provisions respecting deprivation of liberty, that any Nevada statutes that have been enacted to protect organized

society from the evils and dangers included in the question, and well designed to those ends, are not invalid upon constitutional grounds.

The Legislature of 1911 created the State Board of Health. *See*: Stats. of 1911, Chap. 199, p. 392-Sec. 5235, et seq., N.C.L. 1929. Sec. 17 of said Act, as last amended by Chap. 204, Stats. of 1951, p. 312, provides in par. (a), for certain records to be kept by all hospitals and similar institutions, of persons and ailments treated, as may be required by the State Board of Health. Par. (b) of said section makes it the duty of the attending physician to report promptly to the local health officer of the presence of any of certain enumerated diseases. Par. (c) of said section makes it the duty of the attending physician to promptly quarantine persons, family or premises, in conformity with the requirements of the State Board of Health, of persons suffering from certain enumerated diseases.

The said Sec. 17(c) reads as follows:

> It shall be the duty of every attending physician upon any case of scarlet fever, smallpox, diphtheria, and membranous croup, whooping cough, measles, chickenpox, acute anterior poliomyelitis, cerebro-spinal meningitis, diarrheal disease of children, puerperal septicemia or mumps to forthwith establish and maintain a quarantine of such person or persons or the family and premises thereof in conformity with the requirements, rules and regulations which shall be established by the state board of health, and any attending physician who fails to establish and maintain such quarantine in conformity with the requirements, rules, and regulations of the state board of health shall be guilty of a misdemeanor, and punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment.

Par. (d) of this section is new material added in 1951, and adds tuberculosis to the enumerated diseases set out in par. (c). It provides the duty of the attending physician to isolate such persons in conformity with the rules and regulations of the State Board of Health. This paragraph reads as follows:

> It shall be the duty of every attending physician upon any case of infectious tuberculosis to forthwith establish and maintain the isolation of such person or persons in conformity with the requirements, rules and regulations which shall be established by the state board of health.

We are of the opinion that the quarantine provided in par. (c) could be established in a general hospital (and no doubt it frequently is) as well as in the patient's home. We are also of the opinion that the power of the board to make rules and regulations to carry out the provisions of par. (c) and (d), above, carry with it the right to forcibly detain such patients, if necessary, who are suffering from the enumerated diseases. It seems, however, that without such promulgated rules and regulations the power to forcibly detain such patients, suffering from such diseases, does not exist. We are also of the opinion that in the absence of other statutes, this enumeration of diseases, warranting such regulations, is exclusive.

The Legislature of 1937 provided for the control, prevention and care of venereal diseases. *See*: Stats. 1937, Chap. 179, p. 387, Sec. 5317.11 et seq., N.C.L. 1931-1941 Supp. Sec. 5317.12 provides interalia that the State Board of Health may promulgate all necessary rules and regulations and provide for quarantine of diseased persons.

Sec. 5317.12 N.C.L. 1931-1941 Supp., reads as follows:

In addition to the other duties now imposed upon it by law, the state board of health is charged with the duty of controlling, preventing and curing venereal diseases. It shall cooperate with the public health service of the U. S. Government, and with physicians and surgeons, public and private hospitals, dispensaries, clinics, public and private schools, normal schools and colleges, penal and charitable institutions, industrial schools, local health officers and boards of health, institutions caring for the insane, and any other person or persons, in the control, prevention and cure of venereal diseases.

In addition to other powers and duties, the state board of health shall have the power to promulgate such rules and regulations as are necessary to effectuate the control, prevention and cure of venereal diseases in this state and to prescribe reasonable rules and regulations and methods for the treatment of such diseases. The board shall conduct such educational and publicity work as it may deem necessary and shall, from time to time, cause to be issued free of charge to any of the persons or institutions above named, a copy of such of its rules and regulations, pamphlets and other literature issued by it, as it deems reasonably necessary.

The board shall have the power to receive any financial aid made available by any private, state or federal or other grant or source, and shall use such funds to carry out the provisions of this act.

The board shall have the power to promulgate all necessary rules and regulations providing for the quarantine of any diseased persons, where such quarantine appears to the board to be reasonably necessary to carry out the provisions of this act.

Under this section we are of the opinion that rules and regulations could be promulgated by the State Board of Health, to provide for the procedure of quarantine of persons suffering from venereal diseases, and that such regulations could include forcible detention under proper regulations in a general hospital, when reasonably necessary to effect care, control and cure. We feel, however, that this procedure should be approached with caution for we doubt that there are persons suffering from such diseases who resist treatment, in any substantial numbers.

This brings us to the question of mental ailments, and diseases and the law with reference to forcible detention of such patients.

We find no statute authorizing the forcible detention of persons suffering from mental derangement, imbecility or incapacity, until and unless committed to the Nevada State Hospital. We find the statutes as regards commitment to be such as to permit a speedy commitment. We know of our own knowledge that the district courts regard such cases as cases meriting speedy and prompt disposition and that they are speedily and promptly disposed of. Under the doctrine of strict construction it must therefore be held that there is no legal authority for the forcible detention of such persons by a general hospital or at all, until the judicial order of commitment. This, of course, presupposes that there has been no breach of the criminal laws by such persons. If there has been the commission of a crime by such persons they may, of course, be detained forcibly to answer for the crime or until duly disposed of by order of a court of competent jurisdiction.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 56-197 COUNTIES—Agreement between boards of education for attendance of high school students of one county at high school in another county, valid where no specific sum payable thereunder is stated. The amount of any deficit resulting from excess of tuition expenses budgeted for a particular year over and above those actually expended may be included in the budget of a subsequent year prepared at any time before statute of limitations has run, and the amount then disbursed as a part of the fund authorized under the new budget.

Carson City, August 13, 1956

Honorable Peter Breen, District Attorney, Esmeralda County, Goldfield, Nevada

Dear Mr. Breen:

Reference is made to a letter of recent date from the Esmeralda County Auditor and Recorder requesting the opinion of this office on certain questions arising from facts which we understand to be sustantially as follows:

FACTS

Pursuant to the provisions of Chap. 63, Stats. 1947, Secs. 151-162, as amended by Chap. 90, Stats. 1951, the Esmeralda and Nye County Boards of Education of this State entered into an agreement, dated September 7, 1954, providing for the attendance of Esmeralda County high school students for the period September, 1954-June, 1955, at Nye County high school in Tonopah. Approval thereof was endorsed on the agreement by the board of county commissioners in each county, but approval thereof by the State Superintendent of Public Instruction does not appear upon the document itself. In submitting its 1954 budget, the Esmeralda County Board of Education underestimated the ADA of its students who would attend Nye County high school that year, with the result that the amount budgeted was insufficient to meet tuition costs to be paid Nye County for such attendance. It appears that the said board has included the amount of this deficit in its 1955 budget, which sum, as we understand it, is now available in the county school funds of Esmeralda County.

QUESTIONS

1. Is the agreement of September 7, 1954, a valid agreement?
2. Is Esmeralda County obligated to pay to Nye County any unpaid tuition charges incurred on account of Esmeralda County high school students attending Nye County high school during the year 1954, in excess of the amount budgeted for that purpose?

OPINION

In our opinion, both of these questions should be answered in the affirmative.

The statutory provisions, which have been superseded by the present school code, cited in the above stated facts, clearly authorized agreements between county boards of education providing for attendance by high school students of one county at a high school located in another county. Such agreements were subject to the laws of contracts generally plus such specific provisions as were required in the statutes authorizing them. Sec. 156 of Chap. 163, Stats. 1947, required that such agreements be in writing and approved by the boards of county commissioners of the counties in which the contracting high schools were located and by the State Superintendent of Public Instruction. No provision was made, however, that the required approval must appear anywhere on the agreement itself. While it is perhaps the better and safer practice to endorse an approval upon the instrument which is being approved, the law is satisfied if approval of the agreement here under discussion was given in any acceptable manner. We note that lines 11-14,

page 1 of the agreement recites that it was approved by a deputy superintendent of public instruction. That officer is empowered to perform all and any acts which the Superintendent of Public Instruction himself may legally perform. Neither did the statute require agreements of this type to set forth the specific amount which a high school would receive as tuition for attendance of students from outside the county. In view of these considerations, it is our opinion that the agreement in question is valid and binding upon the counties signatory thereto.

We come now to a determination of whether or not Esmeralda County is presently obligated to pay Nye County tuition charged for attendance of Esmeralda County students at Nye County high school in 1954 in excess of the amount provided for in Esmeralda County's budget for that year. We assume that the Esmeralda County Board of Education took into consideration all pertinent available facts relative to the probable ADA of students who would attend Nye County high school during 1954, and that a sincere effort was made in determining the budget accordingly. However, it is an established fact that the ADA of high school students from any county in the State is highly fluctuating from year to year and almost impossible to estimate with certainty. Here, the ADA of Esmeralda County high school students who would attend Nye County high school for the period from July 1, 1954, to December 31, 1954, was estimated at 11, which figure proved to be 15.647 instead. While a budget based upon an ADA far in excess of that estimated might have provided ample funds to meet the additional expenses for tuition caused by an unexpected increase in high school attendance of Esmeralda County high school students, yet a budget based upon a reasonable estimate of the expenses anticipated for this particular purpose is all that the law requires.

We can see no objection to a partial payment of the amount due from Esmeralda County's tuition fund to Nye County. Any fund in the county treasurer's office may be drawn on for the purpose for which it was created until it is exhausted. When Esmeralda County's tuition fund was exhausted, the budget creating it expired and ceased to exist. However, any deficit resulting from the excess of actual tuition expenses over and above the fund budgeted for that purpose continues in existence until expiration of the period prescribed for limitation of causes of action of this type. And when the amount of such deficit was included subsequently in the budget of 1955, it became a part of a new fund to be disbursed under the authority and direction of a new budget. Because of this, Esmeralda County, through its proper officers, is legally authorized under existing budget laws to pay to Nye County the sum still due for tuition under the 1954 agreement.

Certain irregularities as to the time and manner of allowing and paying claims against the county are attributed to predecessors in office. Inasmuch as a determination of any questions arising in this connection is not pertinent in deciding the questions hereinabove submitted, we refrain from resolving these additional questions here.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. TAPSCOTT
Deputy Attorney General

OPINION NO. 56-198 PUBLIC EMPLOYEES—State employees on leave to attend school not entitled to pay or expense allowance.

Carson City, August 16, 1956

Mr. C. A. Carlson, Jr., Budget Director and Ex-officio Clerk of the Board of Examiners, Carson City, Nevada

Dear Mr. Carlson:

This office is in receipt of your letter of August 14, 1956 requesting an opinion on the following facts and questions which we quote from your letter as concisely stated.

FACTS

> From time to time requests are received for out of state travel permission for state personnel on full salary status with attendant per diem and travel expense, to attend short courses at various universities in connection with real estate appraisals; Federal FBI School; nurses refresher courses and similar events.

QUESTION

Is the granting of such requests in conflict with Chap. 152, 1953 Stats.?

OPINION

Secs. 1 and 2, Chap. 152, 1953 Stats., provide as follows:

> No department, board, commission, agency, officer or employee of the State of Nevada shall authorize the expenditure of public money or expend public money for the payment of educational leave stipends to any officer or employee of the State of Nevada.
>
> The provisions of this act shall not be construed to prevent the granting of sabbatical leaves by the board of regents of the university of Nevada.

The word stipend means a wage or compensation received for services rendered. Webster. 40 Words & Phrases 154.

The phrase "educational leave stipends" means, in our opinion, wages or compensations received while on leave from the regular employment for the purpose of receiving some type of schooling.

Now, the classic example, as we understand it, of the taking of a leave from state employment for the purpose of attending some type of school would be the temporary stoppage of the regular service of an employee or officer upon permission granted and thereafter attending upon some course of formal instruction designed to better qualify the employee or officer in his regular job or work.

This type of activity may be entirely commendable if the employee can be spared from his regular work for a short period or there is someone to fill his place temporarily; however, it is to be done at the employee's own expense whether the activity is within the State or takes him outside of the State, because by the provision of the law above quoted no stipend or compensation can be paid to him for this activity. This means not only that such person is to be denied an amount of remuneration over and above his regular salary, but also that he is to be denied his regular salary or any part thereof during such leave.

We are of the opinion that this would be true even in the absence of the express prohibition of the law. We are unable to find provision in the law for the expenditure of public funds for the

purpose of making payment to state employees except as earned compensation for the specific work which they were employed to do. It goes without citation of authority that without such authorization such expenditures cannot be made. Moreover, in the contemplation of the state's system of employment each person brings with him as his own asset at the time he is employed the qualification to do the work for which he is employed. The system does not contemplate the providing of formal education before employment nor does it contemplate it during employment. Insofar as the law now stands, subject to possible exceptions as hereinafter mentioned, the means of maintaining his qualifications are left to the employee's own discretion and ability. It may be added that what the employee does with his time on an earned vacation during which his regular salary continues has no bearing upon the present question.

This brings us to the question of the per diem and travel allowances.

In the example above set forth, it is the opinion of this office that such an employee would not be entitled to such allowance. Sec. 6942 N.C.L. 1929, as last amended by Chap. 239, 1955 Stats. 381, contemplates the allowance for per diem and transportation expense only where one is without the State on official business. Formal education of the employee outside the State, as heretofore stated, is not the pursuance of official business of the State as the law now stands.

We wish to make it clear that, in our opinion, there is an exception to the above determination. It may well be that in certain departments or in certain fields of state work the law applicable thereto may specifically require that an employee or employees thereof are required to engage in some formal training and are required to go on leave for the purpose of obtaining it. Under such circumstances we do not believe it was the intention of the Legislature by the enactment of Chap. 152, 1953 Stats., that such employees are to be required to so comply at their own expense. Under such circumstances we are of the opinion that such employee would be away on the work for which he was employed and engaged in the official business of the State.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-199 SECRETARY OF STATE; CORPORATIONS—Corporations created and regulated by congressional acts, may not be burdened by conditions imposed by state, except insofar as the congressional acts provide.

Carson City, August 21, 1956

Honorable John Koontz, Secretary of State, Carson City, Nevada

Dear Mr. Koontz:

We have your inquiry of August 10, 1956 requiring an opinion of this department, upon a question propounded by an attorney-at-law of another state, which letter, begin brief, we quote in full as follows:

> Where any corporation or association not organized under the laws of the State of Nevada, and not maintaining an office in the State of Nevada for the transaction of business, but who acquires loans or notes on deeds of trust on real property situated in the State of Nevada, Chapter 228 of the Statutes of Nevada 1955 appears

to require such corporation or association to file a list of its officers and directors together with a fee of $50 on or before June 30 of each year.

Would you please advise me as to whether or not it is the policy of your office to require a federal savings and loan association, organized under the laws of the United States of America, to file such list of officers and directors and pay such fee.

The question then presented, of the greatest significance as to the limits of the taxing power of the State, may be stated as follows:

QUESTION

Is a Federal Savings and Loan Association, organized under the laws of the United States of America, in order to enjoy the benefits and privileges secured by Chap. 228, Stats. of Nevada 1955, required to file annually in the office of the Secretary of State a list of officers and directors and pay a fee of fifty ($50) dollars?

OPINION

Omitting the title, Chap. 228, Stats. of 1955, page 361, reads as follows:

Section 1. Any corporation or insurance association organized under the laws of any other state, district or territory of the United States, or foreign government, which does not maintain an office in this state for the transaction of business, may carry on any one or more of the following activities:

1. The acquisition of loans, notes or other evidences of indebtedness secured by mortgages, deeds, or deeds of trust on real property situation in this state, by purchase or assignment, or by participation with a domestic lender, pursuant to the commitment agreement or arrangements made prior to or following the origination, creation or execution of such loans, notes or other evidences of indebtedness.

2. The ownership, modification, renewal, extension or transfer of such loans, notes or other evidences of indebtedness, the foreclosure of such mortgages or deeds of trust, or the acceptance of additional obligors thereon.

3. The maintaining or defending of any action or suit relative to such loans, notes, mortgages or deeds of trust.

4. The maintaining of bank accounts in Nevada banks in connection with the collect or securing of such loans.

5. The making, collection or servicing of such loans.

6. The acquisition of title to property under foreclosure sale or from owners in lieu of foreclosure, and the management, rental, maintenance, sale or otherwise dealing or disposing of such real property.

7. The physical inspection and appraisal of all property in Nevada which is to be given as security for such loans and negotiations for the purchase of such loans.

Sec. 2. Any corporation or association carrying on the activities enumerated in section 1 of this act shall, for the purpose of this act, be deemed to have appointed the secretary of state as its agent for all purposes for which corporate resident agents are required under the general corporation laws of this state and shall, on or before June 30 of each year, file a list of officers and directors and shall pay a fee of $50 for filing the list of officers and directors and the fee shall be in lieu of any fees or charges otherwise imposed on corporations under the laws of this state. The filing of such annual list shall not constitute the maintenance of an office for the transaction of business within this state for the purposes of section 1 of this act.

Sec. 3. No corporation or association carrying on the activities stated in section 1 of this act shall be required to qualify or comply with any provision of chapter 89,

Statutes of Nevada 1907, chapter 108, Statues of Nevada 1901, or chapter 190, Statutes of Nevada 1933.

Sec. 4. This act shall become effective upon passage and approval.

Reference is made to the former opinions of this department construing the statute in question, as follows: Opinion Number 50, of April 26, 1955; Opinion Number 102, of September 12, 1955, as modified by Opinion Number 126 of November 21, 1955.

It will be noted that Sec. 1 of the Act in question enumerates the corporations or insurance associations that may qualify for the benefits sought to be granted by the terms of the Act, and that the enumeration of entities does not include a Federal Savings and Loan Association. In Opinion Number 50 of April 26, 1955, we arrived at certain conclusions as to the purpose of the statute with these words: "It is clear from an examination of the present statute that it has been enacted to permit certain foreign corporations, in the limited functions declared by the statute, to do business, as an exception to the law previously applicable to such corporations." By the term "limited functions" we had in mind the distinctions as to privileges and authorized functions in doing business in Nevada by foreign corporations (1) qualified under this statue or (2) domesticated. In the latter case the rights and privileges being greater and the manner of doing business being less restricted than in the former.

But to date nothing that we have expressed an opinion upon concerning the construction to be placed upon this statute has dealt with Federal Savings and Loan Associations. Corporations of this kind are not expressly included within the language of the statue.

The question to be here determined therefore logically leads to a determination of the quality and structure of such associations, how and by what authority organized and licensed, how owned and administered, how suspended and reorganized, by whom examined, how and in what manner limited in operation to a precise geographic area and other pertinent matters.

For the most part corporations within the Untied States are created by a compliance with the laws of one of the states. It is then as to such state a domestic corporation. Upon complying with the laws of another state, respecting the privilege of doing business in such other state, it is said respecting such other state to be a "domesticated" corporation. But this is not the exclusive manner of "spawning" of American corporate entities. There are some governmental functions or quasi-governmental functions existing requiring a corporate structure for their full and

expeditious discharge that cannot be fully met by the structure being limited to state lines. More specifically if the function is one of federal power as distinguished from state power, requiring statutory law declaratory of the corporate powers, privileges, rights and immunities, the statue which marks out the limits of such, must be of congressional origin.

The Home Owner's Loan Act of 1933 provided inter alia for the organization of Federal Savings and Loan Associations, under the supervision of the Federal Home Loan Bank Board. As originally enacted it provided: (a) the purpose and authority for such incorporations; (b) capital, deposits and certificates of indebtedness; (c) loans, security required and investment of assets; (d) rules and regulations and rule making power by Federal Home Loan Bank Board; (e) the qualifications of the incorporators and the selection of the localities for establishment and in this respect the board was given power to tie the operation of the corporation to a particular community; (f) that upon incorporation each of such associations become automatically members of the Federal Home Loan Bank; (g) that the Secretary of the Treasury be authorized to subscribe to the preferred shares in such corporations in certain amounts; (h) exemptions from taxation by the United States with minor exceptions and limitations upon taxation by the states; ("and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."); (i) the manner of conversion of member of Federal Home loan Bank into Federal Savings and Loan Association; (j) the authority to the Secretary of the Treasury on behalf of the United States to subscribe for fully paid income shares of such associations; and (k) the authority of the Secretary of the Treasury to designate Federal Savings and Loan Associations and/or

Federal Home Loan Banks as fiscal agents of the United States. *See*: Sec. 1464, United States Code Annotated, Title 12, Banks and Banking, 531 to End, page 517.

A number of amendments have been made in the law.

Sec. (c) has been amended, as regards the place in which the loans may be made, security required and the investment of the assets of Federal Savings and Loan Associations. The amounts that may be borrowed by any one borrower and the territory in which any association may function are limited by the rules and regulations of the Federal Home Loan Bank.

Sec. (d) is amended, but apparently in a manner not pertinent hereto.

Sec. (h) is amended, as regards the exemption from taxation, but as regards the restrictions upon the rights of the states to tax, there are no changes in the law previously existing. This we have previously quoted. *See* Pocket Parts for use during 1956.

Clearly such institutions are created, regulated and controlled by the Federal Government and by Federal statutes. The states are therefore ousted of jurisdiction except insofar as their jurisdiction over such institutions is acknowledged by the provisions of the Federal statutes, *McCulloch v. Maryland et al.*, 4 Wheaton 316, 4 L.Ed. 479.

The statute creating Federal Savings and Loan Associations is valid under the "general welfare" clause, in view of the national scope of the problem of preserving home owners and promoting sound system of home mortgage. *First Federal Savings and Loan Association v. Loomis*. (1938) 97 F.2d 831.

