

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1956

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 the 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, *Cordell 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 substantially 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 situated 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 statute 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 statute.

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 United 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 statute 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 statute, 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 statute, 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 statute. 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 Joiners 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 declaration 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 his 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

IT IS 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 incompleated 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 oftentimes 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 statewide, 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 out "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 property 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 enactors 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 negating 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

person has a right to pass, and to use for all purposes of travel or transportation to which it is adapted and devoted. Whether a road is public depends in a measure on the particular facts; thus it must of physical necessity, be so situated and connected as to be accessible to the public; but it does not depend on its length, nor upon the place to which it leads, nor the number of people who use it; it is enough that the public have actual access to the road, whether by a mere neighborhood or settlement road, or by some established public highway. It is immaterial that one person may be most benefited by it.

With reference to question No. 1, stated as follows: "Have the streets been dedicated as public streets?" This depends upon compliance not only with statutory law but also city ordinances appertaining to the subject land where located. Also under the theory of prescription, i.e., estoppel to deny the right of the public to use, the public may gain rights to the use of land for traffic. In a given case it always presents a mixed question of law and fact, and must be accordingly resolved.

We believe that question No. 2 is fully answered. We summarize as follows: The "way or place" must be legally "open to the use of the public, for purposes of traffic." This also in a given case presents a mixed question of law and fact. Consumption of any motor vehicle fuel or special motor vehicle fuel, in any internal combustion motor, in any other way or time other than that designated, is not taxable.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

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139. Nevada State Welfare Board—County Commissioners acting as members of the State Welfare Board under the provisions of Chapter 327 of the 1949 Statutes of Nevada, are entitled to travel and subsistence allowance under Chapter 239 of the 1955 Statutes.

CARSON CITY, January 3, 1956.

MRS. BARBARA C. COUGHLAN, *State Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

DEAR MRS. COUGHLAN: You have requested of this office an opinion resolving the reimbursement of County Commissioners for traveling expenses accruing as a result of service on the State Welfare Board.

Your specific question is "whether the county commissioners acting as members of the State Welfare Board should be reimbursed for traveling expenses as county officials under the provisions of Chapter 359, or as state officials under Chapter 239, both of the 1955 Statutes?"

OPINION

Section 4 of Chapter 327 of the 1949 Statutes creates the State Welfare Board and provides, in part:

Immediately upon the effective date of this act, each of the boards of county commissioners in the state shall designate one of its own members as its representative in an electoral group. This electoral group then shall choose from among themselves four persons who shall thereafter constitute the other four members of the state welfare board. The term of office of the members of the board selected from the aforementioned electoral group shall expire with their terms of office as county commissioners or with the expiration of the terms of the boards of county commissioners of which they are members, whichever event shall be the sooner.

The Act, as amended, sets forth the powers and duties of the State Welfare Board, and it is clear that the powers conferred and duties imposed upon the county commissioner members of the Board are not duties entailed in the performance of their county commissioner duties.

Chapter 239 of the 1955 Statutes provides for travel and subsistence allowances for state "boards." There can be no question but that the State Welfare Board is such a board as is contemplated by this Act.

Chapter 359 of the 1955 Statutes, on the other hand, is a statute to provide for travel and subsistence for county and township officers and would only apply to County Commissioners when their travel was related to their county duties.

It is therefore the opinion of this office, for the reasons hereinbefore set forth, that travel and subsistence allowances for County Commissioners acting as members of the State Welfare Board should be governed by the provisions of Chapter 239 of the 1955 Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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140. Secretary of State—Registration of Trademarks—A mere design in colors, without words, may be registered as a trademark under Chapter 180 of the 1907 Statutes of Nevada and all Acts amendatory thereof and supplementary thereto.

CARSON CITY, January 10, 1956.

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

DEAR MR. KOONTZ: You have submitted to this office for our official opinion the question as to whether a mere design in colors without words may be registered as a trademark under Chapter 180 of the 1907 Statutes of Nevada, as amended.

The question arose as a result of the application to your office by a New York corporation for the registration of a trademark consisting solely of a design and described as follows: A red rectangular field with which a white oval is displayed, the red rectangle having a gold border, all these elements being surrounded by a white rectangular frame with a gold border. The color combination red, white and gold is claimed as part of the mark.

Immediately upon the effective date of this act, each of the boards of county commissioners in the state shall designate one of its own members as its representative in an electoral group. This electoral group then shall choose from among themselves four persons who shall thereafter constitute the other four members of the state welfare board. The term of office of the members of the board selected from the aforementioned electoral group shall expire with their terms of office as county commissioners or with the expiration of the terms of the boards of county commissioners of which they are members, whichever event shall be the sooner.

The Act, as amended, sets forth the powers and duties of the State Welfare Board, and it is clear that the powers conferred and duties imposed upon the county commissioner members of the Board are not duties entailed in the performance of their county commissioner duties.

Chapter 239 of the 1955 Statutes provides for travel and subsistence allowances for state "boards." There can be no question but that the State Welfare Board is such a board as is contemplated by this Act.

Chapter 359 of the 1955 Statutes, on the other hand, is a statute to provide for travel and subsistence for county and township officers and would only apply to County Commissioners when their travel was related to their county duties.

It is therefore the opinion of this office, for the reasons hereinbefore set forth, that travel and subsistence allowances for County Commissioners acting as members of the State Welfare Board should be governed by the provisions of Chapter 239 of the 1955 Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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STATEMENT

This question is of sufficient importance to warrant a careful study not only of our statutes but of the law directly in point as decided by the courts of other states, and an analysis of the trademark law in available texts.

Chapter 180 of the 1907 Statutes has become Sections 7695-7697 N.C.L. 1929, as amended. Because of its importance to a cogent discussion of the question at hand, it is here set forth in its entirety.

Section 7695. Trademark and Union Labels Protected.
Filing Fee. Evidence.

Every person or association or union of workingmen or others that has adopted or shall adopt for their protection any label, trademark or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof with the secretary of state. Said secretary shall thereupon deliver to such person, association or union so filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of two (\$2) dollars. Such certificate of record shall in all actions and prosecutions, under the following three sections be sufficient proof of the adoption of such label, trademark or form of advertisement, and the right of said person, association or union to adopt the same.

Section 7696. *Idem.* Exclusive Use. Counterfeiting of May Be Enjoined. Damages. Attorney's Fee.

Every person, association or union adopting a label, trademark, or form of advertisement, as specified in the preceding section, may proceed by action to enjoin the manufacture, use, display or sale of any counterfeit or imitation thereof; and all courts having jurisdiction of such actions shall grant injunctions to restrain such manufacture, use, display or sale and a reasonable attorney's fee, to be fixed by the court, and shall require the defendant to pay to such person, association or union the profits derived from such wrongful manufacture, use, display or sale, and a reasonable attorney's fee to be fixed by the court, and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court to be destroyed. Such actions may be prosecuted for the benefit of any association or union by any officers or members thereof.

Section 7697. *Idem.* Counterfeiting of. Penalty.

It shall be unlawful for any person or corporation to imitate any label, trademark or form of advertisement adopted as provided in the second preceding section, or to knowingly use any counterfeit or imitation thereof, or to use or display such genuine label, trademark or form of advertisement or the name or seal of such person, union, or association, or of any officer thereof, unless authorized so to do, or in any manner not authorized by him or it. Any person violating any provisions of this section shall be imprisoned in the county jail not

more than thirty days or be fined not less than twenty-five nor more than one hundred dollars.

It is to be noted that the law provides for the filing of any label, trademark or form of advertisement, and upon so doing it is made mandatory for the Secretary of State to deliver to the person so filing a duly attested certificate of the recording of the same, provided that it is original and that the same label, trademark or form of advertisement has not been previously filed. There is no requirement that writing accompany the design.