A corporation organized under the Home Owner's Loan Act as "First Federal Savings and Loan Association of Wisconsin" had a lawful right to transact business as Federal Savings and Loan Association within Wisconsin, and was under sole authority and control of the laws of the United States. *First Federal Savings and Loan Association v. Finnegan*, 16 F. Supp. 678.

It is true that under the express provisions of the federal statue, the states are given authority to tax the Federal Savings and Loan Associations doing business therein upon franchise, capital, reserves, surplus, loans or income, in an amount not greater than that levied upon other "similar local mutual or cooperative thrift and home financing institutions." However, it is our opinion that under the provisions of the statute in question the financial and other burden there provided, are to "permit certain foreign corporations, in the limited functions declared by the statue, to do business (in Nevada) as an exception to the law previously applicable to such corporations."

If this be the purpose then to charge the $50 and to require compliance by the Federal Savings and Loan Association with this statute would be to permit such association to enter the State and do business herein as limited by the statue. But the State of Nevada has no authority to permit such an association to enter or no power to require it to stay out of the State of Nevada. That authority emanates from the National Government under the Act and the rule and regulation powers provided under the Act.

We do not know, do not have any way of knowing and are not required to know that the Federal Building and Loan Association which is referred to by counsel, has any authority to bring any of its operations or functions to the State of Nevada. The regulating authority is as formerly stated. It has the authority or it has it not. If it has such authority the State cannot divest it or limit it by the provisions of the statute in question. If it has it not, the State cannot confer it by the exaction of the fee and by requiring the compliance with the other provisions of the statute in question.

The question is therefore answered in the negative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 56-200 NEVADA STATE CHILDREN'S HOME—Powers conferred upon officers of State Children's Home do not delegate authority to sell or otherwise dispose of real property belonging to said home.

Carson City, August 21, 1956

Mr. Jed Oxborrow, Superintendent, Nevada State Children's Home, Carson City, Nevada

Dear Mr. Oxborrow:

You have advised this office that a bequest, including certain real property located in Yerington, Lyon County, Nevada, was recently made to the Nevada State Children's Home. The opinion of the office is now requested on the following query:

QUESTION

Do existing laws authorize the Nevada State Children's Home to sell or otherwise dispose of real property acquired by it through bequest?

OPINION

In our opinion the question must be answered in the negative.

Under the provisions of Chap. 254, Stats. 1951, the Nevada State Welfare Board was made the governing agency of the Nevada State Children's Home. That Act provides for the appointment by said board of a superintendent of the home and defines his powers and duties, none of which includes the authority to sell or dispose of real property belonging to the institution, although he may receive gifts made thereto in the name of said home.

Neither do we find any such authority conferred upon the State Welfare Board pursuant to the Act creating said board (Chap. 327, Stats. 1949, as amended), nor are we able to imply such

power from those which are specifically delegated therein. The general rule applied to statutes granting powers to administrative boards, agencies or tribunals is that only those power are granted which are expressly or by necessary implication conferred. (Sutherland, Statutory Interpretation—Vol. 3, Sec. 6603.)

We conclude that none of the officers exercising any power or control over the state Children's Home is authorized to sell or otherwise dispose of any real property belonging thereto. Such power may be conferred only by legislative act, which we note was done on three occasions during the 1955 regular session of that body.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-201 PUBLIC SCHOOLS; LABOR COMMISSIONER—A local school board cannot employ an instructor to serve under the voluntary apprenticeship statute while instructor is the husband of one of the members of such board. Chap. 17, Stats. 1951, p. 22.

Carson City, August 22, 1956

Honorable D. W. Everett, Labor Commissioner, Carson City, Nevada

Dear Mr. Everett:

On August 13, 1956, you propounded two questions to this office, as hereinafter stated, upon certain stated facts, requiring an opinion and advice from this department. The facts are as follows:

FACTS

The apprentice council, under Chap. 192, Stats. of Nevada 1939, p. 323, which is an Act to provide for voluntary apprenticeship, proposes to approve under the sponsorship of the Brotherhood of Carpenters and Jointers of America, Local No. 633, at Hawthorne, Nevada, trade instruction of at least 144 hours, costs thereof to be borne by three entities, the State, the United States and the Brotherhood named, as provided by law, under the immediate supervision and instructorship of a journeyman craftsman who is a federal employee at the Naval Ammunition Depot. For such supervision and instruction this journeyman would receive compensation at $3 per hour for two evenings per week of two hours each. It also appears that under the law the employment of such a supervisor-instructor is by law vested in the local board responsible for vocational education. It also appears that at the present a member of that board is the wife of the proposed supervisor-instructor.

QUESTIONS

(1) Considering nepotism statutes may the board as now composed employ the man who is desired as supervisor-instructor of this apprenticeship training?

(2) May this man who is desired as supervisor-instructor of this apprenticeship training safely accept the employment for such proposed apprenticeship training, in view of the present full time employment with the Federal Government at the Naval Ammunition Depot?

OPINION

Sec. 506.03 N.C.L. 1931-1941 Supp., provides for the apprenticeship council's powers and duties with reference to apprenticeship agreements and provides:

> * * * provided, that the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of state and local boards responsible for vocational education.

This, then, definitely fixes the responsibility for the selection of the instructor with the local school board which is responsible for vocational education.

Respecting nepotism, Chap. 17, Stats. of 1951, p. 22, Sec. 1 or the said Act of 1925, is amended to read as follows:

> From and after the passage and approval of this act it shall be unlawful for any individual acting as a school trustee, state, township, municipal, or county official, or for any board, elected or appointed, to employ in any capacity on behalf of the State of Nevada, or any county, township, municipality, or school district thereof, any relative of such individual or of any member of such board, within the third degree of consanguinity or affinity; provided, however, the foregoing shall not apply to school districts having only one teacher, when the teacher so related is not related to more than one of the trustees by consanguinity or affinity, and shall receive a unanimous vote of all members of the board of trustees or county board of education; provided further, that this act shall not be construed to apply at any time to trustees and school employees who are related to them and in service at the time of the passage of this act, and who shall have been duly elected in accordance with the nepotism act of March 16, 1925, as amended February 18, 1927; provided, further, that this act shall not be construed to apply to the wives of the superintendents of the Nevada school of industry, the Nevada state orphans' home, and the Nevada state prison; and provided, further, that nothing in this act shall prevent any officer in this state, employed under a flat salary, from employing any suitable person to assist in any such employment, when the payment for any such service shall be met out of the personal funds of such officer. Nothing in this act shall be deemed to disqualify any widow with a dependent or dependents as an employee of any officer or board in this state, or any of its counties, townships, municipalities, or school districts.

It is, therefore, clear that for school districts employing more than one teacher, a wife could not serve upon a board which would employ a husband as here contemplated. It is clear that such would be a contract contemplated and forbidden by the nepotism statute quoted. This, we feel, fully answers the legal question presented by question (1).

As to question (2), this presents more a question of employee-employer relation than law. This being true, we feel that if the instructor desired by the council and the local plans to accept the position by the resignation of his wife from the local board, and his employment after such resignation, he should communicate with his superior in the federal employment and should fully and frankly state the entire plan, the hours required and salary or income to be received from such assignment, and request a ruling thereon as to whether or not the proposed employment would be in any way objectionable to or incompatible with the federal employment. The response to such an inquiry will delineate the course to follow.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. PRIEST
Deputy Attorney General

OPINION NO. 56-202 LIQUEFIED PETROLEUM—Interpretation of Chapter 93, Statutes of 1953.

Carson City, August 21, 1956

Nevada Liquefied Petroleum Gas Board, Post Office Box 289, Carson City, Nevada

Gentlemen:

This office is in receipt of your letter dated August 17, 1956 requesting the opinion of this office upon the following matters.

Your letter sets forth the problems and questions, and for simplification we quote the body of the letter as follows:

> In interpretation of Chap. 93, Stats. of Nevada 1953, the above named board would appreciate your opinion on the following:
>
> (1) In Sec. 3 of the Act, line 4, does the word "equipment" include in its meaning the term "appliance"?
>
> (Certain dealers in the State who regularly install liquefied petroleum gas appliances do not feel that licensing for them is mandatory under the Act.)
>
> (2) Is the board, under the Act, authorized to issue limited licenses for dealers to ONLY fill liquefied petroleum cylinders or containers, and to restrict them by the license to this work only?
>
> (There seems to be need for such a type of licensing in the State.)

OPINION

The statute in question is unquestionably a regulatory measure designed for public safety. The Act is to be construed in light of that purpose.

Sec. 3 thereof provides, in part:

> The Nevada liquefied petroleum gas board shall make, promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling, transporting by tank truck, tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof.

The installation of appliances for the utilization of liquefied petroleum gases is one and the same with the wording "installation * * * of equipment for * * * utilizing liquefied petroleum

gases." For the purpose of this Act and to the end that safety is paramount the word "equipment" includes appliances.

The above answers the first specific question asked. As to the question of whether those dealers engaged in regularly installing appliances are required to be licensed. Sec. 10 of the Act in question provides, in part, as follows:

> Every person, firm or corporation engaged in the business of installing equipment for the use of liquefied petroleum gas shall obtain a license.

Such dealers, then, are required to be licensed.
Concerning your second question, Sec. 11 provides, in part, as follows:

> Every person, firm or corporation engaged in the sale of liquefied petroleum gas shall obtain a license, upon application to the board, and the license shall be issued by the board when it shall appear that the applicant is reasonably qualified by experience to transport and deliver the gas, and that the equipment used by the applicant complies with the minimum safety standards established by the board.

Sec. 11 contemplates one type of license to be issued when the board considers, in its judgment, that the applicant is qualified by experience to transport and deliver the gas. If the applicant so qualifies the license should issue. Such an applicant qualifies to "transport and deliver." As the law now stands, such a license would qualify to fill the containers as a part of delivery, but he must qualify for the license which is authorized to be issued by the board. It may well be that certain types of limited licenses should be authorized, which is a matter for legislative consideration. However, in light of the purpose of this Act, this office is not at liberty to say that the Legislature authorized the issuance of limited licenses for a partial qualification.

The answer to the second question is in the negative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-203 FOREST FIRE PREVENTION DISTRICTS—Pole lines of utility companies are for purposes of taxation, classed as personal property. Agreements wherein State Forester Firewarden accepts contributions from persons and organizations for fire prevention purposes must be in writing.

Carson City, August 27, 1956

Nevada State Board of Forestry, Room 12, Capitol Building, Carson City, Nevada

Gentlemen:

Reference is made to your inquiry of August 21, 1956, requesting the opinion of this office on questions arising in connection with certain laws creating and governing fire prevention districts as follows:

QUESTIONS

1. Are pole lines of a utility company real or personal property?
2. May the State Board of Forestry accept voluntary donations from firms or individuals for the purpose of fire prevention without written agreement with them?
3. Is the power of taxation as provided for in the Fire Prevention District Act, being Chap. 149, Stats. 1945, as amended, unconstitutional for failure of the title thereto to include such power as a provision thereof?

OPINION

No. 1. Chap. 149, Stats. 1945, creating the office of State Forester Firewarden and providing for fire prevention within the various counties of the State, was amended by Chap. 248, Stats. 1949, Sec. 5(b), to provide for formation of fire prevention districts to be maintained by a tax on "all real property together with improvements thereon in the district." The problem is presented as to whether or not "improvements" as used herein include pole lines of a utility company thereby bringing them within and making them a part of the real property to be taxed.

There is a clear distinction between real and personal property when existing separate and apart, but when combined difficulty arises in distinguishing them. A general rule, subject to many exceptions, is that when personal property becomes fixed or is attached to real property it loses its identity as personalty and becomes a part of the realty. The authorities hold generally that whether or not personal property remains such when annexed to real property depends chiefly upon the intention of the parties annexing it. This intention is inferable from the nature of the thing annexed, the relation and situation of the parties involved, the policy of the law, the mode of annexation and the purpose and use for which the annexation is made. And it seems that generally the intention need not be expressed in words but may be inferred from the facts and circumstances. Thompson—Real Property, Vol. 1, p. 240-242.

In the Revenue Act of 1953, being Chap. 344, Stats. 1953, in Sec. 3 thereof, the Legislature defined real estate, the pertinent portion of which reads as follows:

The term "real estate," when used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, all houses, buildings, fences, ditches, structures, erections, railroads, toll roads and bridges, or other improvements, built or erected upon any land, ** * * provided, however, when an agreement has been entered into, whether in writing or not, or when there is sufficient reason to believe that an agreement has been entered into, for the dismantling, moving or carrying away or wrecking the aforesaid property, or shall undergo any change whereby it shall be depreciated in value or entirely lost to the county, the aforementioned property shall be classified as "personal property," and not "real estate."* (Italics supplied.)

Although the definition of real estate as stated in the 1891 Revenue Act continued to be stated in identical language until 1953, the portion thereof as above italicized was added for the first time in the Act of that year. We consider this addition but a declaration of the existing general law as hereinabove stated and obviously intended to exclude from real property classification all personal property annexed to real property under the conditions therein specified. Certainly the purpose for installing pole lines by a utility company, over either its own land or that of another, is for the benefit of such company and not for the improvement of the land. And where the right of severance of such pole lines has not been expressly reserved by agreement it is reasonable to conclude that it exists by implication and that their identity as personal property is thereby retained.

In view of both general and statutory law it is our opinion that for purposes of taxation pole lines are to be classified as personal property.

No. 2. Under the provisions of the original Fire Prevention District Act, i.e., Chap. 149, Stats. 1945, Sec. 5, the State Forester Firewarden is authorized and directed "to enter into * * * agreements with boards of county commissioners, municipalities, organizations, and individuals in the State of Nevada, owning lands therein * * * that will * * * promote and encourage the protection from fire of forest and other lands having an inflammable cover * * *." Although Sec. 5, along with other portions of the 1945 Act, has been amended (Chap. 248, Stats. 1949), the authority of the said warden to enter into agreements as specified remains unchanged. We believe this provision anticipates and permits agreements wherein persons or organizations make contributions for the promotion of fire prevention in any fire prevention district. The statute is

silent as to whether such agreements must be written or oral. However, good business practice demands that where persons or organizations make contributions to a district fund for fire prevention, there must be a written agreement stating the amount contributed, purpose and other essential data and terms thereof. We, therefore, determine that question No. 2 must be answered in the negative.

No. 3. We believe it unnecessary at this time to express an opinion on this question. It is the province of a court of competent jurisdiction to pass finally upon the constitutionality of laws and unless and until this is done, the taxation provisions of Chap. 149, Stats. 1945, as amended, are for all intents and purposes in full force and effect.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-204 PUBLIC SERVICE COMMISSION; MOTOR VEHICLE DEPARTMENT—Safety Responsibility Act construed. An owner of a motor vehicle under a conditional sales or lease purchase contract has all rights under the Act possessed by outright owner.

Carson City, September 7, 1956

Honorable Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada

Dear Mr. Allen:

We have your letter of August 31, 1956, received in this office on September 5, 1956, requiring an opinion of this office. Your communication reads as follows:

QUESTION

> We have before us a matter concerning insurance and such on leased trucks. Would you please examine the Financial Responsibility Act and tell us if leased vehicles driven by individual owners on a leased basis come within the purview of that Act insofar as insurance on those trucks is concerned?

OPINION

The Act to which reference is made is known as the "Motor Vehicle Safety Responsibility Act." It is Chap. 127, Stats. of 1949, p. 198. The Act has been amended by Chap. 127, Stats. of 1955, p. 182, but in no way relevant hereto.

Sec. 1.3 of the Act defines "Motor Vehicle" as follows:

> Every self-propelled vehicle which is designed for use upon a highway, including trailers and semi-trailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers), and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails.

Sec. 1.6 defines "Operator" as follows:

> Every person who is in actual physical control of a motor vehicle whether or not licensed as an operator or chauffeur under the laws of this state.

Sec. 1.7 defines "Owner" as follows:

> A person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this act.

Art. III of the Act, entitled, "Security Following Accident," including Secs. 3 to 10, inclusive, sets up a comprehensive system for the posting of security, if required, by the commissioner, by the operator of a motor vehicle after the happening of an accident.

Briefly these sections are very inclusive and do not distinguish between operators of trucks and passenger vehicles, or between operators who own the motor vehicles with and those without encumbrance. Also a person in possession of a motor vehicle who operates it upon the highways of Nevada has the same rights after an accident, irrespective of whether he has possession under a conditional sales contract or under a lease contract with the right of purchase or owns the same

without encumbrance. Such being the content of the "Motor Vehicle Safety Responsibility Act" we are clearly of the opinion that leased vehicles, both trucks and passenger cars, under the control of an operator as defined in the Act, who has rights of purchase either under a conditional sales contract or under a lease contract with right of purchase, is entitled to the benefits of the Act, and such benefits are not less comprehensive than if he was an outright owner without debt or encumbrance upon such vehicle.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 56-205 ELECTIONS—A nonpartisan candidate for public office is nominated when filing closes, if such candidate is opposed by only one other candidate. From the time of nomination he is powerless to withdraw his name from the general election ballot.

Carson City, September 10, 1956

Honorable L. E. Blaisdell, District Attorney, County of Mineral, Hawthorne, Nevada

Dear Mr. Blaisdell:

You have requested an opinion of this office upon the following stated facts:

FACTS

A candidate in Mineral County has filed a declaraton of candidacy for the nonpartisan office of county school trustee. One other candidate has filed for the same post representing, or as a candidate from, the same geographic area. (The term "geographic area" has reference to Secs. 62 and 63 of the School Code enacted in 1956). There being only two candidates for the one post the names did not appear upon the primary ballot. This candidate has now requested the county clerk to remove her name from the general election ballot.

QUESTION

May this candidate under these circumstances now withdraw?

OPINION

Sec. 71 of the School Code of 1956 provides that school trustees shall be elected as provided in:

> (a) The General Election Laws of 1917, as amended,
> (b) The Absent Voter Ballot Law, and
> (c) The law of 1951 providing for the use of voting machines. Subdivisions (b) and (c) have no application to this problem. It follows that school trustees are to be elected by a procedure in conformity with candidates for office generally and specifically candidates for nonpartisan offices.

One must, in filing for an elective office in Nevada, file a declaraton of candidacy. The form of the declaration of candidacy for candidates of a political party is found in Sec. 2408 N.C.L. 1943-1949 Supp. (Stats. of Nevada, 1947, p. 476). The section provides that candidates for nonpartisan office are to file the same declaration, in content, except that the candidate shall not certify as to his political party or political affiliation. The declaration is in affidavit form, and a portion thereof pertinent to this question reads as follows: "That I will accept such nomination and not withdraw."

Insofar as the content of the declaration of candidacy was concerned, this language, "that I will accept such nomination and not withdraw," was present at the time of the two Nevada Supreme Court decisions hereinafter cited.

In *State v. Hamilton*, 33 Nev. 418, one T. V. Eddy, duly filed for the Republican nomination for District Judge of Esmeralda County, had been nominated, when, because of is reason assigned, namely, ill health, he requested that his name be stricken from, and not included upon, the general election ballot. The Republican County Central Committee was in accord. The Supreme Court ruled that having been nominated he had no right to withdraw.

In *State v. Brodigan*, 37 Nev. 458, the matter also involved the filing under party designations, for the office of Attorney General. The court held that after nomination, the right to withdraw no longer existed.

We are not able to make a distinction as to the right by reason of the fact that the candidates for county school trustee are nonpartisan. When the office to be filled is nonpartisan and only two file for the office, making it unnecessary for the names to appear upon the primary ballot, the nomination exists and is fixed as of the passage of the hour and date set by law for the closing of

filing. At that moment the candidates are nominated, as fully and effectually as a candidate for a party nomination is nominated by a favorable vote in a primary election.

We are of the opinion that a nonpartisan candidate for a public office in Nevada is without power to withdraw his name from the general election ballot, from the time of his nomination, and that such nomination is existent from the time that filing for the office is legally closed, if he is opposed by only one other candidate.

The question is therefore answered in the negative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 56-206 TAXATION; STATE PROPERTY—Lands lying within an irrigation district and acquired by State through State Highway Department not subject to assessment for operation and maintenance of such district nor for retirement of county bonds issued to assist construction of dam in this district.

Carson City, September 11, 1956

Mr. Chester C. Taylor, Engineer-Manager, Washoe County Water Conservation District, Room 200, Title Insurance Building, Reno, Nevada

Dear Mr. Taylor:

Reference is here made to your letter of recent date wherein you state that over the past several years the Nevada State Highway Department has acquired certain lands lying within the Washoe County Water Conservation District, but has paid no assessments or taxes thereon toward operation and maintenance of said district or for bond retirement purposes. We understand that the lands in question were acquired for the sole purpose of a right-of-way for widening, straightening and otherwise improving a state highway running through the said district. Also, that certain portions of said lands have not as yet been used for this purpose although they will be ultimately so used, and that in the meantime they are lying idle, unoccupied and receiving no benefits by their being within said irrigation district.

QUESTION

Based upon these facts you request the opinion of this office on the following question:

> Are lands lying within the Washoe Water Conservation District and owned by the Nevada State Highway Department subject to assessments for operation and maintenance of the district and for bond retirement purposes?

OPINION

We answer the question in the negative for the reasons hereinafter stated.

Washoe County Water Conservation District was organized under the Nevada Irrigation District Act of March 19, 1919, being Sec. 8008-8097 N.C.L. 1929, as amended. Sec. 32 of the Act provides in effect that expenses incurred for operation, maintenance, etc., of an irrigation

district created pursuant thereto may be defrayed by its board of directors fixing rates of tolls or acreage charges to be collected by the district treasurer, with the provision that such boards may adopt other reasonable methods of fixing and collecting such operation and maintenance charges and that unpaid assessments therefor shall become a lien against the land assessed.