In order to intelligently discuss this question it might be well, at this point, to define a trademark. It may be defined as a sign, device or mark by which the article produced or dealt in by a particular person or organization is distinguished or distinguishable from those produced or dealt in by others.

The objects of a trademark are to point out, either by itself, or by *association* the origin or ownership of the article to which it is affixed so as to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill and to prevent fraud and imposition. It is not essential, however, to the validity of the trademark that it indicate the name or address of the manufacturer or seller of the article.

As is pointed out in the case of *Standard Paint Company v. Trinidad Asphalt Manufacturing Co.*, 220 U.S. 446, 55 L.Ed. 536, a trademark may consist of a word, name, figure, picture, letter, form or device or a combination thereof which serves the purpose of identifying or distinguishing the goods of a particular producer or dealer.

The trademark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the *use* of it, and not its mere adoption. By the Act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualification or condition. If the symbol, however plain, simple, old or well known, has been first appropriated by the claimant as his distinctive trademark, he may, by registration, secure the right to its exclusive use. (Justice Miller in *United States v. Steffens*, 25 L.Ed. 550.)

This law, enunciated by the Supreme Court of the United States, is equally applicable to our statutes.

In his famous work on trademarks (1948 Ed. page 145) Andur states, "If the color or colors are impressed in the form of a particular design, a circle, square or star or the like, the colored design may serve as a trademark," and in *Leschen and Sons Rope Company v. Bascom Rope Company*, 201 U.S. 166, the court pointed out, "It is settled law that color may constitute a valid trademark, provided it is impressed in a particular design such as a circle, square, triangle, a cross or a star."

In *Hygienic Products Co. v. Coe*, 85 Fed. (2) 264, the court points out that in the court below an exhibit was introduced in evidence which showed a large collection of trademarks of color design which had been registered in the United States Patent Office. One of these, trademark No. 200,197, registered to the Ansted and Berk Company on June 30, 1925, consisted of an orange panel, rectangular in shape, enclosed on three sides by a dark stripe to be used on packages and sacks containing flour. The court continued, "The practice of registering such names has continued so long and become so firmly established that it should be given great weight in determining the right of the applicant in the present case to have its mark registered."

The trademark applied to be registered in the instant case in Nevada falls within this category, and, as pointed out in *Southern California Canning Co. v. White Star Canning Co.*, 187 P. 981, if the figure to be registered is of some arbitrary form or figure not suggestive of the article to which it is affixed, the applicant may have the right of exclusive appropriation.

We are heartily in accord, of course, that in any litigation affecting the validity of a trademark, three things are necessary so as to entitle anyone to remedy for an invasion thereof: The adoption of a mark or sign not in use by others to distinguish the goods manufactured or sold by him; that they must be applied to some article of traffic, and that such article must have been placed on the market. But these rules are not applicable to the registration of the trademarks.

OPINION

It is therefore the opinion of this office that a mere design in colors, without words, may be registered as a trademark under Chapter 180 of the 1907 Statutes of Nevada and all Acts amendatory thereof and supplementary thereto.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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141. Insurance—Nevada Insurance Act does not permit limitation of partial subscribership of insurance by rating organizations.

CARSON CITY, January 10, 1956.

HONORABLE PAUL HAMMEL, *Insurance Commissioner, Carson City, Nevada.*

DEAR SIR: The following is in answer to your request for an opinion concerning the meaning of subparagraph (2), Section 121E, Article 15A, Chapter 189, 1941 Statutes of Nevada—Nevada Insurance Act, as amended by Chapter 100, 1947 Statutes of Nevada.