Sec. 44 of said Act, as amended, provides for excluding lands from an irrigation district when it is shown that they derive no benefit therefrom. Generally, the benefit to be derived as contemplated by the statute is such as will increase the value of the land. *Truckee-Carson Irrigation District v. McLean*, 49 Nev. 278. And if any lands within an irrigation district are found by the board of directors to be of such character as to prevent them from receiving benefits from any proposed or existing works, the board must make an order excluding such lands from the district. *Springmeyer v. Irrigation District No. 1*, 50 Nev. 80. It is obvious that land acquired by the State Highway Department for a right-of-way will not be enhanced in value by reason of any benefits, if any, which may be afforded by their being within the boundaries of an irrigation district. Under the provisions of the section of the Act last above cited and as interpreted in the Springmeyer decision, such lands may and should be, upon proper application, excluded from the district imposing assessments against them.

Regardless of whether such exclusion has been effected or not, we believe that such lands are not subject to the assessments in question for still other reasons. The Nevada State Highway Department is but an arm or branch of the State. This being so, any lands acquired by it belong to and are the property of the State. Under the provisions of the various revenue Acts adopted and in effect in the State at divers times, the last being Chap. 217, Stats. of Nevada 1955, "all lands and other property owned by the state" are exempt from taxation. In our opinion such exemption extends to assessments imposed on lands lying within an irrigation district which have been acquired by the State through the State Highway Department.

Under the provisions of Chap. 17, Stats. of Nevada 1935, being Sec. 8257.01-08, N.C.L. 1929 (1931-1941 Supp.), the Washoe County Commissioners were authorized to aid in the acquisition and construction of a dam, commonly referred to as Boca Dam, for upstream storage on the Truckee River. For this purpose non-interest bearing bonds were issued and delivered to the Washoe County Water Conservation District by said Commissioners in the sum of $500,000 as the county's contribution to the project, the Federal Government supplying a like sum under the terms of a cooperative agreement with said district. Said bonds are retired by levy of an ad valorem tax through annual assessments "on all *taxable* property within the county." Here the

statute clearly excludes from the levy any property which is not taxable. State owned lands acquired by the State Highway Department fall into this category. Again, the exemption statute, i.e., Chap. 217, Stats. of Nevada 1955, determines the question. The lands involved are not therefore subject to a tax levy for retirement of the aforesaid county bonds.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-207 PUBLIC EMPLOYEES RETIREMENT SYSTEM—If years of service requirement is met, public employee who serves one-half of his time as fireman for city which is member of system, is entitled to retire at age 55, despite fact that major portion of his contribution comes from employment with county member of the system.

Carson City, September 11, 1956

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

Dear Mr. Buck:

You have requested of this office an opinion as to the eligibility of a public employee for retirement as a fireman under the provisions of Chap. 183 of the 1951 Stats., when the major part of his contribution to the system arises as a result of his employment in another capacity by the county.

The facts upon which a determination must be made are succinctly as follows: The employee in question works an 8-hour shift with a county highway department at $380 per month. He works an 8-hour night shift with the city as a fireman at $100 per month.

OPINION

In order to logically arrive at the correct legal conclusion it is necessary to consider the laws relative to retirement as they affect public employees following the ordinary pursuits of government, and as they affect firemen and policemen.

Under subparagraph 9 of Sec. 21 of Chap. 183 of the 1951 Stats., it is provided, "The term 'minimum service retirement age' shall mean 55 for police officers and firemen and age 60 for all others."

Sec. 14 of the Public Employees Retirement Act states that the objectives of the Act shall be to provide each employee who is a member of the system with the years of service or attained age in the Act specified, a disability allowance as in the Act specified and a total service retirement allowance of one-half his average salary for the five consecutive highest salaried years of his last ten years of service. * * * This objective shall be deemed applicable to police officers and firemen with 20 or more continuous years of credit in the system and who have reached the age of 55 years.

Sec. 18 of the Public Employees Retirement Act provides that "on and after July 1, 1949, a police officer or a fireman who is a member of the system and who has attained the age of 55 years, and has completed a minimum of ten years of accredited service, may be retired from service and thereafter, except as the act otherwise provides, the date of retirement shall be the first day of the calendar month in which application for retirement shall be filed with the retirement board or the last day of compensation, whichever is later."

Subparagraph 5 of Sec. 2 of the Act defines "retirement allowance" as payment for life derived from contributions of members and public employer.

There is nowhere in the Public Employees Retirement Act a proviso that determination of retirement age is dependent on the amount earned in any particular job by the employee. Rule 2 of the Retirement Board, adopted April 20, 1949, provides that, "A police officer or fireman must have served his last five years and at least one-half of his time as policeman or fireman to qualify for the earlier retirement age which is allowed for police officer or fireman." Here again it can be determined that time served and not money earned is the governing factor.

It is the understanding of this office that the public employee who is the direct concern of your inquiry serves an 8-hour day with the county and an equal amount of time daily with the city as a fireman. It would therefore appear that if the length of service requirements are met, that under the law and under rules adopted by the Public Employees Retirement Board, the employee in question is entitled to retire at age 55.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-208 PUBLIC UTILITIES; MUNICIPAL POWER SYSTEMS—In the absence of statutory exemption, municipal or governmental public utilities are subject to Chapter 192 of the 1933 Statutes imposing a duty on public utilities to pay 7 percent per annum on consumer deposits.

Carson City, September 12, 1956

Honorable L. E. Blaisdell, District Attorney, Mineral County, Hawthorne, Nevada

Dear Mr. Blaisdell:

You have called the attention of this office to an order of the Public Service Commission of Nevada dated August 17, 1956, which reads as follows:

BEFORE THE PUBLIC SERVICE COMMISSION OF NEVADA
Case No. 1261

In the Matter of Interest Payments by Utility Operators on Customer Deposits.

At a general session of the Public Service Commission of Nevada, held at its offices in Carson City, Nevada, August 17, 1956

Present: Chairman Robert A. Allen
Commissioner Fred W. Clayton
Assistant Secretary Cora Austin

ORDER

IT APPEARING that there has arisen some question as to the requirement covering interest payments by utility operators on customer deposits, and

IT FURTHER APPEARING that all electric utilities, all water utilities, and the major gas utilities provide in their rules and regulations for the payment of interest on customer deposits,

IT IS HEREBY ORDERED, pursuant to Section 6117, Nevada Compiled Laws, 1929, that on and after October 1, 1956, every public service company, corporation or individual furnishing light, power, water, gas, telephone, or any other service for which a published rate is charged shall, and they are hereby required to pay to every customer, from whom any deposit shall have been required, interest on the amount of said deposit at the rate of seven percent (7%) per annum from the date of deposit until the date of settlement, or withdrawal of deposit. Where such deposit remains for a period of one year or more and the person making the deposit continues to be a consumer, the interest on said deposit at the end of the year shall be either paid in cash to the depositor or applied on current bills for the use of light, power, water, gas, telephone, or other service at the option of the depositor as stated in writing, and

ITIS FURTHER ORDERED That every firm, company, corporation or person who shall fail, refuse or neglect to pay the interest provided above shall be subject to the penalties provided for in Section 6135, Nevada Compiled Laws, 1929.

By: the Commission,

/s/ Cora Austin,
Assistant Secretary

You request an opinion of this office as to whether said order is applicable to, and binding upon, the Mineral County power system.

OPINION

Sec. 6167.01 N.C.L. 1931-1941 Supp. requires the payment by every public service company, corporation or individual furnishing light and power or water or both, to the public to pay 7 percent per annum to every customer or consumer from whom a deposit is required on said deposit. The order of the Public Service Commission above referred to merely reiterates this law.

Chap. 45 of the 1921 Stats. of Nevada provided for the purchase, acquisition and construction of a power line by the Mineral County Commissioners, and Sec. 16 of that Act provided that the maintenance and operation of the Mineral County power line should be under the control, supervision and authority of the board of county commissioners, further provided for the establishment of rates by said commissioners subject to the supervision of the Public Service Commission of Nevada.

Chap. 259 of the 1953 Stats. of Nevada amended the above Act and particularly Sec. 19 thereof. The only amendment with which we are here concerned is that portion of the Act which reads as follows, "* * * provided, however, that all moneys deposited by users as meter deposits or line construction deposits shall be kept in a separate fund, to be known as the 'Mineral County light and power deposit fund,' which is likewise hereby created; and the board of commissioners may from time to time set aside such portion thereof as may be necessary or advisable to provide for the maintenance and operation of the Mineral County power line."

A deposit of the kind here described is in effect a trust. The depositor places the money up with the power company as a guarantee that he will pay the bills assessed against him as a consumer. The agreement is that upon conclusion of his consumption, and having met his obligation, as billed against him for use of such power, his deposit will be returned. The constitutionality of Chap. 259, 1953 Stats. is not, however, before us here.

The statute does not seem to make any distinction between public utility companies operated by private enterprise and those operated by municipalities. While the obligation to serve the public is voluntarily assumed, once this obligation has been established, it is subject to public regulation, and its public duties are imposed by law. Moneys available in the "Mineral County light and power fund" as distinguished from the "Mineral County light and power bond redemption fund," are available to meet the interest charges on deposits called for by Sec. 6167.01 N.C.L. 1931-1941 Supp., and the order of the Public Service Commission of August 17, 1956, is theretofore applicable to the Mineral County power system.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-209 PUBLIC SCHOOLS—Home instruction or private or parochial school students by public school teachers when such students are ill is unconstitutional and illegal. Ill child, if enrolled in public schools, entitled to all benefits and privileges accruing to school children similarly enrolled.

Carson City, September 12, 1956

Honorable Byron F. Stetler, Superintendent of Public Instruction, Carson City, Nevada

Dear Mr. Stetler:

This office is in receipt of an inquiry from you which raises two questions: 1. Is the school district responsible for the interim education of a child while ill at home, when such child is a regular enrollee of a private or parochial school? 2. If the parent enrolls the child in a public school during the period of disability, is the school district responsible during the child's illness for home instruction/

OPINION

There can be no question but that upon you and the State Board of Education rests the responsibility for the education of all children of school age, whether such education is in a public school or in a private or parochial school.

However, the financial responsibility for such education differs with the type of school. Sec. 236 of the 1956 School Code defines "public schools" as meaning all kindergartens and elementary schools, junior high schools and high schools which receive their support through public taxation and whose textbooks, courses of study and other regulations are under the control of the board of education.

Sec. 10 of Art. XI of the Constitution of Nevada provides: "No public funds of any kind or character whatever, state, county or municipal shall be used for sectarian purposes," and subparagraph 2 of Sec. 94 of the 1956 School Code provides, "No portion of public school funds shall in any way be segregated, divided or set apart for the use of any sectarian or secular society or association."

Subparagraph (b) of par. 3 of Sec. 459 of the School Code of 1956 provides that nothing in the section cited shall be so construed as to give private schools any right to share in the public funds apportioned for the support of the public schools of this State.

Parents have the right under our constitutional form of government to make a choice as to whether their children shall be educated in the public schools, private schools, or parochial schools. Having made the decision to enroll their children in private schools or parochial schools, they cannot be heard to complain that their children are denied certain privileges which are extended to those children attending public schools, such as free transportation and tuition, for they are fully aware of these benefits at the time their decision is made. They have weighed these benefits against the benefits of private or parochial schools and have determined that the latter outweigh the former. There is nothing to prevent them, should they so desire, from removing their children from the private or the parochial school and enrolling them in a public school.

The constitutional and statutory prohibitions against the use of public funds for educational purposes in private and in parochial schools are as deep seated and as deep rooted as our form of government.

A child regularly enrolled in a private school is there, in most instances, subject to a contract for tuition between the school and the parents. The general rule is that such a contract is entire and that a pupil's incapacity by reason of illness does not relieve the parent of liability for compensation during such illness. (Annotated 69 A.L.R. 715) Nor does the illness place upon the private school the burden of furnishing instruction to such student at home. This is one of the hazards which must be met by the parents by private tuition.

In the case of the parochial school the student is not, by reason of his illness, transformed from a parochial student to a public school student. Upon recovery he will return, not to public school, but to the parochial school. Therefore, the constitutional prohibition as well as the statutory prohibition would prevent the expenditure of public funds to provide educational facilities at his home during his illness.

Question number one must, therefore, be answered in the negative.

The answer to question number two is dependent upon a number of factors. To begin with it is not within the province of school enrolling officials to presuppose that a child enrolled during disability will return to private or parochial school upon completion of his convalescence. If the ill child can meet the eligibility requirements for admission to public school, then this office takes the position that he must be enrolled. It is equally consistent to hold that once enrolled the student is entitled to the same privileges or benefits as are afforded all public school children in that school district. If among those benefits is a program for instructing those unable to attend school by reason of illness or some other incapacity, the newly enrolled student is entitled to instruction while home-bound.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-210 CANDIDATE; JUSTICE OF PEACE—Legal residence required for the purpose of filing for justice of peace governed by Section 6405, N.C.L. 1929, and not by Section 6 of Chapter 1 of 1956 Election Laws.

Carson City, September 13, 1956

Honorable Grant Sawyer, District Attorney, Elko County, Elko, Nevada

Dear Mr. Sawyer:

Your office has requested an opinion as to the eligibility of a person for the office of justice of the peace of Mountain City, Nevada, based upon the residence requirements of our election laws.

Briefly stated the facts are these: A man has filed for justice of the peace in Mountain City. He commenced residing in Mountain City in October or November of 1955, where he assists in the operation of a grocery store during the week. He maintains a home for his family in Mountain Home, Idaho, where he and his family had resided for a number of years, and visits them there on weekends.

One further fact is set forth in your letter, viz., that this man filed his candidacy for justice of the peace approximately three weeks before he registered to vote in Nevada.

Your specific question, arising as a result of the foregoing facts, is: "Is this man a resident under the provisions of Sec. 6 of Chap. 1 of the 1956 Election Laws?"

OPINION

Let us first consider the section to which you refer. Sec. 6 of Chap. 1 of the 1956 Election Laws?

> If a man has a family residing in one place and he does business in another, the former must be considered his place of residence, unless his family be located there for temporary purposes only; but if his family reside without the state, and he be permanently located within the same, with no intention of removing therefrom, he shall be deemed a resident.

This section must be read in conjunction with Sec. 6405 N.C.L. 1929, defining legal residence. Such section reads 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.

The pertinent part of the law defining what shall constitute legal residence in the State of Nevada insofar as this case is concerned is as follows: "The legal residence of a person with reference to his * * * eligibility to office * * * is that place where he or she shall have been actually, physically and corporeally present within the * * * county, * * * during all of the period for which residence is claimed by him * * *; 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."

Now it would appear to me that this is the law which should apply to the candidate for justice of the peace, for it specifically places him in the category of one who either is, or is not, by reason of his residence eligible for public office. If this is so the candidate, in my opinion, is qualified. Mountain City, Nevada, is that place where he has been actually, physically and corporeally present during the period for which residence is claimed. When he leaves Mountain City on weekends, there can be little doubt that he intends to return without delay and to continue his residence in the Nevada city. His interests would make any other conclusion an absurdity.

On the other hand, Sec. 6 of Chap. 1 of the 1956 Election Laws applies specifically to the registration of electors for general, special and primary elections. This office pointed out in Opinion No. 146 that in the case of *State ex rel. Boyle v. Board of Examiners*, 21 Nev. 67, the court pointed out: "The qualifications of an elector are those prescribed by the Constitution, and they cannot be altered or impaired by the legislature. *Registration is not an electoral qualification*, but is only a means for ascertaining and determining in a uniform mode whether the voter possesses the qualifications required by the Constitution, and to secure in an orderly and convenient manner the right of voting." There can be no doubt but that the candidate was a qualified elector at the time he filed, despite the fact that he did not register to vote until some three weeks later.

But all other considerations aside, that part of Sec. 6 of Chap. 1 of the 1956 Election Laws applies with full force to this candidate for it reads as follows: "* * * but if his family reside without the state, and he be permanently located within the same, with no intention of removing therefrom he shall be deemed a resident."

It must be apparent, therefore, that the candidate meets the requirements as to eligibility for public office (which is actually the only question in issue) and also as to residential requirements for voting purposes.

Your inquiry must, therefore, be answered in the affirmative with emphasis placed upon the fact that regardless of Sec. 6 of Chap. 1 of the 1956 Election Laws, the candidate would be qualified as to residence in seeking public office.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-211 PUBLIC SCHOOLS—Any surplus in a school district fund in excess of commitments already made may be expended for construction of buildings for school use.

Carson City, September 17, 1956

Honorable Byron F. Stetler, Superintendent of Public Instruction, State of Nevada, Carson City, Nevada

Dear Sir:

We acknowledge receipt of your letter of the 13th advising that on September 4, 1956, the voters in White Pine County school district elected to authorize the issuance of bonds for the construction of school plant facilities, one of these being the establishment of a school for handicapped children. The opinion of this office is requested on the following question:

QUESTION

> Can the construction of this facility (the establishment of a school for handicapped children) be legally commenced at this time (by) using money from the regular budget and reimbursement made to the school district fund from the building fund after the bonds are sold?

OPINION

The answer to this question is provided in the new state school code adopted March 2, 1956, being Chap. 32, Stats. of Nevada, 1956 (Special Session), and in our opinion should be in the affirmative.

Sec. 281(1) of said code provides in part:

> * * * the board of trustees of a school district may make such special provisions as in its judgment may be necessary for the education of physically handicapped minors.

And to effect this purpose, it is provided in Sec. 286(2) that:

> * * * boards of trustees of school districts may: (a) Purchase sites and erect buildings for such purposes in the same manner as other school sites or school buildings may be purchased and erected.

These sections clearly authorize boards of school trustees in either county or joint school districts to provide for facilities to educate mentally handicapped children residing within any such district. Use of funds for this purpose would constitute a valid use thereof. Sec. 129(2) of the code provides in part:

> Money on deposit in the county school district fund, *when available,* may be used for: (c) Repair and construction of buildings for school use. (Italics supplied.)

We deem the italic words of especially significance in determining the legislative intent as to when and under what conditions district funds may be used for the repair and construction of buildings for school use. These words, in our opinion, impose a definite restriction as to such use, it being authorized only as to funds over and above what is already committed for other school uses. The amount of money which may therefore be diverted from the district fund for application toward the construction of the building for which the bond issue was authorized, would be limited to any surplus found to exist in the fund in excess of what will be required for commitments already made in accordance with the annual budget of the district. Presumably this surplus, if any exists, is inadequate to pay the total cost of construction of the facility or facilities contemplated or a bond election would never have been called for in the first place. But if it is found to be substantial in amount to justify starting the construction planned, its use for that purpose is authorized under the code. Assuming that the election authorizing the bonds was in all respects legal, then such course might be wise in order to expedite building what is apparently a much needed facility. However, if the bond issue should fail for some reason, then the district would be faced with the possibility of having an incompleted building, unfitted for any use, until such time as additional funds were made available. These are matters which should be well considered before starting construction of a building unless and until sufficient funds are available for its completion.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-212 STATE LEGISLATOR—Member of Senate or Assembly is barred by Section 1 of Article III of the Constitution of Nevada from membership on State board or commission, the latter being executive arms of the State Government.

Carson City, September 21, 1956

Honorable Thomas W. Miller, Chairman, State Park Commission, Reno, Nevada

Dear Colonel Miller:

You have directed to this office an inquiry as to whether a member of the Legislature, during the term for which he is elected, may serve on one of the commissions which are executive arms of the State Government.

OPINION

The Constitution of Nevada, Art. IV, Sec. 8, contains the following provisions:

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

The section of the Constitution quoted is plain and unmistakable. If the emoluments provided for any board or commission members have been increased by a Legislature of which said legislator and board or commission member was an elected member, then he cannot constitutionally remain a member of such board or commission.

There is a further provision of our State Constitution which is applicable, even in the absence of emoluments or salary. This is Sec. 1 of Art. III, which provides:

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

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

The commissions established by law in this State are executive arms of the government, delegated with administrative powers and with supervision and control over certain phases of our State Government.

As was state in *Gibson v. Mason*, 5, Nevada 283:

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

The language employed in Sec. 1 of Art. III of the Constitution of Nevada is clear and unambiguous. It does not content itself with principles which must be apparent to any student of government, but lays down a strict rule which forbids an officer in one of the three departments from holding at the same time an office in either of the other two departments.

It is clear that for a member of the Legislature to hold office as a member of a state board or commission is incompatible with this well established constitutional provision, for by the very nature of their office they are in a position to enact laws and to make appropriations which directly affect the board or commission of which they are a member.

There is nothing to prevent a member of a state board or commission from running for the Legislature, but once elected to that august body, he must resign or be removed from the board or commission in order to gain compliance with the constitutional prohibition against holding office in separate branches of the State Government.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-213 ELECTIONS; PRIMARY ELECTION—County commissioners or county clerks not empowered to withhold name of party nominee of primary election from general election ballot in absence of appropriate court action.

Carson City, September 21, 1956

W. J. Hemingway, Chairman, Board of County Commissioners, Ely, Nevada

Dear Mr. Hemingway:

You have requested this office to furnish you with an opinion concerning the candidacy of one who, as a nonpartisan, filed for the Democratic nomination for Assemblyman from White Pine County.

Leaving out the name of the candidate, the facts were as follows:
A person who upon registration as an elector in 1953 refused to designate his party affiliation, and was thus considered a non-partisan, filed in due time for the 1956 Primary as a candidate for the Assembly on the Democratic ticket.

It was necessary for him in so doing to file a declaration of candidacy, and to swear to the same. The pertinent parts of this declaration, with which we are here concerned, read as follows:

"* * * that I am a member of the Democratic party; that I have not reregistered and changed the designation of my political party affiliation on an official registration card since the last general election; that I believe in and intend to support the principles and policies of such political party in the coming election; that I affiliated with such party at the last general election of this State; that if nominated as a candidate of the Democratic party at the ensuing election I will accept such nomination and not withdraw * * *."

The candidate was successful and received sufficient votes in the race for the Assembly in White Pine County in the primary election held September 4, 1956, to entitle him to go on the ballot as one of four Democratic aspirants for the Assembly at the general election to be held on November 6, 1956.

The specific question to be resolved by this office is this: Can a person, who is registered as a non-partisan, and who files for office as a member of one of the main political parties and is nominated by a direct vote of the people at a primary election, have his name removed from the general election ballot by other than court action?

OPINION

Subparagraph (h) of Sec. 1 of Chap. 310 of the 1955 Stats. provides:

> This statute shall be liberally construed to the end that minority groups and parties shall have an opportunity to participate in the elections and that the real will of the electors shall not be defeated by any informality or failure to comply with all the provisions of law in respect to either the giving of any notice or the conducting of the primary election or certifying the results thereof.

Sec. 7 of Chap. 310 of the 1955 Stats. of Nevada provides that the county clerk, not less than twenty-one days before the September Primary, shall prepare sample ballots, and mail five copies thereof to each candidate, and shall mail to each registry agent, for distribution, one sample ballot for every four registered voters in such precinct. This section also provides that on the fifteenth day before any primary the county clerk shall correct any errors or omissions on the official ballot and shall cause the same to be printed and furnished to precinct election officers at the ratio of

110 ballots for each 100 electors registered in such party; *and the same ratio of non-partisan ballots for electors who have registered for the primary without designating any party affiliation.*

I call attention to this section to point out that these safeguards, taken together with the published list of registered voters, are sufficient to put not only the candidates but the general public on notice as to the party affiliations of the qualified electors. Despite these safeguards the person in question filed his declaration of candidacy and it was not challenged, either by the county clerk, the election officials or a qualified elector.

On May 7, 1946, the Honorable Alan Bible, Attorney General of Nevada, issued an opinion which is closely allied with the present problem. The question asked in that case was as follows: May an elector whose registration card shows that his political affiliations are nonpartisan change such registration declaring his affiliations to be with the Democratic party and file as a candidate for nomination for the office of sheriff as a member of the Democratic party? General Bible answered in the affirmative. In his opinion he pointed out that the official registration card of an elector who registered as a non-partisan would show that he was not a member of any political party, and that Sec. 2404 N.C.L. 1929, as amended, shows a political party to be an organization of voters qualified to participate in a primary election. Under the provisions of par. (g) of Sec. 1 of Chap. 310 of the 1955 Stats. such participation may be in either of two ways: First—Any organization of electors which, under a common name or designation at the last preceding November election, polled for any of its candidates equivalent to 5 percent of the total vote cast for Representative in Congress. Second—Any organization of electors which, under a common name or designation, shall file a petition, signed by qualified electors equal in number to at least 5 percent of the entire vote cast at the last preceding November election for Representative in Congress, declaring that they represent a political party of principle, the name of which shall be stated, and that they desire to participate and nominate officers by primary * * *.

The opinion of General Bible goes on to point out that the elector, although not a member of a political party, may have affiliated with a political party and may desire to become a member of such party. In the case of *Wolck v. Weedin*, 58 Fed.2d 928, it was held that a person need not be a member of a party, but if he sympathized with the party's aims and desired to join when allowed to do so, that was sufficient to show his affiliation with such party. The non-partisan elector would not, therefore, reregister for the purpose of changing his politics, but to become a member of his selected party.

General Bible in his learned opinion points out that the manifest purpose of the Legislature was to prevent the switching from one political party to another in order to become a candidate of that party at a primary election, and the changing of a registration card for any other reason would not do violence to such purpose.

It must be pointed out that the present case differs from that set out in Attorney General Bible's opinion in that there the reregistration occurred prior to the filing for office, whereas here, the registration occurred after the nomination in the primary.

There can be no doubt that the Legislature under the powers given to it by Sec. 6 of Art. II of the Constitution of Nevada may prescribe rules and regulations governing elections, provided they do not conflict with constitutional guarantees. That the provisions of our direct primary law are constitutional has been decided in the case of *Riter v. Douglass*, 32 Nev. 400.

The contention must be forwarded that any objections to the placing of a person's name on the primary ballot should be taken prior to the election (*State v. Fransham*, 48 Pac. 1; *Lund v. Hall*, 186 N.W. 284; *Dithmar v. Bunnell*, 110 N.W. 177), and it was held in the case of *Adair v. McElreath*, 145 S.E. 841, that voters finding the names of candidates on their official ballots are not required to determine whether they are entitled to a place thereon, but may safely rely on the action of the officers of the law and on the presumption that they have performed their duty. In the case of *Torkelson v. Byrne*, 226 N.W. 134, it was held that an election will not be set aside because of irregularities on the part of election officials unless it appears that such irregularities affect the result.

This office points out these decisions because they inescapably lead to the conclusion that the person in question in this case, being a nonpartisan, would have had the right to reregister as a Democrat prior to the primary election. Does the fact that he did not, violate his statements made

in his declaration of candidacy. We think not as far as his affiliation with the Democratic party is concerned, as pointed out in Attorney General Alan Bible's opinion No. 300 of May 7, 1946, and the case of *Wolck v. Weedin*, 58 Fed.2d 928. He campaigned as a Democrat and is evidently well and favorably known to the voters of White Pine County or he would not have been elected.

While it has been determined that a nominee is not a public officer (*Riter v. Douglass*, 32 Nev. 400), it is pointed out in the case of *State ex rel. Rinder v. Goff*, 109 N.W. 628, that he holds a quasi-office and that with it certain rights are vested. He is entitled to its single privilege, the right to have his name put on the official ballot, in the proper place, as against all the world, until in some proper action or proceeding to contest his right it is decided that another person was in fact nominated.

In *State ex rel. Barger v. Circuit Court for Marathon County*, 190 N.W. 563, it was held that after nomination in the primary election of a candidate for State Senator, a court had no jurisdiction to determine that the candidate's name might be taken from the election ballot, even though prior to the general election the candidate's noneligibility might be plainly disclosed. This was based upon the proposition that under the State Constitution the respective houses of the Legislature were the sole judges of the election returns and qualifications of their own members. Art. IV, Sec. 6 of the Nevada Constitution, has a similar provision with regard to the qualifications, elections and returns of its own members.

Finally assuming that we were to find that this nominee's name should not appear on the general election ballot because prescribed procedures were not followed, the disturbing question remains as to how, and by whom, it can be removed. The offices of county commissioners and county clerks are ministerial offices, and the incumbents have only such powers as are expressly granted to them by the Legislature. Such powers are exclusive and except as to those specifically enumerated, and those as might be reasonably inferred as implied powers to carry out powers expressly granted, do not exist. (*First Nat. Bank of San Francisco v. Nye County*, *38 Nev. 123; State v. McBride*, *31 Nev. 57; State v. Boerlin*, 30 Nev. 473.) We find nothing in the law reciting or inferring that the board of county commissioners or the county clerk have the power to remove a successful candidate's name from the general election ballot.

We do not infer from the citation of the Barger case (supra) that a Nevada court does not have the power to effect such a removal, nor do we express an opinion that such power exists. Upon this question we express no opinion.

It is, therefore, the opinion of this office that the name of the successful nominee for Assembly on the Democratic ticket at the September, 1956, Primary, should go on the general election ballot in November, in the absence of an order to the contrary by a court of competent jurisdiction.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-214 PUBLIC EMPLOYEES RETIREMENT ACT—Public Employees Retirement Board has power to determine disability of employee at time of withdrawal of contributed funds, and to allow repayment of withdrawn funds and award of disability benefits, without reemployment of said employee.

Carson City, September 24, 1956

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

Dear Mr. Buck:

You have directed to this office a letter dated September 19, 1956, in which you request an opinion on the following inquiry:

QUESTION

> It is within the power and privilege of the Retirement Board to accept an establishment of incompetency as sufficient to nullify the action of the individual in withdrawing contributions and to permit repayment of such withdrawn contributions, without reemployment in a position covered by the system, with consequent reinstatement as a member of the system?

The facts which led to a submission of the inquiry were briefly as follows:

A public employee who was a contributor to Public Employees Retirement was dismissed from her position on April 1, 1956, the reason for such dismissal not being shown on Nevada Personnel Department Form 35. On April 19, 1956, the employee, in accordance with the right granted her under subparagraph (2) of Sec. 16 of the Public Employees Retirement Act, withdrew from the fund to which she had contributed, the entire amount then standing to her credit in such fund.

At a later date (approximately one month) she was committed to the Nevada State Hospital. Several months later a guardian was appointed for her.

It is the contention of the guardian, so appointed, that at the time the public employee applied to withdraw her contributions that she was incompetent, and that therefore the board should allow the repayment of the amount withdrawn, with the consequent reestablishment of the incompetent as a member of the Public Employees Retirement System, thus subjecting her to the benefits available under the system.

OPINION

In order to arrive at a conclusion consistent with the facts outlined heretofore, it is necessary to set forth and to study those provisions of the Public Employees Retirement Act which are applicable.

Let us begin by stating that the public employee in question had not attained the minimum service retirement age, but was at the time of her separation in the employ of a participating member of the system.

Under subparagraph 2 of Sec. 16 of the Act we find the following language:

> (2) In the event that an employee who is a member of the system, who has contributed to the fund and who has not attained his earliest service retirement age, is separated, for any reason other than death or disability, from all service entitling him to membership in the system, he may withdraw from the fund the amount credited to him in his account.

Pausing here for a moment it is not clear, because of the status of the records of the State Personnel System, whether the dismissal of the public employee in question was due to disability, which could, of course, be either physical or mental. This is of the greatest importance because if, at the time the employee applied to withdraw her contributions she was disabled, the Public Employees Retirement Board would be estopped by the law from allowing her to do so. It is apparent therefore that the officials of the Public Employees Retirement System upon whom devolve the duty of determining the allowance of a withdrawal of contributed funds by a public employee, and who are familiar with the law, determined that in this instance the employee was not disabled either mentally or physically at the time she applied to withdraw her contributions.

Mental illness, however, is an illusory and difficult disability to determine where laymen are concerned. A person thus afflicted has in many types of mental diseases, periods of rational thinking and adjustment, and even in periods of aberration gives the appearance ofttimes of being in complete possession of the mental faculties.

If the person in question was, in fact, not disabled on April 19, 1956, when she applied for withdrawal of her contributions, and became mentally incompetent shortly prior to her commitment to the State Hospital, then under Sec. 16, subparagraph (4) (b) of the Act, she ceased to be a member of the system. The pertinent part of such section and subparagraph reads:

"An employee shall cease to be a member of the system * * * in the event that during any absence from such service he withdraws the amount credited to his account in the fund."

The only manner in which the board may reinstate an employee as a participating member in the system is set forth in subparagraph 3 of Sec. 16, of the Act, which allows a person who has withdrawn the amount credited to him, and who returns to the employ of a participating agency within five years after separation from previously covered employment, and who redeposits, with interest, all deposits previously withdrawn, to again become eligible for benefits under the Act.

Under the circumstances set forth in this case it is apparent that the public employee stands little chance of returning to public service with a participating member of the Public Employees Retirement System. Strictly construed, the law would estop the employee in question from repaying the amount of her withdrawal and applying for benefits under the disability clauses of the Act. However, it is the opinion of this office that a liberal and justified construction of subparagraph 20 of Sec. 16 of the Act would allow the Public Employees Retirement Board to accept competent medical testimony, as well as testimony from the participating employer, as to the mental or physical disability of the employee in question on April 19, 1956, and to adjudicate, if the testimony and facts warrant it, a return of the amount withdrawn and the awarding of benefits under the disability clauses of the Public Employees Retirement Act.

This conclusion is reached after a careful study of the Act and a determination in our mind that the Act was passed by the Legislature to protect as fully and as completely as possible the public employee of the participating agencies.

Your question therefore is answered in the affirmative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-215 MOTOR VEHICLES—No authority in Public Service Commission to license person to do business as used car dealer; nor to deny dealers registration on basis of past record.

Carson City, October 1, 1956

Mr. Richard A. Herz, Director, Motor Vehicle Division, Public Service Commission, Carson City, Nevada

Dear Mr. Herz:

This office is in receipt of your letter dated September 26, 1956. We quote the body of your letter as follows:

> We request a written opinion as soon as possible from your office on the following case which confronts the Motor Vehicle Division.
>
> In the licensing of a used car dealer under the present Nevada Statutes, we require a printed form called a "Statement of Facts", to be answered by the person or firm applying for a license. The Statement of Facts must be signed by a Nevada Highway Patrol officer, who inspects the premises and is satisfied that the applicant can be licensed as a used car dealer.
>
> If the Highway Patrol officer does not sign the Statement of Facts, the Motor Vehicle Division will not issue a dealer's license to the applicant.
>
> At the present time we have an applicant where the Nevada Highway Patrol officer refuses to sign the Statement of Facts, because of the past reputation the dealer has acquired in dealer operations in the State of California.
>
> Investigation by the Highway Patrol has revealed the applicant has been convicted several times in the State of California, because of improper transactions on the sale of motor vehicles to the public.
>
> Can the State of Nevada, Motor Vehicle Division, in this particular case refuse to license the applicant as a used car dealer in the State of Nevada?
>
> We are enclosing a copy of our list of investigations, obtained from Nevada State Highway Patrol.

OPINION

Your specific question and the import of your letter leads us to believe that you are requesting our opinion as to whether or not your division has the authority to refuse to permit an individual or corporation to enter into the business of used car dealing in this State. If this is what you have in mind, the answer is in the negative.

Chap. 289, 1955 Stats. of Nevada, is the latest amendment pertaining to this subject. While this chapter, in Sec. 1 thereof, uses the term "dealer's license", this does not, in our opinion, refer to a license which, if denied to an applicant, would prevent him from entering into the used car business. The whole procedure comprehending the issuance of the dealer's registration certificate and general distinguishing number or symbol constitutes nothing more than a procedure in lieu of the regular registration of each vehicle, and the law so states. The authority to determine whether

a person or firm can enter into the business of dealing in used cars in this State has not been delegated to the Public Service Commission of Nevada.

If your question is directed to whether your division has the authority to deny an applicant the dealer's certificate of registration and general distinguishing number, as contemplated in the above cited provision, on the basis of his past record, this office is inclined to the view that this question must also be answered in the negative. We are unable to find such extensive authority lodged with the Public Service Commission, either express or implied.

A portion of subparagraph (b) of Sec. 1, cited above, provides as follows:

> (b) The application shall be upon a blank to be furnished by the department, and *the applicant shall furnish such proof as the department may deem necessary that the applicant is a manufacturer or dealer, and entitled to register vehicles under the provisions of this section. The department, upon receipt of such application and when satisfied that the applicant is entitled thereto,* shall issue to the applicant a certificate of registration containing the latter's name and business address and the general distinguishing number or symbol assigned to him in such form and containing such further information as the department may determine * * *.(Italics ours.)

We are of the opinion that the italic wording lodges no further discretion with the commission than the acquisition of proof that the applicant is a dealer in used cars. Outside of the requirement that a bond be furnished as a security against fraudulent dealing, the entire provision concerning dealers contemplates a regulation designed for the purpose of registration for identification and not for the purpose of the regulation of a business that may or may not be fraught with fraudulent practice.

Such extensive authority as may have been thought to exist would, in the opinion of this office, have to be far more clearly delineated. Whether such control is necessary would be a matter for legislative determination.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: William N. Dunseath
Chief Deputy Attorney General

OPINION NO. 56-216 PUBLIC HEALTH—State Board of Health empowered by the Legislature to adopt a regulation requiring annual chest X-ray examinations of food handlers, school teachers, and certain other workers in contact with the public, for the purpose of discovering and controlling communicable tuberculosis.

Carson City, October 8, 1956

Daniel J. Hurley, M. D., Acting State Health Officer, Carson City, Nevada

Dear Dr. Hurley:

Under date of October 4, 1956, you have addressed a letter to this office inquiring as to whether the State Board of Health has been empowered by the Legislature to adopt a regulation requiring annual chest X-ray examinations of food handlers, school teachers and certain other workers in contact with the public, for the purpose of discovering and controlling tuberculosis.

OPINION

The powers of the State Board of Health are set forth in Sec. 5259 N.C.L. 1931-1941 Supp. and for the purpose of this opinion I quote the language which is apropos to the presently anticipated regulatory measure:

> The state board of health is hereby declared to be supreme in all health matters and it shall have general supervision over all matters relating to the preservation of the health and life of citizens of the state * * *. The state board of health shall have the power * * * to adopt, promulgate, amend and enforce reasonable rules and regulations consistent with law (a) to define and control dangerous communicable diseases, * * * (d) to provide for the sanitary protection of water and food supplies * * * (f) to protect and promote the public health generally.
> * * * Such rules and regulations shall have the force and effect of law and shall supersede all local ordinances and regulations * * * inconsistent therewith.

Our Legislature in bestowing these broad powers on the State Board of Health recognized that the health of the people is an economic asset and a social blessing. As our population has increased, both nationally and statewise, and our civilization has become more complex, there has been a steady tendency toward a code of rules to guard against illness, disease and pestilence. Health officers and boards have been appointed for the purpose of devising and enforcing sanitary measures and safeguards. The preservation of the public health is one of the duties devolving upon the State as a sovereign power. Among all the objects sought to be secured by government laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the State, through its proper instrumentalities or agencies, to take all necessary steps to promote this object.

That the enactment or promulgation of rules to govern the public health is constitutional, there can be no doubt. The measures find ample support in the police power which is inherent in every state.

That the Legislature at one time had just such remedial measures in mind as are here sought to be instituted is evidenced by Chap. 79 of the 1935 Stats. of Nevada. This law provided for prospective employees of food establishments, before engaging in such employment, to secure from a city or county physician a certificate showing the holder thereof to be free from any communicable disease, including tuberculosis. This law was repealed in 1937 by Chap. 106 of the Stats. of that year.

Rules and regulations affecting or governing the public health, whether enacted by the Legislature or promulgated by a board of health which has the power so to do under legislative authority, must be submitted to by individuals for the good of the public, unless there is a clear invasion of the constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law.

The requirement that those who handle food for public dispensation, or teachers who come in daily contact with the next generation, submit to X-ray for the purpose of determining whether they have communicable tuberculosis, is not, in my opinion, arbitrary or unreasonable. The courts have upheld the right of health authorities, as a valid exercise of the police power, to require all members of a community to submit to vaccination, subject to a penalty for failure so to do. The proposed regulation does not go so far, for the requirement in the present instance may be forestalled or bypassed by the individual involved by not seeking, or remaining with, the employments to be governed by this regulation.

It is, therefore, the opinion of this office that the State Board of Health has the power under legislative authority to adopt a regulation requiring annual chest X-ray examinations of food handlers, school teachers, and certain other workers in contact with the public, for the purpose of discovering and controlling communicable tuberculosis.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-217 NEVADA REAL ESTATE COMMISSION—Under the Nevada Real Estate Act there is no authority for the commission to issue a special privilege license entitled "Mortgage Loan Broker License."

Carson City, October 17, 1956

Mr. Gerald J. McBride, Executive Secretary, Nevada Real Estate Commission, 309 West Telegraph Street, Carson City, Nevada

Dear Mr. McBride:

We have your letter of October 15, 1956, requesting an opinion of this office. The letter refers to two opinions of this department, namely, Opinion Number 167 of May 7, 1956, and Opinion Number 175 of June 8, 1956.

The earlier opinion held that "A 'mortgage broker' whose operation is 'buying and selling' first and second trust deeds and mortgages is not a 'real estate broker' as defined by statute." This was based upon the facts stated that such brokers did not in any manner participate in the creation of the loan, but only purchased and sold those evidences of indebtedness already existing.

The latter opinion mentioned, with another conclusion, was based upon other facts of the stated operation of the mortgage broker. The question propounded was: "Are mortgage brokers whose operations are negotiating and processing original or purchase money trust deeds and mortgages, in which they are not named as principals, and for which they expect and receive compensation, real estate brokers as that term is defined by statute?" The interrogatory was

answered in the affirmative, by reference to the express provisions of Sec. 2 of the Act, which section in both opinions was quoted.

Briefly, the problem that is now presented to your office is this: Mortgage loan brokers who negotiate loans are real estate brokers, and as such should be licensed, as such. Such brokers perform an important function in obtaining money which is urgently needed in a tight money market. Such brokers have no desire to prepare themselves to pass the difficult real estate brokers examination, or to carry on all of the normal functions of a real estate broker. Such brokers fully realize the importance of their function in a tight money market and would not be adverse to special treatment. The Nevada Real Estate Commission is fully conscious of the danger and desires to avoid any ruling which would be a disservice or which would result in injury to the present licensees or the public.

QUESTION

Under Sec. 17, par. 1 of the Nevada Real Estate Act, providing that each license issued by the commission shall contain such matter as shall be prescribed by the commission, does the commission have the power and authority to issue a license entitled "Mortgage Loan Broker License," such license to contain provisions which would limit the authority of the licensees thereunder to perform only the functions outlined in Opinion Number 175?

OPINION

The statutes appertaining hereto are of 1947, Chap. 150, p. 484; 1949, Chap. 204, p. 433; 1955, Chap. 279, p. 457.

The statute creating and regulating the functions of the commission, many times refers to the issuance of two types of licenses namely, "Real Estate Broker License" and "Real Estate Salesman License." It authorizes no other type of license. The enumeration of types of licenses that may be issued by the Nevada Real Estate Commission, is exclusive. We are not unmindful of the fact that under Sec. 6 of the Act there is conferred upon the commission a rule making power. Such power, of course, permits the making of such rules only as are reasonably necessary to carry into effect the express powers. This provision does not purport to authorize the commission to alter the substantive provisions of the statute, nor would such authorization, if it were present, be constitutionally allowable.