Your letter quotes the above cited subparagraph and is here requoted as follows:

Subject to rules and regulations which have been approved by the commissioner as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, subdivision, or

In *Hygienic Products Co. v. Coe*, 85 Fed. (2) 264, the court points out that in the court below an exhibit was introduced in evidence which showed a large collection of trademarks of color design which had been registered in the United States Patent Office. One of these, trademark No. 200,197, registered to the Ansted and Berk Company on June 30, 1925, consisted of an orange panel, rectangular in shape, enclosed on three sides by a dark stripe to be used on packages and sacks containing flour. The court continued, "The practice of registering such names has continued so long and become so firmly established that it should be given great weight in determining the right of the applicant in the present case to have its mark registered."

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OPINION

It is therefore the opinion of this office that a mere design in colors, without words, may be registered as a trademark under Chapter 180 of the 1907 Statutes of Nevada and all Acts amendatory thereof and supplementary thereto.

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Your letter quotes the above cited subparagraph and is here requested as follows:

Subject to rules and regulations which have been approved by the commissioner as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, subdivision, or

class of risk or a part or combination thereof for which it is authorized to act as a rating organization. Notice of proposed changes in such rules and regulations shall be given to subscribers. Each rating organization shall furnish its rating services without discrimination to its members and subscribers. The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating organization to admit an insurer as a subscriber, shall, at the request of any subscriber or any such insurer, be reviewed by the commissioner at a hearing held upon at least ten days' written notice to such rating organization and to such subscriber or insurer. If the commissioner finds that such rule or regulation is unreasonable in its application to subscribers, he shall order that such rule or regulation shall not be applicable to subscribers. If the rating organization fails to grant or reject an insurer's application for subscribership within thirty days after it was made, the insurer may request "a review by the commissioner as if the applicant had been rejected. If the commissioner finds that the insurer has been refused admittance to the rating organization as a subscriber without justification, he shall order the rating organization to admit the insurer as a subscriber. If he finds that the action of the rating organization was justified, he shall make an order affirming its action."

Your question concerning this subparagraph is quoted from your letter as follows:

QUESTION

The opinion of the Attorney General is requested as to whether or not the wording "subject to rules and regulations which have been approved by the commissioner as reasonable, each rating organization shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, subdivision, or class of risk or a part or combination thereof for which it is authorized to act as a rating organization" is meant to authorize a rating organization the right to make rules *limiting* partial subscribership or whether the wording means that a rating organization *must* allow partial subscriberships and the authority for making rules and regulations applies only to making rules and regulations applicable to the mechanics of servicing such subscribers, the proper fees to be charged for such services, etc.

OPINION

This office is of the opinion that the subparagraph does not authorize a rating organization to promulgate rules or regulations which would limit partial subscribership.

If it is said that by this provision that the rating organization by rule or regulation with the approval of the commissioner as to reasonableness can limit partial subscribership, the provision must then be construed as meaning that there shall be unlimited partial subscribership unless the rating organization for good reason limits partial subscribership.

Now, if the Legislature intended such a delegation of power to the rating organization and to the commissioner, it may well be argued that such power is so primarily legislative in nature that the Legislature was without the power to make the delegation. See 11 American Jurisprudence 921, Section 214 and following; *Ex Rel. Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581; *Moore v. Humboldt County*, 48 Nev. 397, 232 P. 1078. Whatever the answer may be as to whether such delegation would be a delegation of legislative power beyond the power of the Legislature, this office is of the opinion that such rule-making power was not intended or attempted. Our reasons follow. Had such an authority been granted to the rating organization by the subparagraph in question, we would then be in distress as to the intention of the lawmakers; for such an expression would have been repugnant to the purpose of this article concerning the regulation of rates as expressed in Section 121.

Section 121 of the above cited Article provides as follows:

Purpose of Article. The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage, except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section.

It is to be noted that while one of the purposes of the Act is to authorize cooperative action among insurers in rate making, such purpose is expressly qualified by the wording, "Nothing in this article is intended to prohibit or discourage reasonable competition."