Sec. 17, par. 1, of the Nevada Real Estate Act reads as follows:

> The commission shall issue to each licensee a license in such form and size as shall be prescribed by the commission. This license shall show the name and address of the licensee, and in case of a real estate salesman's license, shall show the name of the real estate broker by whom he is employed. Each license shall have imprinted thereon the seal of the commission, and in addition to the foregoing *shall contain such matter as shall be prescribed by the commission.* The license of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in the custody and control of such broker. Each real estate broker shall conspicuously display his license in his place of business. (Italics supplied.)

We understand the proposal of the commission to be, upon the above quoted provision as authority, to issue a license entitled "Mortgage Loan Broker License," despite the fact that two and only two types of licenses are authorized by the statute, and not including this designation. Also, that under the provisions that the license "shall contain such matter as shall be prescribed by the commission," the commission would provide that such licensees perform only the functions that were discussed in Opinion Number 175.

Such a disposition of the matter by the Nevada Real Estate Commission would in effect be an alteration or amendment of the statute, and would not constitute rule making, and is totally unauthorized. The Nevada Real Estate Commission has the powers expressly conferred upon it by the provisions of the statute and none other.

We hold, that under the provisions of the statute and in conformity with the two opinions, the function and manner of operation of a mortgage loan broker determines whether or not he is a "real estate broker" as defined by law. If he is such he is required to be licensed. If he is required to be licensed the license will be as a "real estate broker," for there is no authority to issue a license as a "mortgage loan broker." If he is licensed as a "real estate broker," he is fully licensed as such, and not licensed to perform part of the normal functions of a "real estate broker." The statute does not authorize the issuance of conditional licenses or limited privilege licenses of real estate brokers. It follows that there is no authority to examine for a limited privilege license.

We are conscious of the fact that this determination does not fully meet the need of the commission or of the licensees hereunder. But the remedy is with the Legislature, and we doubt not but that the Legislature will, when requested, amend the Act in such a manner as to retain its

features respecting unauthorized competition and broaden the Act in a manner to encourage the free flow of money and credit into real estate transactions, all to the resulting benefit of the licensees and the general public.

For the reasons given the question stated must be answered in the negative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. PRIEST
Deputy Attorney General

OPINION NO. 56-218 GRAND JURIES—Grand Jury in Nevada does not have authority to issue or submit public report denouncing or castigating public officials, boards or private citizens in absence of evidence warranting, and consequent return of, an indictment for a criminal offense.

Carson City, October 19, 1956

Honorable George Dickerson, District Attorney, Las Vegas, Nevada

Dear Mr. Dickerson:

You have requested of this office, at the direction of the Grand Jury of Clark County, an opinion as to whether under our laws a grand jury may issue a scathing and denunciatory report against public officials in the absence of such probable cause as would warrant indictments against said public officials for acts criminal in their nature.

You report that you have advised the grand jury that under our laws, and under the applicable opinions of courts in other states, they have no such right.

OPINION

In order to arrive at a conclusion commensurate with the importance of this subject it is necessary to consider not only the statutory law and the opinions and decisions of courts throughout the United States, but constitutional provisions of both the United States Constitution and the Constitution of Nevada.

The fifth amendment to the Constitution of the United States wisely provides, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * *," and Sec. 8 of Art. I of our State Constitution provides, "No person shall be tried for a capital offense or other infamous crime * * * except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney

general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions * * *."

The powers of a grand jury must necessarily be limited by statute and under Sec. 10826 N.C.L. 1929, as amended by Chap. 162 of the 1943 Legislature, those duties are set forth as follows: "The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; into the condition and management of the public prisons within the county; into the willful and corrupt misconduct in office of public officers of every description within the county; may inquire into any and all matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district, or town therein."

The question then arises as to whether the grand jury's duty and power to investigate and inquire into the willful and corrupt misconduct in office of public officers within the county, carries with it the power to make a scathing and denunciatory report in the absence of the discovery of an indictable offense. We think not for reasons which we shall set forth at length.

On July 6, 1953, former Attorney General W. T. Mathews set forth in a scholarly and well-substantiated opinion (No. 274), the limitations imposed upon a grand jury by constitutional provisions and statutory law. The opinion pointed out that the foreman of the grand jury swears in the oath which he must take before assuming that important duty (Sec. 10810 N.C.L. 1929) that he will "diligently inquire into, and true presentment make, of all offenses against the State of Nevada committed or triable within this county, of which you shall have or can obtain legal evidence," and the same oath is taken by each grand juror (Sec. 10811 N.C.L. 1929).

In citing the case of Petition of McNair, 187 Atlantic 498, the language of part of that learned decision was set forth as follows:

> A grand jury's investigation cannot be a blanket inquiry to bring to light supposed grievances or wrongs for the purpose of criticizing an officer or a department of government, nor may it be instituted without direct knowledge or knowledge gained from trustworthy information that criminal conspiracy, systematic violations of the law, or other criminal acts of a widespread nature prevail, and at least one or more cognate offenses should exist on which to base a

> general investigation. The investigation cannot be aimed at individuals primarily, as such nor at the commission of ordinary crimes (*Commonwealth v. supra*; *Commonwealth v. Reedy*, 21 P. Dist. & Co. R. 524; *In re* Alleged Extortion Cases, supra), but should be of matters of criminal nature wherein public officers or the interests of the general public are involved.
>
> * * * * *
>
> Investigations for purely speculative purposes are odious and oppressive and should not be tolerated by law. Before they may be instituted, there must be knowledge or information that a crime has been committed. There is no power to institute or prosecute an inquiry on chance or speculation that some crime may be discovered. Matter of Morse, 42 Misc. 664, 87 N.Y.S. 721. The grand jury must know what crimes it is to investigate. The court of quarter sessions has no power to set such an inquiry in motion unless it has reasonable cause to believe that an investigation will disclose some criminal misconduct which is within its jurisdiction to punish.
>
> The grand jury must not be set upon fruitless searches founded upon mere rumor, suspicion or conjecture. These are proper matters for police investigation. Before reflection is cast upon the integrity of public officials, a preliminary investigation by the forces of law charged with the discovery of crime should be made to determine whether there is any real foundation. Such jury investigations involve great expense to the public, subject the citizen to inconvenience, and frequently interfere with the normal functioning of public officials and bodies brought before it. They throw a cloud of suspicion upon the parties subject to attack and undermine public confidence in them. There must be a sound, solid basis on which to proceed.

General Mathews held that in the absence of a showing of a willful, corrupt or criminal act committed by the Colorado River Commission members and triable in Clark County, that the grand jury was without authority to make an investigation of that commission.

In a recent opinion by the Attorney General of Illinois (No. 209, April 26, 1955) the Honorable Latham Castle, after pointing out the duties imposed upon grand juries in that state by the legislature, and which duties were similar to those imposed upon grand juries in this State, pointed our "Other than the foregoing there would appear to be no additional subject matter upon which a grand jury in this state is required to report."

In calling attention to the case of Chicago, *Wilmington and Vermillion Coal Company, et al, v. The People of the State of Illinois*, 114 Ill.App. 75, where a grand jury report accompanied an indictment (a much stronger position for such a report than where no indictment is returned) the Attorney General of Illinois quotes the language of the court in that case:

> The grand jury which found this indictment made a written report to the Criminal Court * * *
>
> We are asked to take judicial notice of that report and to consider its contents in our efforts to reach a proper conclusion in this case. We cannot so do. Such report is the *voluntary act of the*

grand jury, for which there is no authority in the law. That body performed its whole duty when it passed upon all criminal cases of which it had knowledge, and returned to the court all the true bills found. The indictment is the completed act of the grand jury; and that paper stands upon its merits or falls because of its demerits, wholly uninfluenced by any report, written or verbal, which the "accusing jury" may make to the court under whose guidance it has performed its labors. (Italics added.)

The Attorney General of Illinois goes on to state, "A report which reflects unfavorably upon the conduct and character of public officials or citizens, unless supported by an indictment may be expunged from the records of the court (citing 24 Am.Jur. Sec. 36, p. 859)."

The Illinois opinion continues:

> In the State of Utah the grand jury is directed by statute to inquire into the wilful and corrupt misconduct in office of public officers. In the case of *In Re* Report of Grand Jury (Utah) 260 P.2d 521, a grand jury returned a report, unsupported by any indictments, condemning the management of certain public agencies and institutions of the State. The Supreme Court of Utah affirmed an order of the lower court expunging the censorious portions of the report. The court stated inter alia (pp. 526-527):
>
> > It would be dangerous to imply from our statutes any authorization for a grand jury to make a report of unsavory conditions found by them in investigating other public institutions and governmental subdivisions and agencies, if the report, directly or indirectly, charges or imputes misconduct on the part of a public officer whom the grand jury does not choose to indict * * * If however, no evidence of the commission of a public offense is unearthed by a grand jury which warrants their returning an indictment, we think it subservient to the best interests of our citizenry that no report be filed with the court which contains any imputation of misconduct or wrongdoing on the part of a public officer unless the grand jury follows the report with an indictment of the officer in question. While much good can result from a grand jury calling attention to conditions which they find to be in need of remedying, when the report goes further and impugns the motives and conduct of public officials, the possibility of damaging the reputation of blameless public officials overshadows the good which might result to the public from the filing of such a report.

The Attorney General of Illinois states, "It would seem to be the consensus among courts to which the matter has been presented that the historic two-fold function of the grand jury to

investigate and either indict or absolve the parties should not degenerate into a mere scolding of public officials or carping criticism of political subdivisions created by constitution or statute."

The right of a public official to be secure under his constitutional rights to be confronted by his accusers and to offer a defense is so firmly established in American Jurisprudence as to preclude an unwarranted and sometimes politically inspired attack by a grand jury in the absence of a criminally indictable offense. Nowhere has the logic or reasoning behind this philosophy of government been more clearly annunciated than by Mr. Justice Woodward in the case of *In Re* Jones in the Supreme Appellate Court of New York:

The question presented by this record involves the legal right of a Grand Jury to bring in a presentment against individuals where the evidence adduced does not disclose that any crime has been committed. In other words, we are asked to determine whether the Grand Jury acting under the laws of this state is authorized to make a public record censoring individuals for alleged misconduct or where the conduct alleged does not constitute a crime. Whether the State of New York has established an inquisition in which the conduct of citizens may be reviewed and officially criticized and censored according to the standards of ethics or morals of such board rather than by those standards which have been fixed and determined by the law of the land. In determining the powers of the Grand Jury under the laws of this State, whether regulated by statutes or usage constituting the common law, we have a right to consider what that body might do under this indefinite power of making presentment if that power be conceded. If it has a right to censor the petitioner in the matter now before us it is difficult to conceive of any limitation upon the powers of the Grand Jury. It may establish its own standards of right and wrong. It may subject the citizens to the odium of judicial condemnation without giving him the slightest opportunity to be heard, often times working in the public estimate as great an injury to the standing and character as though he had, in fact, been accused of a crime. This is a perversion of the essential spirit of the Grand Jury system, which had for its object the protection of the citizens against an open and public accusation of crime and from the trouble, expense and

anxiety of a public trial before a probable cause is established by the presentment and indictment. It cannot be that it was ever contemplated that this body created for the protection of the citizens was to have the power to set up its own standards of private or public morals and to arraign citizens at the bar of public opinion without responsibility for the abuse of that power and without giving to the citizens the right to a trial upon the accusations. There are two great purposes, one to bring to trial those who are properly charged with crime and the other to protect the citizens against unfounded accusation of crime. When the Grand Jury goes beyond this in an attempt to set up its own standards and to administer punishment in a way of public censor, it is defeating the very purpose it was intended to conceive, and its action cannot, therefore, be lawful. Section 6 of Article I of the State Constitution provides: "No person shall be held for a capital or otherwise infamous crime unless presentment or indictment of a Grand Jury, and in any trial in any Court whatever the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions". *(It is interesting to note that this is identical with Section 8, Article I of the Constitution of the State of Nevada.)*

Justice Woodward further states, "a presentment or indictment as applied to the citizens by our Constitution contemplates in substance the same thing. It contemplates an accusation of crime to be followed by an answer on the part of the person thus formally accused, with an opportunity to be heard in his own defense before a jury of his peers. The terms are, in their relation to the individual, synonymous. No one would contend that a citizen could be indicted for anything less than a crime or that if indicted he could be denied an opportunity to answer and to appear in his own defense before a jury, and it seems to me equally clear that there is no

constitutional right to make a presentment against an individual in a case where an indictment would not lie."

And he concludes by elucidating, "If the acts charged do not constitute a crime, then there is no indictment before the Court and the petitioners clearly have a right to be relieved of the odium of a judicial censor where the document in which such censor is contained is a mere impertinence without authority of law."

The fitness for public office, which requires removal by lawful proceedings, is an issue to be tested in another forum. It is not a proper element in what is required to be a factual report after investigation, and there are many cases which hold that such reports may be expunged from the record. (*In re* Crosby, 213 N.Y.S. 86; *In re* Wilcox, 276 N.Y.S. 117; *In re* Osborne, 125 N.Y.S. 313; *In re* Heffernan, 125 N.Y.S. 737; Application of United Electrical Radio and Machine Workers of America, 111 Fed.Supp. 858; *Ex Parte* Robinson, 165 So. 582; *State ex rel. Strong v. District Court*, 12 N.W.2d 776; *State v. Bramlett*, 164 S.E. 873, etc.)

The court in *In re* Osborne, 125 N.Y.S. 313, sets forth in clear and unmistakable language the inherent dangers of unwarranted grand jury reports:

> It has become a custom of almost invariable occurrence that the Grand Jury at the close of its term may make presentment on some subject on which frequently no evidence has been heard. This no doubt proceeds from the zeal of its members to promote the general welfare by calling attention to certain conditions which they believe should be remedied. So long as they are confined to matters of general interest they are regarded as harmless even though a waste of time and effort, and after the ephemeral notice of the day has passed they are allowed a peaceful rest, but it is very different when the motives and conduct of the individual are impugned and he be held to reprobation without an opportunity to defend or protect his name and reputation for it must be borne in mind that if the gentlemen of the Grand Jury were to meet as an association of individuals and give expression to the sentiments contained in a presentment little attention would be paid to them and a healthy regard for the responsibility of utterances injurious to the individual would in all probability restrain exaggerated and unfounded statements. The mischief arises from a prevalent belief that a Grand Jury making the conventional presentment speaks with great authority and acts under the sanction of the Court thereby giving to its deliverance a solemnity which impresses the mind of the public. This is grave error. The powers and duties of a Grand Jury are defined by law. No matter how respectable or eminent citizens may be who comprise the Grand Jury they are not above the law and the people have not delegated to them arbitrary or plenary powers to do that, under an ancient form, which they have not a legal right to do * * * its action should be checked when, from thoughtlessness or misconception of its jurisdiction, or an exaggerated idea of its own importance, it arraigns the citizen in phrase accusing him of acts or conduct which in themselves are not criminal, thereby precluding him from the right guaranteed by the Constitution to every man to meet his accusers face to face before a Jury of his peers, and which are the more insidious and harmful because they must remain without answer or denial.

In 28 Corp. Jur. 799, the following statement applicable to general law is made:

> Grand Juries sometimes make a sort of general presentment of evils or evil things to call attention to them, yet not as instructions for any specific indictment. It has been held that a Grand Jury has no power to file with the Court a report of this nature charging no crime, but reflecting upon the conduct of specified individuals and a Court may expunge such a report from the records where it appears to have inadvisedly made or as merely a guise to accuse a public official with laxity in the enforcement of certain laws.

The policy established by the foregoing citations must be observed, because, in our opinion, when a grand jury issues a report castigating a public official, without evidence to support an indictment, it imposes the punishment of public reprimand upon *ex parte* proceedings. When a grand jury does this it defeats the very purpose of its existence. It takes upon itself the role of moral preceptor without authority and the continuance of such practices might well lead to serious and unwarranted abuses of grand jury power.

It is, therefore, the opinion of this office that grand juries in the State of Nevada have no authority to issue or submit public reports denouncing or castigating public officials, boards or private citizens, in the absence of evidence warranting, and consequent return of, an indictment for a criminal offense.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-219 COUNTY COMMISSIONERS; SCHOOL BOARDS—The trustees of a school district and the county commissioners of a county may forego the legal requirement of advertising for bids where the amount of the contract exceeds $1,000 when the purchase is made through the State Purchasing Department.

Carson City, October 25, 1956

Honorable Roscoe H. Wilkes, District Attorney, Pioche, Nevada

Dear Mr. Wilkes:

You have submitted to this office an inquiry as to whether a school district or a board of county commissioners may forego the legal requirement of advertising for bids where the amount involved exceeds $1,000, and when the purchase is made through the State Purchasing Department.

OPINION

Sec. 20 of Chapter 333 of the 1951 Stats. sets forth the procedures and requirements to be met by the director of the State Purchasing Department in requesting bids for materials and supplies exceeding $500 in value.

Sec. 28 of the Act empowers the director to authorize using agencies to make purchases not exceeding $500 for each order and not in excess of $1,000 over all, for a period not exceeding three months, when the exigencies of the situation demand such procedure.

Under Sec. 42 of the Act the director may make available to political subdivisions the materials and supplies purchases by the department from the War Assets Administration.

In 1955 the Legislature amended Sec. 20 by Chap. 13 of the Stats. of that year by adding to the requirement for advertising for bids in excess of $500, "that whenever such advertising relates to any supplies, materials or equipment to be obtained at the request of any county, municipality, irrigation district or school district, such advertising must be published in the county or counties in which such requesting agency is located, or, in lieu thereof, a true copy of such advertisement, certified to by the director, shall be forthwith filed with the county auditor of such county or counties."

These provisions, and especially the latter, take from the boards of school trustees and the county commissioners the necessity of advertising for bids in accordance with Sec. 426 of the 1956 School Code and Sec. 1963 N.C.L. 1929 as amended, when purchases are made through the State Purchasing Department.

The purpose of advertising through the medium of the press is to advise the general public of the contemplated purchases, as well as to bring the matter to the attention of a larger and more diverse group of bidders. This is accomplished through the amendment of Sec. 20 of the State Purchasing Act as set forth in Chap. 13 of the 1955 Stats.

It stands to reason that county commissioners and school boards may forego the necessity of advertising for bids in excess of $1,000 when materials and supplies are purchased through the State Purchasing Department.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-220 GRAND JURIES—Modifies Opinion No. 218.

Carson City, October 29, 1956

Honorable George Dickerson, District Attorney, Las Vegas, Nevada

Dear Mr. Dickerson:

In rereading Opinion No. 218 issued by this office on October 19, 1956, I notice that the words "individual members of" were not inserted in front of the word "boards" in both the syllabus and the last paragraph of the opinion.

The syllabus should read:

Grand Juries—Grand Jury in Nevada does not have authority to issue or submit public report denouncing or castigating public officials, individual members of boards or private citizens in absence of evidence warranting, and consequent return of, an indictment for a criminal offense.

And the last paragraph should read:

It is, therefore, the opinion of this office that grand juries in the State of Nevada have no authority to issue or submit public reports denouncing or castigating public officials, individual members of boards or private citizens, in the absence of evidence warranting, and consequent return of, an indictment for a criminal offense.

The statutes, of course, give the grand juries the power to make a report as to the condition and management of public prisons within the county, and as to boards or commissions when the morals, health and general welfare of the people are directly concerned. Such reports, however, should not make a scathing or denunciatory report of individuals connected with such institutions, boards or commissions, in the absence of evidence sufficient to warrant an indictment.

To this extent and this extent only, Opinion No. 218 is modified.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-221 VOCATIONAL EDUCATION ACT OF 1946—The State Legislature in adopting the Nevada School Code of March 2, 1956, Section 95, accepting Smith-Hughes Act of 1917 and Vocational Education Act of 1946, by implication also adopted Public Law 911, 84th Congress, August 1, 1956, amending the latter Act.

Carson City, November 2, 1956

Honorable Byron F. Stetler, Superintendent of Public Instruction, Carson City, Nevada

Dear Sir:

In your letter of October 30, 1956, you refer to the plan of the Nevada State Board for Vocational Education providing for the extension and improvement of practical nurse training based on the State's acceptance of the Federal Vocational Education Act of 1946, which plan was recently submitted to the Department of Health, Education, and Welfare, United States Office of Education. That department has requested clarification of said plan in its communication to you in the following quotation:

Section I.

1.1—The Nevada Statutes cited in the plan relate to the operation of the Vocational Education Programs for which grants are made available under the Smith-Hughes Act and the Vocational Education Act of 1946. Thus, they do not specifically include operation of a program for which grants are available under P. L. 911 (84th Congress) although that amends the Vocational Education Act of 1946. It will thus be necessary that a statement of your Attorney General be submitted as a part of the plan, indicating that the State Board for Vocational Education has authority to operate such a program.

In view of this request, you have submitted certain inquiries for the opinion of this office as follows:

QUESTIONS

1. Did the Nevada State Legislature intend that amendments to the Federal Vocational Education Act of 1946 passed subsequent to the amendment date of August 1, 1946 be accepted?
2. Does the State Board for Vocational Education have the authority to operate a program provided for under P.L. 911 (84th Congress) which amends the Vocational Education Act of 1946?

OPINION

Vocational education became available to the states upon enactment by Congress of the Smith-Hughes Act of 1917. Almost immediately Nevada accepted the benefits afforded thereby through appropriate legislation and has participated in the program continuously since. When the federal act was supplemented by enactment of the Vocational Education Act of 1946, the State availed itself of a broader program so as to realize additional benefits, and in 1953 a limited amount of practical nurse training was included. The special session of the State Legislature, in adopting the new school code of March 2, 1956, specifically accepted the provisions of both the Smith-Hughes Act of 1917 and the Vocational Education Act of 1946 (Chap. 32, Stats. of Nevada 1956, Sec. 95). Subsequently the 84th Congress, on August 1, 1956, enacted Public Law 911 amending the Vocational Education Act of 1946 with respect to practical nurse training, thereby giving rise to the questions hereinabove propounded.

A cursory examination of the problems here involved might prompt the hasty conclusion that had the State Legislature intended to include subsequent amendments, or supplemental laws, to the Vocational Education Act of 1946, it would have expressed its intent by stating that the said Act was accepted "together with all amendments or acts supplemental thereto." This it failed to do, but undoubtedly this omission will be brought to the attention of the 1957 Legislature for proper action. It is a rule of statutory interpretation that a "statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute." (Sutherland Statutory Construction, Vol. 2, Sec. 5208.)

Thus the problem resolves itself into a determination of whether or not there was an implied intent on the part of the Legislature to incorporate the subsequent amendment here under discussion into and as a part of the legislative act. We believe there was. Although not apparent from any express words in said Act, certain extrinsic aids nevertheless point to this conclusion.

The early acceptance by the State Legislature of federal benefits for the establishment and maintenance of vocational education in this State and continuous participation therein over the years since; the extension of the vocational education program throughout the State as conditions justified; the creation of a Board of Vocational Education for the administration of such programs; the fact that limited State revenues alone would not have permitted accomplishment of similar training with State funds, and many more conditions are all facts from which it may reasonably be implied that the Legislature intended to realize every possible benefit from any and all federal laws pertaining to vocational education. As federal aid for this purpose increased, so did the State extend its program to include more types of training. Under the ruling of the United States Department of Education that provision in the federal acts for promotion of education in trades and industry included practical nurse training, the Legislature readily made appropriations for that purpose.

That the Legislature had in mind a more extensive program of practical nurse training when it adopted the 1956 School Code, such as was provided for in the amendment to the Vocational Education Act of 1946, is evidenced by Sec. 276 of said code, reading as follows:

> 1. The moneys for vocational education, which consists of agricultural education, trade and industrial education, home economics education, and such other phases of vocational education as the state board for vocational education may approve for adoption in Nevada schools, shall be provided for and raised in the manner specified in section 95 * * *.

It is further provided in Sec. 272 of the School Code that the State Board for Vocational Education shall have authority:

> 1. To cooperate with any federal agency, board or department designated to administer the acts of Congress referred to in Section 95.
> 2. To administer any legislation enacted pursuant thereto by the State of Nevada.

We read into these provisions a strong implication of legislative intent to extend and promote any and all types of vocational education for which the State had a need at the time of enactment of the School Code or which might thereafter be needed. Any such long range plans obviously contemplated increased benefits through amendments to the federal acts.

While laws pertaining to public grants are as a general rule strictly construed, yet we are not unmindful of the exception that "Where a public grant has as its purpose the promotion of great public enterprises and the happiness, prosperity and development of the community, the basic policy behind the rule of strict interpretation is the beneficent operation of the statute." (Sutherland Statutory Construction, Vol. 3, Sec. 6406.) Grants promoting public education have been held to come within this category and there are many cases so holding. We believe that for the same reasons a liberal construction is applicable to Sec. 95 of the School Code, even though the federal acts therein adopted are subsequently amended.

Based upon the foregoing, it is the opinion of this office that both the questions hereinabove submitted should be answered in the affirmative.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-222 MOTOR FUEL TAX—Apportionment of motor fuel tax to be in accordance with Motor Vehicle Fuel Tax Act of 1935 as amended. Municipal Charter—City of Gabbs entitled to apportionment of motor vehicle fuel tax six months after incorporation and not prior thereto.

Carson City, November 16, 1956

Honorable William P. Beko, District Attorney, Nye County, Tonopah, Nevada

Dear Mr. Beko:

On August 10, 1956, you directed an inquiry to this office as follows:

> Is it the duty of the county treasurer to apportion all of the Nye County road fund on the date of the incorporation of the City of Gabbs, or is it the duty of the county treasurer to apportion only those funds received into the county road fund after six months from the effective date of the Act?

You also inquire as to whether the apportionment of motor vehicle fuel taxes as set forth in Sec. 36 of Chap. 381 of the 1955 Stats. of Nevada is contrary to the provisions of the Motor Vehicle Fuel Tax Act of 1935.

OPINION

Sec. 36 of Chap. 381 of the 1955 Stats. reads as follows:

> County Commissioners to Apportion Road Fund. The Board of County Commissioners of Nye County, and it is hereby made their duty, from time to time, 6 months after the effective date of this act, upon the request of the Board of Councilmen, to apportion to the city such proportion of one-half of the General Road Fund of the County of Nye as value of the whole property within the corporate limits of the city, as shown by the assessment roll, shall bear to the whole property within the corporate limits of the city, as shown by the assessment roll, shall bear to the whole property of the county, inclusive of the property within the city, and all moneys so apportioned shall be expended upon the streets, alleys, and public highways of the city, under the direction and control of the city board of councilmen.

It will be noted that it is made the duty of the County Commissioners of Nye County six months after the effective date of this Act, upon request of the Board of Councilmen of Gabbs, to apportion certain moneys which are derived from the sale of motor vehicle fuel. With this portion

of Sec. 36 there can be no quarrel, and it is the interpretation of this office that insofar as that portion of Sec. 36 is concerned the request by the board of councilmen can be made for funds which are available only after the six months' period. To hold otherwise would be to infer that it would be within the ability of the county commissioners to determine the needs of the city in advance of the six months' period and to set aside certain funds for apportionment. The law does not contemplate this because all of the funds apportioned up to the six months' period might be used by the county commissioners elsewhere in the county.

As to the balance of Sec. 36, it is clearly contrary to and in variance with Sec. 6570.02 N.C.L. 1943-1949 Supp. as amended by Chap. 124 of the 1955 Stats., which provides a uniform method of levying taxes on motor vehicle fuel.

Under subdivision (a) of said section, the money derived is to be paid by all counties to the State Tax Commission and by that commission to the State Treasurer. It is allocated by the State Treasurer to the county treasurer monthly according to formulated use without reference to the county from which it is derived. The amount under this subsection is 1/2¢ per gallon, and the levy is mandatory and the funds so apportioned are dedicated to the construction, maintenance and repair of county roads and for the purchase of equipment for such work. It is therefore concluded that no part of this fund may be legally apportioned to the city councilmen for city street use.

Under subsection (b) we find that the county commissioners of each county have a discretion as to whether the tax of one cent per gallon on motor vehicle fuel shall be collected and paid by dealers within their respective counties. Sums so collected are paid to the Nevada Tax Commission and by the commission to the State Treasurer, who distributes the money monthly to the county treasurer of the county from which the money was derived, to be expended solely for the construction, maintenance and repair of the public highways of the county and incorporated cities within the counties and for the purchase of equipment for such work. This money is apportioned from the general road fund of the county based on the ratio which the assessed valuation of property within the boundaries of the incorporated cities bear to the total assessed valuation of the counties inclusive of property within the incorporated cities. All such moneys so apportioned are to be expended upon the streets, alleys and public highways of such city under the direction and control of the governing body of the city, other than state highways, and for no other purpose. This Act is general in scope and applies to all counties within the State, as well as to the municipalities therein, and for this reason is controlling even though at variance with Sec. 36 of Chap. 381 of the 1955 Stats.

The formula set forth in Sec. 36, Chap. 381, 1955 Stats., in the opinion of this office, contravenes Sec. 20 of Art. IV of the Constitution of Nevada, in that it violates the Constitution prohibition against legislation regulating county and township business or for the assessment and collection of taxes for State, county and township purposes by local or special laws, and also contravenes Sec. 21 of Art. IV of the Constitution of Nevada which provides that in all cases enumerated in Sec. 20 and in all other cases where a general law can be made applicable, all laws shall be made general and of uniform operation throughout the State.

It is therefore the opinion of this office based upon the foregoing, that county commissioners can apportion road funds only in accordance with the Motor Vehicle Fuel Tax Act as amended by Chap. 124 of the 1955 Stats. And that under Sec. 36 of Chap. 381 of the 1955 Stats., such apportionment may be made only after a date which is subsequent to six months from the date of incorporation of Gabbs, and that such apportionment may only be made from funds available after the date of the request.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-223 POWERS AND DUTIES OF NEVADA LIQUEFIED PETROLEUM GAS BOARD extend to the control of installations of gas equipment for private purposes as well as for purposes of resale.

Carson City, November 20, 1956

Nevada Liquefied Petroleum Gas Board, P.O. Box 289, Carson City, Nevada

Gentlemen:

In your letter of November 15, 1956, you have submitted the question hereinafter set forth and requested the opinion of this office in answer thereto.

QUESTION

> Does the Board control installation of ALL LP storage tanks, 1500 gallons or more, if put in by an individual or firm for their own private or personal use and not for the purpose of resale of LP gas as a dealer? And how is this affected if there are employees on the premises?

OPINION

We answer the first part of the question in the affirmative.

The Nevada Liquefied Petroleum Gas Board was created under the provisions of Chap. 93, Stats. of Nevada, 1953, and its powers and duties defined therein. We therefore look to certain sections of that Act in determining this question.

> Sec. 3. *The Nevada liquefied petroleum gas board shall make, promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling, transporting by tank truck, tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof.* Said regulations shall be such as are reasonably necessary for the protection of the health, welfare and safety of the public and persons using such materials, and shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter. Such regulations shall be adopted by the Nevada liquefied petroleum gas board only after a public hearing thereon, held after notice given in the manner and for the time specified by said board. (Italics supplied.)

The wording used in this section would appear to give the board exclusive power to make and enforce all regulations for installation of liquefied gas equipment as may be deemed reasonably necessary for protection of health, welfare and safety.

> Sec. 4. It is hereby declared that regulations in substantial conformity with the published standards of the national board of fire underwriters for the design, installation and construction of containers and pertinent equipment for the storage and handling of liquefied petroleum gases as recommended by the national fire protection association shall be deemed to be in substantial conformity with the generally accepted standards of safety concerning the same subject matter.

This section sets up a standard to be followed or adopted by the board in establishing its rules to assure the protection of the public health, welfare and safety.

Sec. 5. *All equipment shall be installed and maintained in a safe operating condition and in conformity with the rules and regulations of the Nevada liquefied petroleum gas board adopted under sections 3 and 4 of this act.* (Italics supplied.)

This section requires that the installation of *all* equipment be made pursuant to the standards and rules provided for in Secs. 3 and 4.

Sec. 9. No municipality or other political subdivision shall adopt or enforce any ordinance or regulation in conflict with the provisions of this act or with the regulations promulgated under section 2 of this act.

This section was obviously included in the Act to prevent dual standards and conflicting regulations in the installation of liquefied gas equipment. It adds emphasis to what is provided elsewhere in the Act that the powers and duties of the board in this respect are exclusive.

Read together, it becomes apparent that the Act is intended to be applicable to installations of all gas equipment whether it be for purposes of resale or purely private use. The primary purpose of the Act is the protection of the health, welfare and safety of the public rather than the promotion of the gas industry. To achieve this aim the board's powers must extend to installations of every nature regardless of its use or purpose.

We believe that the intent of the Legislature was clear as to the powers of the board and that such powers should be asserted through its proper officer or officers when contemplated installations come to their attention. Failure or refusal to comply with the board's regulations will subject offenders to the penalties provided for in the Act.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-224 NEVADA STATE BOARD OF DISPENSING OPTICIANS—Use and distribution of certain articles by dispensing opticians not in violation of the Act of 1951.

Carson City, November 26, 1956

Nevada State Board of Dispensing Opticians, 134 So. 4th Street, Las Vegas, Nevada

Attention: Victor Isaacson, Secretary-Treasurer.

Gentlemen:

In your letter of November 23, 1956, you have requested the opinion of this office as to whether or not distribution of a certain article entitled "What Your Eyes Tell the Doctor," by

Bernard Rosenberg, and appearing in Coronet Magazine in July, 1956, violates par. 3, Sec. 12 of the Dispensing Opticians Act of 1951.

OPINION

The paragraph in question of the above-mentioned Act makes it a misdemeanor, punishable upon conviction by fine of not less than one hundred nor more than five hundred dollars, imprisonment for not less than ten days nor more than one year, or both, "To make use of any advertising statement of a character tending to indicate to the public the superiority of a particular system or type of eyesight examination or treatment."

It appears to be the intent of the Act to prevent certain types of advertising which border on the unfair or which are designed to produce questionable business advantages to the advertiser, or which might tend to cheapen the profession. Accordingly, the Legislature has specifically listed certain definite prohibited types of advertising by dispensing opticians.

A careful reading and analysis of the Rosenberg article fails to convince us that it is of a character tending to indicate to the public the superiority of a particular system or type of eyesight examination or treatment. In fact, it is very general and illustrates by case discussions the value of consulting a competent ophthalmologist for periodic eye check-up. In our opinion its content does not come within the category of statements, the use or distribution of which is prohibited by the Dispensing Opticians Act of 1951. Care should be taken, however, that such use or distribution is not an infringement of any copyrights of the author of the article.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-225 Omitted from record.

OPINION NO. 56-226 PUBLIC SERVICE COMMISSION; UNINCORPORATED TOWNS—Jurisdiction granted Public Service Commission in a special Act to control the water system of a certain town is lost upon incorporation of said town into a city pursuant to General Incorporation Laws of the State, and is not revived when such city disincorporates.

Carson City, December 3, 1956

Honorable Robert A. Allen, Chairman, Public Service Commission, Carson City, Nevada

Dear Mr. Allen:

Reference is made to your letter of November 15, 1956, stating that prior to its incorporation Hawthorne operated its water system under an ordinance adopted April 6, 1933, by the Mineral County Commissioners acting as a town board, which said ordinance provided for distribution of water under regulations and at rates subject to the approval and confirmation of the Nevada Public Service Commission. In 1946 the town incorporated, thereby removing its water system from the jurisdiction of the said commission, but after a period of time it disincorporated and reverted to its former status. Based upon these facts you have submitted the following inquiry for the opinion of this office.

QUESTION

In so reverting, would the Hawthorne water system again come under the jurisdiction of the Public Service Commission.

OPINION

The Public Service Commission Act of 1919, being Secs. 6100-6146, N.C.L. 1929, created the Public Service Commission and delegated to it certain powers and duties. Sec. 6106 thereof defines the term "Public Utility" and provides further that "* * * the public service commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, *unless otherwise provided by law."* (Italics supplied.) That the above Act does not apply to municipally owned public utilities, unless otherwise provided by law, was determined in *Ronnow v. City of Las Vegas*, 57 Nev. 332. (*Also see* Attorney General's Opinion No. 231, 1953.)

In enacting Chap. 141, Stats. 1929, authorizing the Mineral County Commissioners, in their capacity as a town board, to construct and operate a municipal water plant for domestic, commercial and industrial use in the then town of Hawthorne, the Legislature saw fit in Sec. 15 thereof to subject the rules, regulations and rates to be adopted by said board for the management and control of its plant, to the approval and confirmation of the Public Service Commission. Ordinance No. 16 adopted by the Mineral County Commissioners on April 6, 1933, recognized this legislative mandate and specifically provided for such approval and confirmation.

When Hawthorne changed from its status as a town to that of an incorporated city pursuant to the general incorporation laws in 1946, the subject matter upon which Sec. 15 of Chap. 141 was designed to operate ceased to exist. Consequently the section was rendered inoperative and became a nullity. At the time of its enactment the Legislature was presumed to have knowledge of the general incorporation laws of the State under which Hawthorne was later incorporated.

That body could not have intended that the section in question operate beyond the time Hawthorne remained unincorporated. Nor could it reasonably have intended that said section be alternately operative or non-operative as the voters might choose for their community to be incorporated or not. From this we deduct that the intention of the Legislature was that upon incorporation of Hawthorne as a city, so much of Chap. 141, Stats. 1929, as conflicted with control of its water system, and particularly Sec. 15 thereof, would fully expire rather than become merely suspended. Although the courts are not in full agreement, it is, nevertheless, a maxim followed in the federal and many state courts, and which we believe applies in determining our question here, that when the reason for the law ceases, the law itself ceases. *Rupert Hermanos, Inc., v. People of Puerto Rico*, 106 F.2d 754 (1939); *Fosgate Co. v. Kirkland*, 19 Fed.Supp. 152 (Fla. 1937); *Jackson v. Porter*, 188 P. 375 (Mont. 1920); *Broadwater v. Kendig*, 261 P. 264 (Mont. 1927); *First Trust Co. of Lincoln v. Smith*, 277 N.W. 762 (Neb. 1938); *Phipps v. Boise Street Car Co.*, 107 P.2d 148 (Ida. 1940); *Evans v. Gunn*, 20 N.Y.Supp.2d 368 (N.Y. 1941); *State Ex Rel.* Pope, 156 P.2d 299 (Wyo. 1945).

Upon incorporation Ordinance 16 of the former town board was likewise rendered ineffective. All functions of the newly created city respecting its water system then became subject to the laws of the State governing municipal corporations in general, leaving nothing of the old form of control over said system which could be revived later. Disincorporation of the city which was completed approximately last year did, however, bring the community back under the general laws governing unincorporated towns to the same extent as though it was coming into that status for the first time. This is true for the reason that such general laws are applicable to *all* unincorporated towns in the State. Assuming incorporated status for a time by any town in the State does nothing to invalidate said laws, but must, upon becoming again qualified by disincorporation, resume operation under them. But such resumption of operation will do nothing to revive the provisions granting the Public Service Commission a voice in the control of the Hawthorne water system contained in Chap. 141, Stats. 1929, which was a special Act applicable only to that town.

We are, therefore, of the opinion that disincorporation of the city of Hawthorne and reversion to an unincorporated status does not under the circumstances herein discussed, and in the absence of further legislation, bring its water system under the jurisdiction of the Public Service Commission.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-227 NEVADA STATE CHILDREN'S HOME unauthorized to lend institution's property to a county school district or other governmental function of the State.

Carson City, December 6, 1956

Mr. Jed Oxborrow, Superintendent, Nevada State Children's Home, Carson City, Nevada

Dear Mr. Oxborrow:

We have your letter of December 3, 1956 asking the opinion of this office upon the advisability of lending the school bus owned by the Nevada State Children's Home to Ormsby County School District for emergency school transportation.

OPINION

A thorough search of the statutes fails to reveal any authority authorizing the lending of any property owned by the Nevada State Children's Home under any circumstances. We find in Chap. 254, Stats. of Nevada 1951, Sec. 6, concerning the powers and duties of the superintendent of said home, that "The superintendent shall have power to manage and administer the affairs of the home and to establish rules for its operation not inconsistent with any policies set forth by the state welfare board." Under the provisions of Chap. 327, Stats. of Nevada 1949, setting out the powers and duties of the State Welfare Board, we find in Sec. 9 thereof that said board is authorized to "administer and manage the affairs of the Nevada State Orphans Home." No details are specified as to the manner in which the board might exercise its powers, but we do not feel that it was the intention of the Legislature to authorize the lending of any porperty belonging to the Nevada State Children's Home.

It is a general rule of law in determining the powers of all appointive and elective officers that such officers are empowered to do or perform only what the statutes specifically enumerate as powers and duties or what the statutes specifically enumerate as powers and duties or what may be reasonably inferred therefrom. In our opinion no inference may reasonably be drawn from any laws presently in effect authorizing use of any property of the State Children's Home by a school district or any other unit of state, county or city government.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-228 CONSTITUTIONAL LAW—Law approved by referendum vote of the people cannot be amended except by direct vote of the people, in conformity with Section 2 of Article XIX of the Constitution of the State of Nevada.

Carson City, December 10, 1956

Mr. J. E. Springmeyer, Legislative Counsel, Carson City, Nevada

Dear Sir:

You have advised this office that the Legislative Commission requests an answer to the following question:

> Under the provisions of Art. XIX of the Constitution of the State of Nevada, may the 1957 Session of the Nevada Legislature amend Chap. 397, Stats. of Nevada 1955, known as the Sales and Use Tax Act of 1955, in view of the fact that the said Chap. 397 was given referendum approval by the people of the State of Nevada at the general election held on November 6, 1956?

OPINION

An answer to this question requires a careful study and analysis of Sec. 2 of Art. XIX of the Constitution of Nevada, particularly with reference to the meaning of the words and phrases "overruled," "annulled," "set aside," "suspended," "or in any way made inoperative." In order to facilitate reference to the pertinent provisions of Sec. 2 of Art. XIX of the Constitution of Nevada, it is hereby set forth:

> When the majority of the electors voting at a state election shall by their votes signify approval of a law or resolution, such law or resolution shall stand as the law of the state, and shall not be overruled, annulled, set aside, suspended, or in any way made inoperative except by the direct vote of the people. When such majority shall so signify disapproval the law or resolution so disapproved shall be void and of no effect.

The paramount question confronting the Legislature is in effect this: Are the words and phrases "overruled," "annulled," "set aside," "suspended," "or in any way made inoperative," synonymous with the word "amend." If they are, either grouped together or standing alone, then, the people having approved the Sales and Use Tax Act by a referendum vote, the Legislature could not amend the Act at the forthcoming session of the Legislature. If they are not synonymous, then the Act could be amended.

It is important to decide the intent of the Legislature in adding Art. XIX to the Constitution of Nevada, in order to determine the true meaning of the words used. In short, did the legislators

purposely omit the word "amend" from Sec. 2 of Art. XIX, so as to leave the door open for legislative amendment, or did they omit it feeling that it was unnecessary in view of the words and phases used.