Now, partial subscribership means that the insurer is able to subscribe to the insurance rates authorized to be set by the rating organization for any kind of insurance, subdivision, or class of risk or a part or combination thereof. The insurer is bound by and must sell at the rates set on that part for which it is a subscriber. On that part for which it is not a subscriber, it has freedom to sell at rates determined by itself in competition with other nonsubscribers subject only to the provisions of, and the regulation of the commissioner under, the statute. Thus, in those fields of insurance engaged in by nonmembers and nonsubscribers at rates below the rates set by the rating organization, the partial subscriber is free to compete reasonably with nonsubscribers in those fields to which it does not subscribe. Now, limitation of such partial subscribership by the rating organization with the approval of the commissioner means that the subscriber must sell at the rates set by the rating organization in those fields within the limitation. The limitation could cover the major portion, if not all, of the fields of insurance on which the organization is authorized to set rates, or, at least, those fields in which a partial subscriber may wish to compete with nonsubscribers and nonmembers. By such limitation, the subscriber, if he chooses to be a subscriber (it is common knowledge that

for most purposes and for most insurers it is economically impracticable to be anything but a subscriber or member of a rating organization), is deprived of such freedom to reasonably compete.

Such a limitation is, therefore, not consonant with the purpose of the law expressed by the above quoted provision to the effect that nothing in this article is intended to prohibit or discourage reasonable competition. We take it as fundamental that when the Legislature has been so careful as to expressly set forth the purpose of the law, such expression is the proper touchstone upon which to resolve questions of legislative intent arising in subsidiary provisions of the Act. *Nye County v. Schmidt*, 39 Nev. 456, 157 P. 1073.

Without attempting to classify a rating organization as to its legal status in our law, it is sufficient to say that in light of the federal law (hereinafter referred to) and the state law on this subject, it is clear that the activities of insurance rating associations have been so affected with a public interest that their very existence and their powers are authorized only by virtue of the state statute. The extent of the regulation and the consequent powers of the subject regulated is determined by the statute. This is not an unusual exercise of the governmental police power. See 11 American Jurisprudence 1044, Section 284 following. The limitation of partial subscribership being beyond the purpose and intent of the law is for that reason beyond the power of the rating organization and the commissioner to effectuate. As far as the commissioner is concerned, it is elementary that an agency of administration has no power to legislate policy, and by the same token has no power to take part in such legislation. See, for example, 42 Am. Jur. 358 "Public Administrative Law," Section 53 and the cases cited therein.

This office is unable to find a single court decision in which this precise question was determined. However, the matter was discussed in the opinion of the Superintendent of Insurance of the State of New York in the matter of the Independent Fire Filing of the Insurance Co. of North America, et al, dated September 14, 1954. In that matter, the rating organization had not attempted to limit partial subscribership by formal regulation, and the question there was not precisely the same as that here involved; however, the New York provision is substantially the same as the Nevada statute on this point, and the New York Superintendent of Insurance had the following to say in his opinion:

In my opinion the position of New York Fire Insurance Rating Organization on the question of partial subscribership cannot be sustained. The language of Section 181(4) is clear and unequivocal. Any rule or regulation of NYFIRO inconsistent with the plain guarantee of the right of partial subscribership as set out in Section 181(4) would have to be rejected.

The entire opinion of the New York Superintendent of Insurance was confirmed without opinion by the N. Y. Supreme Court, Appellate Division, *Cullen v. Bohlinger*, 136 N.Y.S. 2d 361. See also *Cullen v. Bohlinger*, 126 N.E. 2d 564.