We are constrained to feel that the words used by the Legislature are to be taken together so as to prevent amendment of a law that by referendum vote stands as the law of the State by the terms of Sec. 2 of Art. XIX of the Constitution. The phrase "or in any way made inoperative" lends credence to this legal interpretation, for if the Act as approved by the people can be emasculated by amendment, thus falling short of annulment, abrogation or suspension, yet it could most certainly to all intents and purposes be made inoperative. Who is to say, if legislative amendment be possible under the constitutional prohibition, where such amendments are to end. We strongly feel that the method of amendment has, by the Constitution itself, been provided by the phrase, "except by the direct vote of the people." The people have adopted the law as it now stands. If they become dissatisfied with it, they can, by direct action, initiate such changes as they deem desirable.

That the reasoning of this office is correct is clearly indicated by the opinion of our Supreme Court in the case of *Tesorieré v. District Court*, 50 Nev. 302. In that case the Legislature had proposed a different measure than the initiative measure proposed and both were submitted to the people for approval or rejection at the general election held November 7, 1922. The measure proposed by the Legislature was approved and the measure proposed by initiative petition was rejected. The Supreme Court held that the measure approved by the people was subject to amendment because it had originated in the Legislature. That its holding would have been otherwise if the initiative measure proposed by the people had been approved is indicated by the language of Justice Ducker in his concurring opinion. We quote it herewith:

> It will be observed from these provisions that three things must occur before a law is confirmed by the people so that it cannot be amended or repealed except by their direct vote: First, there must be a law; second, there must be the expressed wish of 10 per centum or more of the voters of the state that it be submitted to the vote of the people; and, third, a majority of the electors voting at a state election must signify approval of the law.
>
> None of these essentials appeared in the procedure followed as prescribed by section 3 of said article 19 by which the said measure became a law. It was not a law when submitted, but a measure proposed by the legislature with the approval of the governor under the right conferred by section 3. It was not referred to the

electors for their approval or rejection by the expressed wish of 10 per centum or more of the voters of the state, but by the legislature under said authority of said section 3. It was not approved by a majority of electors voting at a state election, but by a majority of the votes cast for and against the measure. Consequently it did not by referendum become enacted into a law that could not be amended by the legislature by reason of the prohibition of section 2 of article 19.

For the reasons above set forth, it is the opinion of this office that Chap. 397, Stats. of Nevada 1955, known as the Sales and Use Tax Act of 1955, cannot, because of its adoption by a referendum vote of the people at the general election on November 6, 1956, be amended except by a direct vote of the people in accordance with the provisions of Sec. 2 of Art. XIX of the Constitution of Nevada.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-229 NOTARIES PUBLIC—Governor authorized to issue Notary Public Commission to employees of the U.S. Government, but not to a person holding a lucrative office thereunder unless otherwise excepted in Article IV, Section 9, Constitution of Nevada.

Carson City, December 11, 1956

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

Dear Governor Russell:

This acknowledges receipt of your inquiry of November 23, 1956, enclosing a copy of a letter recently received by your office concerning application for a notary commission by an employee of the United States Government. It is noted that the commission is desired for purposes of convenience and with no expectation of receiving any compensation for notarial services during office hours as such practice is prohibited by Internal Revenue rules. Based upon these facts you have submitted the question hereinafter stated for the opinion of this office.

QUESTION

Is the issuing of a notary commission to an employee of the United States Government prohibited by reason of Art. IV, Sec. 9, Constitution of the State of Nevada, which reads as follows:

> No person holding any lucrative office under the Government of the United States, or any other power, shall be eligible to any civil office of profit under this state; provided, that postmasters whose compensation does not exceed five hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office.

OPINION

The power of the Governor to appoint and commission notaries public in this State is provided for in Secs. 4732-4735 N.C.L. 1929. The Nevada State Supreme Court has ruled that

the section of the State Constitution with which we are here concerned imposes certain limitations upon such power of appointment. That court has held that the office of notary public is a civil office of profit under this State within the meaning of said section and, therefore, that a receiver of public money in a United States Land Office was ineligible to the office of notary public. *State v. Clarke*, 21 Nev. 333.

It is clear from the authority above cited that one holding a lucrative office under the United States Government is ineligible to any civil office of profit under this State, including that of notary public. This brings us to a determination of whether or not the section imposes a prohibition against the appointment of an employee of the United States Government to the office of notary public in this State.

No comprehensive definition of the term "employee" is possible. The courts have provided numerous ones, designed chiefly to fit or apply to the laws, constitution or conditions of the jurisdiction concerned. Although a real distinction exists between an officer and an employee, no rule can be laid down which is applicable in all cases. Nor is it important that we determine the distinction here. Suffice it to say that our Supreme Court in a scholarly opinion by Justice Coleman, and concurred in by Chief Justice Norcross, has ruled that where the word "office" or "officer" appears in our Constitution, it does not mean or include the word "employee" or "employment." In *State v. Cole*, 38 Nev. 215, 235, the court said:

> The word "office" or "officer" is used in the constitution of this state in more than twenty different sections, and in no instance where such words are used is there any context which would indicate a broader definition than that which legitimately belongs to such words. Notwithstanding the words "civil office of profit" appear in the section of the constitution without context or qualifying expression, affording justification for construction, we are urged to construe into the language something that is not there, and to hold that the convention in adopting, and the people in ratifying, the constitution, intended to adopt a policy which the language of the constitution fails to express. As said in 6 Ruling Case Law, 47:
>
> > Courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent.

This maxim of constitutional law was applied by this court in *State v. Clarke*, 21 Nev. 333, 31 Pac. 545, 18 L.R.A. 313, 37 Am. St. Rep. 517, in construing the identical words involved here, found in the section of the constitution following the one in question. This court in the Clarke case said:

> A fundamental principle in all construction is that where the language used is plain and free from ambiguity, that must be our guide. We are not permitted to construe that which requires no construction.

We can no more in this case say that what is in fact a mere employment is nevertheless within the meaning of "civil office of profit" than the court in the Clarke case could say that the office of notary public was not within the meaning of such language. As "the language used is plain and free from ambiguity," as held in the Clarke case, it comprehends every office of whatever character, and it follows, as a necessary sequence, that it likewise excludes every position or employment that does not possess the character of an office.

The court employed the above language in determining whether or not the word "employee" came within the prohibitions contained in Art. IV, Sec. 8, Constitution of Nevada. By analogy, the same reasoning applies with equal or ever greater force in our determination that "employee" is not within Art. IV, Sec. 9, of said Constitution.

From the foregoing authorities it is our opinion that you are authorized by law to issue a notary public commission to an employee of the United States Government, but not to a person holding a lucrative office thereunder, unless included in the exceptions specified in Art. IV, Sec. 9, of the Nevada State Constitution.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-230 NEVADA REAL ESTATE COMMISSION—Chapter 150, Statutes of 1947, as amended by Chapter 204, Statutes of 1949, governs travel expenses and compensation allowances of members, providing for actual traveling expenses and a per diem of $10.

Carson City, December 12, 1956

Mr. Gerald J. McBride, Executive Secretary, Nevada Real Estate Commission, 309 West Telegraph Street, Carson City, Nevada

Dear Mr. McBride:

In your letter of December 7, 1956 you state that there appears to be a conflict between the provisions of Chap. 150, Stats. of 1947, as amended, and Chap. 270, Stats. of 1953, with reference to traveling expenses and per diem allowances to members of the Nevada Real Estate Commission. By reason thereof you have submitted the inquiries hereinafter appearing for the opinion of this office.

QUESTION

1. Are the members of the Nevada Real Estate Commission to be governed by the wording of the Nevada Real Estate Act in seeking reimbursement for travel expenses?
2. If the answer to question No. 1 is affirmative, what interpretation is to be placed on the wording "actual traveling expenses and compensation for each day . . . ?

OPINION

Chap. 150, Stats. of 1947, as amended, is commonly known as and called "The Nevada Real Estate Act," whereas, Chap. 270 Stats. of 1953, as an Act authorizing and empowering the State Board of Examiners to fix the amount of expense money for traveling and subsistence of all officers and employees of the State who, under the law, are required to file claims with the Board of Examiners for allowance and approval. Members of the Nevada Real Estate Commission are not required to file such claims and accordingly do not come under the provisions of said last-mentioned Act. The two Acts mentioned are not, therefore, in conflict, inasmuch as they deal with different subject matters.

Having in effect answered question No. 1 in the affirmative, we proceed to a determination of No. 2. As originally enacted in 1947, the Nevada Real Estate Act failed to provide for any per diem allowances for members of the then board while attending meetings. Only an allowance for actual expenses for this purpose was provided for. (*See* Attorney General's Opinion No. 798,

1949). The Act was amended, however, by Chap. 204, Stats. of 1949, to provide for payment from the commission's funds, "actual traveling expenses and compensation for each day or fraction thereof in the sum of ten dollars ($10) per diem . . ." To us, these words are clear and unequivocal in meaning. They require not only that the *actual traveling expenses* of a member attending meetings be paid as was done under the Act before it was amended, but that in addition thereto, *a per diem of $10 be paid* said member.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. 56-231 UNIVERSITY OF NEVADA; UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR; TRUCKEE-CARSON IRRIGATION DISTRICT—The T.C.I.D. has no authority to levy an assessment against the State of Nevada upon its University Experiment Farm at Fallon, on account of construction costs or operation and maintenance costs of the Newlands Project facilities.

Carson City, December 17, 1956

Dr. Minard W. Stout, President, University of Nevada, Reno, Nevada

Dear President Stout:

We are in receipt of your letter of October 5, 1956, asking that we render an official opinion upon questions hereinafter stated. In your letter you recited certain facts, and from our study we have gained information of other facts which appear to have a bearing upon the questions to be decided. We here recite these briefly as follows:

FACTS

On April 5, 1906, 160 acres of land was withdrawn from the Newlands Irrigation Project by the Interior Department of the United States Government for the use of Western Irrigation Agricultural Division of the United States Department of Agriculture.

From this original quarter section of land considerable land (36.4 acres) was taken for the construction of roads, irrigation canals and drainage ditches, which roads, canals and ditches, are in use partially to serve other lands which are a part of the irrigation system. No instruments have been found respecting such easements. It is true that the system was operated by the Department of the Interior to the date December 18, 1926 (upon which date the T.C.I.D. took over the operation) and is therefore unlikely that there were any written instruments or easements

respecting such ditches, roads and canals. The easements are now confirmed by the provisions of the patent. *See* page two thereof.

A reservation of the patent also shows a further condition of the grant confirming a right of a ditch rider of the Truckee-Carson Irrigation District to occupy a building on the lands covered by the patent, and to use a tract of approximately two acres of said tract for garden purposes.

From the date aforesaid, namely, April 5, 1906, the said farm has been operated, as an agricultural experimental farm by the United States to October 3, 1951. See, "History of Stations," report of house committee, departmental reports, etc., respecting Sec. 389, Title 7, (Agriculture) U.S.C.A., under which authority the patent was issued, of U.S. Code Congressional Service, 81st Congress, Second Session 1950, page 3862. Since October 3, 1951, the said farm has been operated by the State of Nevada, through its University, by virtue of a patent issued on said date, and has at least from April 5, 1906 had an established water right. All "vested water rights for mining, agricultural, manufacturing, or other purposes," are confirmed and conveyed to the State of Nevada, by the terms and provisions of the plant.

From the date of control over said project by the T.C.I.D., namely, December 18, 1926, said instrument making the said district a fiscal agent of the United States, Department of the Interior, although water was supplied without interruption by the T.C.I.D. to the United States Department of the Interior, to October 3, 1951, no billing or charge was made to the United States, or no credit asked or given upon either of two items, viz:

(a) a proportion of the cost of construction of the irrigation facilities, approximately $54 per irrigable acre, or

(b) the annual charge per irrigable acre for operation and maintenance of the facilities.

On October 3, 1951, the United States of America, by the Director, Bureau of Land Management, executed a patent to the land in question to the State of Nevada. The land conveyed by said patent is more particularly described as follows:

> Lots three, four, five and the southeast quarter of the northwest quarter of section six in township eighteen north of range twenty-nine east of the Mount Diablo Meridian, Nevada; containing 153.37 acres, according to the official plats of the survey of the said lands on file in the Bureau of Land Management, Department of the Interior.

A number of restrictions and reservations are contained in the patent, respecting mining and proceeds of mining not material to the controversy, but among others is contained the following:

> The State of Nevada does by the acceptance of this patent, covenant and agree for itself and its successors and assigns, forever, as follows:
>
> 1. The property interest hereby conveyed shall be devoted to, or used for, cooperative agricultural experimental work of the *Department of Agriculture* and the State of Nevada.

2. Any subsequent transfer of the property interest conveyed hereby will be made subject to all the covenants, conditions, and limitations contained in this instrument. (Italics supplied.)

Certain other provisions of the patent are significant. It is provided therein: "TO HAVE AND TO HOLD the lands included in this patent together with all rights, privileges, *immunities*, and appurtenances of whatsoever nature, thereunto belonging to the State of Nevada, and to its successors and assigns forever; * * *."

(Italics supplied.)

Although certain burdens are enumerated in the patent as herein mentioned, the patent contains no reversion clause. This was considered by the Congress, and a decision was reached against its inclusion. *See*: U.S. Code Congressional Service, 81st Congress, Second Session, 1950, p. 3862, et seq.

Acceptance by the sovereign state was necessary. *See*: U.S. Code and Congressional Service, supra. *See also*, Sec. 5529 N.C.L. 1929. The records of the Surveyor General and of the Governor do not disclose that there was a document of acceptance. The statute cited does reveal that there was a legislative intent to vest discretion in the Governor and to authorize an acceptance of gifts of this type, even though the gift did carry a burden or obligation (as in the instant case) with it. We are not disposed to make an issue of the lack of documentary records showing acceptance as provided by law. The University has administered the farm. We are of the present view that the opinion herein can be found upon more substantial reason. We therefore pass the question of due acceptance.

In the spring of 1953 the watermaster of the T.C.I.D. informed the University of Nevada that the Experiment Station (Farm) did not have an irrigation water right and was therefore not entitled to irrigation water for the coming year. The local ditch rider was instructed to deliver no water to the property. Water was withheld for approximately seven weeks and the station suffered crop damage and loss in excess of $3,000. The University was immediately informed of the watermaster's decision and arrangements were made whereby the Station (University of Nevada) could apply for inclusion into the irrigation district.

Since 1953 the University of Nevada has conformed to the demands of the T.C.I.D., having applied as aforesaid, to have its lands included within the lands to be serviced by the T.C.I.D. Since that date the University has paid annual installments as required by the T.C.I.D., upon the theory of cost of operation and maintenance. In 1955 the University paid $302.33 to the district. It is not clear if this sum was credited to the latter of the two items mentioned or to both, but it is clear from the communications of H.B. Richards, Irrigation Superintendent of the T.C.I.D., that both charges are claimed. We refer to (1) construction costs and (2) operation and maintenance, Stated more precisely the proposed charges are:

(a) a proportion of the cost of the irrigation facilities, of approximately $54 per irrigable acre payable over a period of 40 years in equal annual installments, without interest, and

(b) the annual charge per irrigable acre for operation and maintenance of the facilities.

We shall hereafter refer to (a) above as "construction charges" and (b) "operation and maintenance charges."

QUESTIONS

Question No. 1. May the Truckee-Carson Irrigation District make a charge against the State of Nevada, through its University, by reason of its ownership of the said lands in question, upon the theory of construction charges?

Question No. 2. May the Truckee-Carson Irrigation District make an annual charge against the State of Nevada, through its University, by reason of its ownership of the said lands in question, upon the theory of annual and maintenance costs?

OPINION

After long and fatiguing study we have arrived at the conclusion that both questions must be answered in the negative.

The "Newlands Project" was built by the United States Department of the Interior, under the provisions of Chap. 12, (Public Lands) Title 43, U.S.C.A. Secs. 371 to 609, entitled "Reclamation and Irrigation of Lands by Federal Government." Under Secs. 498 to 501 thereof, inclusive, it is provided that the Government may transfer the operation and maintenance of the project to an association or district, under contract with the district, and regulates and enumerates the powers and duties of the district thereunder.

Under Chap. 64, Stats. of 1919, p. 84, (Sec. 8008 et. Seq., N.C.L. 1929) the Legislature provided for the organization and government of irrigation districts, and provided, (Sec. 8072 N.C.L. 1929) that such districts so created and organized could take over the management of irrigation projects built by the United States. This latter section as amended by Stats. of 1923, p. 289, was no doubt preparatory to the taking over of the Newlands Project by the Truckee-Carson Irrigation District.

Sec. 8077 N.C.L. 1929, provides for the collection by the district of sums to be held as the "United States Contract Fund." We have formerly referred to this fund or item as the "construction charges."

Sec 8079 N.C.L. 1929, referring to the contract to be entered into between a district and the Government and for the service by the district for the Government as fiscal agent, for construction charges, provides that the district shall take into account "existing contracts." The inference is therefore clear that for construction charges, as to land then under irrigation, the obligation as to a particular parcel of land is fixed and is to be recited in the contract between the United States and the district. This contract, a copy of which we have in our files was of December 18, 1926, supplemented June 14, 1944. As to lands that may have been brought under

irrigation within the district, subsequent to the date December 18, 1826, we are not required to speculate for such facts are not before us. It therefore appears clear that as to the land in question the duty (or lack of it) of the owner of this particular parcel of land was fixed as of the date of the contract. This would lead to the conclusion that if that parcel of land on that date was not under obligation as to construction charges, it could not subsequently be obligated, no matter to what owner it might go, for operation as a public service or for profit. It was not under obligation by the terms of that contract or otherwise, upon that date, for either charge, the construction charge or the operation and maintenance charge.

Under Sec. 389, Title 7, U.S.C.A., the Congress authorized the Secretary of Agriculture to transfer the experiment station at Fallon, Nevada (among others) to the Department of Agriculture of the State Government. This was the enabling statute under which the State of Nevada acquired the parcel in question heretofore described. The Section is silent as is the contract of December 18, 1926, as to the two questions here under review.

In *Magee v. Whitacre, et al.*, 60 Nev. 208, 106 P.2d 751, the ad valorem tax upon lands lying within an irrigation district having remained unpaid and the assessments of the irrigation district having remained unpaid, the county of Lyon took title to the real property, which remained unredeemed for the entire period of equity of redemption. Thereafter the county sold the same to appellants, the plaintiffs in the district court action. Appellants, the plaintiffs in the district court, contended that the lien of the irrigation district was extinguished by reason of the fact that the land was owned by the county. The contention was not good. The court on appeal held that although ad valorem taxes and irrigation district assessments are not the same, the Legislature had the power to make the latter of equal dignity, and to create a lien to secure the payment of same. We mention this case in some detail for the reason that it is urged that although the State is exempt from the payment of ad valorem taxes upon its property, ad valorem taxes and irrigation district assessments are not the same, and the State is not exempted from the duty to pay the latter. This case is cited as authority to establish that the two types of taxes are not identical.

Special assessments under irrigation district act are not "taxes" in the ordinary sense. *In Re* Walker River Irrigation District, 44 Nev. 195 P. 327.

In a leading case, *Nevada National Bank v. Poso Irrigation District*, 73 P. 1056, (1903) lands, which at the time of the information of the irrigation district were owned by the United States, which were subsequently sold by the Government to a third person, neither the Government nor the purchaser having assented to the inclusions of the lands within the district, such lands were not only not liable under a judgment rendered against the district in an action on its bonds, but were exempt from any assessment under the statute for the payment of the bonds. The court said: "* * * if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the Government or the purchaser it attaches a condition to the disposal of the property of the Government without its sanction or consent, and which must, in such cases, interfere with its disposal." In this case although the sale by the Government was to a natural person (not to the State Government) and without reservations and burdens upon the grantee, the irrigation district was nevertheless precluded from assessing the lands in question to pay the construction costs of the project.

In *Bishop v. Jordan*, (1930) 285 P. 1096, the same question as in Poso Irrigation District case was presented to the District Court of Appeals, State of California, and with the same determination, that lands that were owned by the Government of the United States at the time of the formation of the irrigation district, water having been apportioned to the land, and later sold by the United States to an individual, cannot be assessed to discharge the construction cost of the irrigation project in the absence of a specific agreement to such effect.

See also: *B. F. Lee v. Osceola & Little River Road Improvement District No. 1, of Mississippi County, Arkansas*, 268 U. S. 645; *Drainage District No. 7, Poinsett County et al., v. Exchange Trust* Company, (1928) 2 S.W.2d 32; *Woody v. Security Trust & Savings Bank*, (1934) 29 P.2d 898; *City of Inglewood v. Los Angeles County*, (1929) 280 P. 360.

The Inglewood case brings out the principle (pages 364 and 365) that property of the United States is not taxable so long as title remains in the United States, but that when the property is transferred to an individual it may be taxed for any legitimate purpose, except that if the

proposed “tax” (assessment) be to discharge an indebtedness by which the land has been improved, it may not be levied.

It is therefore clear, from the above authorities, that an assessment for construction charges upon the land in question would not lie even if the transfer of title had been to an individual, without reservations and restrictions, creating a burden upon the title. If not, certainly the contention that it is collectible is not well founded when transfer was to the State of Nevada, with reservations, restrictions and burdens.

We now approach the second question, namely, that of the liability of the State to the T.C.I.D., for the annual operation and maintenance charge.

The historical record of the operation of the “Agricultural Dry Land and Irrigation Field Stations” is long. We shall draw certain conclusions from the report. *See*: U. S. Code Congressional Service, 81st Congress, Second Session 1950, p. 3862 et. seq.

We conclude the following:

(a) The farms were set up to carry on experiments of value to the community and region.

(b) The farms, of which there were several in as many of the western states, cost the Government money and appropriations were difficult to get.

(c) The relinquishment of control by the Government would be complete but would not be partial.

(d) Since the transfer of title contemplated a transfer of obligation the transfer could not be effectuated in the absence of consent of the State.

(e) A greater degree of coordination between the agricultural schools of higher learning within the State and the experimental farm activities, appeared to be desirable.

(f) Mineral rights were fully retained.

From the patent itself the intent of Congress in the Act allowing a transfer to the State, becomes clear in certain respects, viz:

(a) All rights and immunities enjoyed by the United States respecting the land in question were transferred to the grantee states, except as provided in the instrument to the contrary.

(b) The operational district was to be fully protected by a clear declaration of easement rights and of the rights to the district to use certain facilities without cost to the district.

(c) The government through its Department of Agriculture, was to retain certain control in the agricultural experimental work.

(d) The financial burden incidental to such terms was to be transferred to the grantee state.

(e) That the acceptance of the patent would itself carry the burdens enumerated therein, to be a burden running with the land and to whom it might be subsequently conveyed.

(f) That the United States was protected without inclusion within the patent of reversionary rights.

(g) That the United States should be fully protected as to a reservation of all mineral rights.

The statute itself (Sec. 389, Title 7, U.S.C.A., p. 233) is in no respect in conflict with the conclusions of legislative intent hereinabove set out.

It is clear that the State and Government have in no way or manner agreed to an acceptance of the burdens by the State, proposed by the T.C.I.D. to be imposed upon the State.

From all of the foregoing we have arrived at the conclusion that there is a complete subrogation and substitution of parties (State Government substituted for National Government) to the rights, powers, privileges, duties and immunities of the Federal Government in its relationship with the T.C.I.D., and that the one occupies the legal position of the other in all respects as to the operation of the farm, except as expressed in the patent to the contrary.

From this conclusion we draw the secondary conclusion that it was never the intent of the United States or of the State of Nevada, that the State be required to pay to the T.C.I.D. any part of the construction costs of the Newlands Project or any sums on account of the annual cost of operation and maintenance of the Newlands Project, and that the T.C.I.D. has no authority to collect such sums or either of them under the contract of December 18, 1926, or under any statutory law, and that therefore the authority asserted by the T.C.I.D., to collect said sums or either of them, from the State of Nevada, does not exist.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General

OPINION NO. 56-232 NEVADA INDUSTRIAL COMMISSION—Expenditure of funds for actual and necessary travel expenses under Chapter 168 of the 1947 Statutes of Nevada, as amended, not unlawful.

Carson City, December 19, 1956

Honorable Guy Perkins, Chairman, Nevada Industrial Commission, Carson City, Nevada

Dear Mr. Perkins:

You have directed an inquiry to this office as to whether the payment of actual traveling expenses by the Nevada Industrial Commission in accordance with Chap. 168 of the 1947 Stats., as amended, is contrary to law in that it is not in accord with the provisions of Chap. 239 of the 1955 Stats. which amends Chap. 270 of the Stats. of 1953.

In order to differentiate between the two Acts prior to any discussion touching upon the legal or constitutional questions involved, it might be well at this point to set forth the titles to the Acts in question.

The title of the Nevada Industrial Insurance Act (Chap. 168, Stats. of 1947 as amended by Chap. 240, Stats. of 1953) reads as follows:

> An act creating an industrial insurance commission; providing for the creating and disbursement of funds for the compensation and care of workmen injured in the course of employment; relating to the compensation of injured workmen and the compensation of their dependents where such injuries result in death; making premium payments by certain employers compulsory; providing that certain acts are crimes; authorizing the commission created by the act to make such rules and regulations as may be necessary; authorizing the commission to invest the funds provided for; defining and regulating the liability of employers to their employees, and repealing all acts and parts of acts in conflict with this act.

The title of the Act providing for per diem and travel expenses for state employees (Chap. 239 of the 1955 Stats.) reads as follows:

An Act to amend an act entitled "An Act authorizing and empowering the state board of examiners to fix the amount of expense money for traveling and subsistence charges per day of district judges, state officers, commissioners, representatives, and all other employees of the state who, under the law, are required to file their claims with the board of examiners for allowance and approval, and repealing all acts and parts of acts in conflict herewith," approved February 3, 1928.

The Nevada Industrial Insurance Act by Sec. 43 thereof provides: "* * * The members of the commission, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers, and other assistants that may be employed shall be entitled to receive from the State Treasury their actual and necessary expenses while traveling on the business of the commission. Such expenses shall be itemized and sworn to by the person who incurred the expense and allowed by the commission."

The Travel Allowance Act (Chap. 239 of the 1955 Stats.) provides for in-state travel expenses by allowing public employees a per diem of $10 per calendar day, and $1.50 for each 6-hour period when travel status is less than a full calendar day, plus $4 per night for lodging when the employee's duties require him to remain away from home at night, plus his transportation costs. If the travel is out of State the employee is allowed $15 per diem for each full calendar day he is outside the State, and $2.50 for each full 6-hour period that he is out of State for less than a full calendar day, plus $5 per night for lodging, plus transportation.

It can readily be observed by reading the title to Chap. 239 of the 1955 Stats. that it is an Act authorizing the State Board of Examiners to fix travel and subsistence charges for employees who are required under the law to file their claims with such board. The question then arises, "Is the Nevada Industrial Commission required to file claims for such expenses with the Board of Examiners." There is no provision for it in the law, and as a matter of fact the Supreme Court of Nevada has cogently and logically disposed of the matter in the case of *State v. McMillan*, 36 Nev. 383, in a learned opinion. We quote from that opinion.

Relator applies for a writ of mandate commanding the state treasurer to pay out of the "state insurance fund" a claim which has not been approved by the board of examiners.

Is the state insurance fund, as so derived from premiums, identical with the state treasury, and are the demands against it claims against the state within the meaning of the constitutional and statutory provisions regarding approval by the board of examiners and the drawing of warrants by the state controller? If action by this board and official were required, much of the detail work performed by the special officers and clerical force of the industrial commission would have to be delayed until it could be considered by the board, which meets bimonthly, and has many other duties to perform, and the further question would arise whether the payment of such claims would have to be deferred until an appropriation, the amount of which would not be easy to determine, could be made by the legislature. Under the law as indicated it is evident that all claims against the state treasury must be presented to the board of examiners and to the state controller before they can be paid out of that exchequer. But if the fund be regarded as a special one, placed in the hands of the state treasurer for safe keeping, in trust for employees injured and the dependents of employees who are killed, and as separate from the state treasury, presentation of claims to, or action by, the board of examiners or the controller is not required by these general laws relating to claims against the state treasury, or otherwise, for the Nevada industrial commission act does not provide that claims against the state industrial insurance fund shall be presented to the board of examiners or to the state controller.

The fact that the state treasurer is made the custodian of the fund does not necessarily make it a part of the state treasury. The provision in the act that $2,000 should be paid to the Nevada Industrial Insurance Commission out of any moneys in the state treasury not otherwise appropriated, and that within six months after the receipt of that sum the commission should, out of the premiums received by it from employers, repay that amount to the state treasury, may be considered as indicating that the legislature intended that the commission should draw that sum as a loan from the state treasury, and thereafter disburse it without approval by the board of examiners or the state controller, and inferentially that there should be a fund separate from the state treasury, and that the commission should likewise disburse any moneys in that fund without action by the board of examiners or the state controller.

Any act of the legislature requiring employers to contribute to the state treasury for the support of the state government a percentage on the monthly payrolls, on the basis on which premiums are paid into the state insurance fund, would be unconstitutional because not uniform taxation. (Art. 4, sec. 20.) These premiums are not paid for the purposes for which taxes and revenues are usually paid into the state treasury, and could not be used or made available for the payment of warrants for the ordinary expenses of the state government which are payable out of the state treasury. The state insurance fund being derived only from the payment of premiums by employers who do not object to coming under the terms of the compensation act, and being provided for the special and humane purpose of compensating employees who are maimed or injured, and the widows and orphans of those who are killed, may be distinguished from the state treasury, which is provided for the payment of the general expenses of the state government, and which is supplied under compulsory laws and provisions of the constitution requiring a uniform system of taxation.

The state insurance fund should be regarded as separate from the state treasury, as are county and city funds, which are derived under general or special acts of the legislature. The "state treasury" has a well-understood meaning, which does not include such a special fund as this one, providing for injured employees and their dependents, and we conclude that the requirements for presentation of claims against the state treasury to the board of examiners and the controller do not apply to the state insurance fund.

It is to be presumed that the learned members of the Legislature were familiar with this judicial decision which has not been over-ruled, and that therefore in the enactment of the travel and subsistence law they excluded those agencies whose claims are not subject to review by the State Board of Examiners, either by statute or otherwise. Sutherland in his profound work on Statutory Construction has stated that "the subject expressed in the title must be, however, the actual subject of the legislation," and "Under the constitutional provision a title is an indispensable part of every statute, and the expression of the subject of the Act must be found, if at all, in the words of the title."

Sutherland, concurring in the views of this office as to the awareness of alert legislators states, "Thus, legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, the rules of Statutory Construction, and the Judicial decisions."

As pointed out in the McMillan case, supra, the Legislature in placing control of the disposition of N.I.C. funds in the hands of the Nevada Industrial Commission, did so because they realized that such a commission could not function if it were necessary to submit their claims to a board which meets at interim periods. Mr. Justice Taber in the case of *Conservation District v. Beemer*, 56 Nev. 104, pointed out that the constitutional prohibition against the

enactment of a special law passed to meet a particular situation with which the existing general law does not adequately deal. He cites *Evans v. Job*, 8 Nev. 322, wherein the court wisely stated, "It is evident to our mind that the framers of the Constitution recognized the fact that cases would arise in the ordinary course of legislation requiring local or special laws to be passed in cases where in their opinion a general law might be applicable to the general subject but not applicable to the particular case."

Mr. Justice Horsey in the case of *Cauble v. Beemer*, 64 Nev. 77, makes the following comment, "Whether or not a general law is, or would be applicable is for this Court to decide; but in the absence of a showing to the contrary the Court seldom goes contra to the very strong presumption that the legislature has good reason for determining that a general law is not or would not be applicable in some particular cases. * * * Upon this subject the Court in *Hess v. Pegg*, supra, had this to say, 'For this Court to oppose its judgment to that of the legislature, except in a case admitting of no reasonable doubt, would not only be contrary to all well considered precedent, but would be an usurpation of legislative functions. * * *.' "

Justice Horsey further stated, "The legislature, and not the Courts, is the supreme arbiter of public policy and of the wisdom and necessity of legislative action. This Court has repeatedly upheld the constitutionality of special or local acts, passed, in some instances, because the general legislation existing was insufficient to meet the needs of a particular situation."

It is also to be noted that Sec. 1 of Chap. 239 of the 1955 Stats. refers to public funds. There is considerable doubt in the mind of this writer as to whether the funds collected under the Nevada Industrial Insurance Act are public funds. Many cases hold that moneys collected by assessment from private individuals or corporations, and not deposited to the general fund subject to control of the State Controller, but in a special fund to be returned in the way of benefits to a particular group or classification, are not public funds. (*State Ex Rel. Sherman v. Pope*, 174 P. 468; *State Ex Rel. Johnson v. Clausen*, 99 P. 743.) We see no need to extend this opinion by a discussion of this point for the reason that we feel that points previously raised and expounded are controlling.

The reiteration by unauthorized and unqualified advisors as to the interpretation of laws by legislative intent rather than by the unambiguous words of a statute is at once dangerous and impractical. The intent of the Legislature is to be sought only when a law is uncertain in its language and ambiguous in its terms. Sutherland in his work on Statutory Construction points out, "The chances that of several hundred men each will have exactly the same determinate situation in mind as possibles of a given determinable, are infinitesimally small. * * * To insist that each individual legislator besides his 'aye' vote must also have expressed the meaning he attaches to a bill as a condition precedent to predicating an intent on the part of the legislature, is to disregard the realities of legislative procedure."

The codifiers and enacters of our laws have wisely contemplated the chaos and confusion that might result by submitting legislative acts to numerous individuals for their interpretation. Under Sec. 7313.01 N.C.L. 1931-1941 Supp., it is provided, "The Attorney General of the State of Nevada and his duly appointed deputy shall be the legal advisers on all state matters arising in each and every department of the state government."

For the reasons heretofore expounded it is the opinion of this office that the Nevada Industrial Commission has not made unlawful expenditures in paying actual and necessary travel expenses in accordance with Chap. 168 of the 1947 Stats. as amended, despite the fact that Chap. 239 of the 1955 Stats. provides a different method, and designates different amounts, for the payment of travel and subsistence claims to those employees whose claims must be audited and allowed by the Board of Examiners. The Legislature, if it disagrees with this opinion, can amend both the Travel and Subsistence Act and the Nevada Industrial Insurance Act, so as to achieve compatible provisions.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-233 HOUSING AUTHORITY ACT—No method or procedure provided in Housing Authority Act for discontinuing the functions of a housing authority or disposing of surplus money on hand. Only the Legislature can prescribe such procedure.

Carson City, December 27, 1956

Honorable E. R. Miller, Jr., District Attorney, White Pine County, Ely, Nevada

Dear Mr. Miller:

In your letter of December 20, 1956, you state that the Housing Authority of White Pine County, which was created and carried on its operations for several years pursuant to the Act of March 31, 1947, now wishes to discontinue functioning as such and wind up its affairs, having in its possession some $20,000 surplus funds. You request the opinion of this office on the following question which we quote:

> May a local Housing Authority created under the provisions of the Act of March 31, 1947, as amended, now Sections 5470.01 to 5470.25, upon winding up of its operations and finding itself in possession of surplus funds, exercise any power to specify the purpose for which such funds are to be used in turning over the same to the County?

OPINION

It is our opinion that the question must be answered in the negative. The above mentioned Act as enacted by Chap. 253, Stats. of 1947, being Secs. 5470.01-5470.25 N.C.L. 1943-49, created a housing authority in each city, town or county of the State, and authorized them to function as such upon proper resolution of their governing bodies. Sec. 5470.07 of the Act provides in part as follows:

> An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this act (but not the power to levy and collect taxes or special assessments) * * *.

Following the above quoted portion of the section, the Act sets forth and enumerates the powers of an authority which are added to in certain subsequent sections. None of the powers so enumerated in the Act itself, or as amended by Chap. 9, Stats. of 1951, contain anything, either specifically or by implication, providing for the discontinuance of operations of an authority or disposition of any of its surplus funds.

And the Act itself seems to prohibit looking elsewhere in the Statutes for authority to cease operations or dispose of surplus funds. Following the powers enumerated in Section 5470.07 of the Act, we find the following:

> No provision of law with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

We interpret this last quote to be an expression of legislative intent that no laws are applicable to an authority with respect to its property functions unless and until specifically authorized by the Legislature. We find nothing in the Act itself or elsewhere which provides a method or procedure for disposing of surplus funds when an authority ceases functioning.

No law or procedure having been provided and the power to do so having apparently been reserved to the Legislature, it is therefore our conclusion that any solution to the question hereinabove propounded, lies with that body.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: C. B. Tapscott
Deputy Attorney General

OPINION NO. -56-234 STATE OR PUBLIC BUILDINGS; EQUIPMENT—The word "equipment" as used in Chapters 392 and 400 of the 1955 Statutes, providing for the construction, furnishings and equipment of buildings for the University of Nevada, refers to such equipment as becomes a permanent part of the buildings and classrooms, and does not include such office equipment and audiovisual equipment as may be purchased through the State Purchasing Department.

Carson City, December 28, 1956

Mr. M. George Bissell, Manager, State Planning Board, Carson City, Nevada

Dear Mr. Bissell:

You have requested this office to define the limits of the word "equipment" as used in Chaps. 392 and 400 of the 1955 Stats. of Nevada.

Your request arises by reason of a letter addressed to the State Planning Board under date of December 4, 1956, by Robert C. Poolman, University Engineer, wherein Mr. Poolman asks that it be determined whether the following articles may be included within the statutory provision for equipment in Acts providing for the erection of certain buildings at the University of Nevada:

1. Typewriters, adding machines, accounting machines, and calculating machines to be used in student classes in business administration.
2. Audio-visual equipment to be used in the classroom such as projection screens, slide, motion, and opaque projectors, to be used in student instruction in the building.
3. Duplicating and processing equipment to be used by the registrars office, also to occupy the building, such as photostatic equipment, Ozalid reproducers, and IBM sorting, cataloging, and accounting equipment.

In your request you state that it is the feeling of the board that these items are budgetary items which were not within the contemplation of the Legislature when it specified equipment for these buildings.

OPINION

Black's Law Dictionary in defining the word "equipment" points out that it is an exceedingly elastic term, the meaning of which depends upon context. This office is of the opinion that the context of Chaps. 392 and 400 of the 1955 Stats. supports the theory of the State Planning Board, and in support thereof quotes the language which we feel is determinative. In Sec. 6 of Chap. 392 the following phraseology is used, "* * * The Nevada state planning board shall advertise in a newspaper of general circulation in the State of Nevada, for separate sealed bids for the reconstruction and remodeling of the building and the equipment and furnishings thereof, * * *", and in Sec. 6 of Chap. 400 the phraseology is nearly identical, to-wit: "The Nevada state planning board shall advertise in a newspaper of general circulation in the State of Nevada for separate sealed bids for the construction of the building and the equipment and furnishings thereof * * *."

This indicates clearly that the Legislature referred to equipment as those fittings which become a permanent part of the buildings in question. The method of securing such supplies or equipment as typewriters, adding machines, etc., is provided for in Chap. 333 of the 1951 Stats., creating the State Purchasing Department. Sec. 11 of that Act provides, "The director shall be required to purchase or contract for all supplies, materials and equipment needed by any and all using agencies, unless otherwise provided by law."

For the reasons stated, it is the opinion of this office that the word "equipment" as used in Chaps. 392 and 400 of the 1955 Stats. does not refer to office or audio-visual equipment, and that such equipment should be purchased through the State Purchasing Department.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

OPINION NO. 56-235 UNIVERSITY OF NEVADA—Board of Regents of the University of Nevada have power and authority to sell or lease real property formerly occupied by the Nevada Historical Society.

Carson City, December 28, 1956

Honorable James Slattery, P. O. Box 9474, Reno, Nevada

Dear Senator Slattery:

This letter is in reply to your letter of December 24, 1956. The question presented for reply is this: Does the Board of Regents of the University of Nevada have the power to sell or lease for a long term the ground owned by the University and formerly occupied by the Student Union Building?

You have stated that a national fraternity desires to purchase or lease the property for fraternity house purposes.

OPINION

Chap. 179, Stats. of 1931, p. 288, provides in the first paragraph of Sec. 1 that the board of capitol commissioners of the State of Nevada are authorized to transfer two parcels of land to the Board of Regents of the University of Nevada, "to be used for student business activities only." Thereafter, in the same section, follows the description of the two parcels, by metes and bounds.

Sec. 2 of the same Act provides:

> In the event that the board of regents of the University of Nevada should at any time sell the aforesaid lots and lands there shall be placed in the general fund of the State of Nevada from the proceeds of such sale the sum of six thousand five hundred dollars, and the remainder of the proceeds of such sale shall be placed in the funds of the University of Nevada.

This statute of 1931, above cited, refers to other statutes, which reflect light upon the manner and conditions upon which this property was acquired. Chap. 203, Stats. of 1911, p. 411, appropriates the sum of $5,000 for the acquisition of a site and building to house the collections of the Nevada Historical Society. Chap. 215, Stats. of 1919, p. 390, appropriates $2,600 for the purchase of a lot adjoining the property of the Nevada Historical Society, for its purposes and authorizes the expenditure of such sum as may be required for such purchase, "not to exceed" the sum of $2,600.

We presume that the provision for the return to the general fund of the State of $6,500, as provided in the Act of 1931, is in effect a declaration to return the sums that have been advanced from the general fund, namely, $5,000, under the Act of 1911, and the sum of $1,500 under the Act of 1919.

The clause above quoted, from the Stats. of 1931, namely, "for student business activities only," in view of the provisions of Sec. 2, above quoted, cannot be construed as negativing the power of the Board of Regents to sell the real property, for a latter section is a specific declaration that the power to sell does exist.

Sec. 7728, N.C.L. 1943-1949 Supp. (Stats. of 1945, p. 448) provides in part as follows:

> The powers and duties of the board of regents are as follows:
> Fourteenth—To sell or lease any property granted, donated, devised, or bequeathed to the university, except property granted to it by the United States of America; and provided, the sale or lease of such property be not prohibited by or inconsistent with the provision or conditions prescribed by the grant, gift, devise, or bequest thereof; and provided further, that any such sale or lease be approved by the governor. The proceeds and rents from such sale or lease shall be held, managed, invested, used, bestowed, and applied by said regents for the purposes, provisions, and conditions prescribed by the original grant, gift, devise, or bequest of the property so sold or leased.

We construe this provision to mean that the power of the Board of Regents of the University to sell or lease real property given to it, does exist, unless the property came from the United States of America, or unless the specific conditions of the gift are such as to prevent the sale or lease proposed.

We believe that the Act of 1931, Sec. 2 thereof, above quoted, manifests a legislative intent that the Board of Regents should have the power to sell the two parcels for a price not less than $6,500. In effect then, this Act has placed a minimum selling price for the realty below which the Board of Regents would not be authorized to act.

We also are of the opinion that under the provisions of subdivision Fourteenth, Sec. 7728 N.C.L. 1943-1949 Supp., above quoted, the power by the Board of Regents to lease the property in question clearly does exist.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: D. W. Priest
Deputy Attorney General