The emphasis, in this opinion, placed upon that portion of Section 121 above quoted providing that nothing in this article is intended to

prohibit or discourage reasonable competition is supported by the federal legislation on this subject. The congressional action found in U.S.C.A. Title 15, Chapter 20, Section 1011 and following is designed to make the federal law prohibiting combinations in restraint of reasonable competition applicable to the insurance business except where the several states have regulated it. This, as we understand it, is an outgrowth of the activities of Southeastern Underwriters Association culminating in the expression of the United States Supreme Court in *United States v. Southeastern Underwriters Association* (322 U.S. 533, 88 L.Ed. 1440) to the effect that the business of insurance is an interstate business and subject to the Sherman Anti-Trust Act. Section 1013 of the same federal law provides in subparagraph (b) that nothing contained in this Chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Without determining whether or not a regulation limiting partial subscribership would violate Section 1013 of the federal law above cited, we are of the opinion that the state Legislature in no way intended to sanction by statute the same type of organization which the federal law attempts to prevent. Nor do we think that the Legislature intended to sanction the same type of organization which, without such sanction, may be violative of Section 49D(3), Article 5 of the Nevada Insurance Act wherein it is provided:

Section 49D. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance: (3) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of or monopoly in, the business of insurance.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

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142. Insurance—Corporations—Domestic stock insurance corporations may organize and issue nonpar stock for varying considerations.

CARSON CITY, January 18, 1956.

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

DEAR MR. HAMMEL: This will acknowledge receipt of your letter dated December 6, 1955, requesting the opinion of this office on questions concerning the organization of a domestic stock insurance corporation. Your questions are quoted from your letter as follows:

QUESTIONS

1. Can a corporation be formed to do a life insurance business with a stock having no par value?
2. Can a corporation be formed to do a life insurance

prohibit or discourage reasonable competition is supported by the federal legislation on this subject. The congressional action found in U.S.C.A. Title 15, Chapter 20, Section 1011 and following is designed to make the federal law prohibiting combinations in restraint of reasonable competition applicable to the insurance business except where the several states have regulated it. This, as we understand it, is an outgrowth of the activities of Southeastern Underwriters Association culminating in the expression of the United States Supreme Court in *United States v. Southeastern Underwriters Association* (322 U.S. 533, 88 L.Ed. 1440) to the effect that the business of insurance is an interstate business and subject to the Sherman Anti-Trust Act. Section 1013 of the same federal law provides in subparagraph (b) that nothing contained in this Chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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Respectfully submitted,

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QUESTIONS

1. Can a corporation be formed to do a life insurance business with a stock having no par value?
2. Can a corporation be formed to do a life insurance

business with two types of stock; i.e., preferred stock for control purposes to be retained by the organizers, and common stock to be sold for the purpose of obtaining moneys to form and further the corporation?

3. Can the organizers of a corporation to do a life insurance business retain a large share of the stock plus 20% of the total value of the balance of stock sold for organization expenses? (See Section 12(5) (a) of General Insurance Laws.)

OPINION

Questions numbered 1 and 2 are answered in the affirmative. The following reasoning will be applicable to both questions.

Section 12, subparagraph (1), Nevada Insurance Act (Chapter 189, 1941 Statutes, as amended) provides as follows:

Section 12. Incorporation of Stock or Mutual Insurance Companies. A company, empowered and authorized to do an insurance business in this state, may be organized and licensed in the manner prescribed in this article, and subject to the other requirements of this act. The successive steps shall be as follows:

(1) The company shall incorporate under the general corporate laws of this state and file its articles in the office of the secretary of state as required by law.

It is to be observed that with the exception of such qualifying provisions as are found in the Nevada Insurance Act, the domestic stock insurance companies are to be incorporated under the general incorporation laws of Nevada.

Section 11 of the General Corporation Law of Nevada (Chapter 177, 1925 Statutes, as amended) provides as follows:

Section 11. Every corporation shall have power to issue one class or kind of stock, or two or more classes or kinds of stock, any of which may be of stock with par value or stock without par value, with full or limited voting powers or without voting powers and with such designations, preferences and relative, participating, option or other special rights, or qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate or articles of incorporation, or in any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of the certificate or articles of incorporation, or of any amendment thereto. Any class or kind of stock may be a special stock, whether a corporation has power to issue one or more than one class or kind of stock. The power to increase or decrease or otherwise adjust the capital stock as in this chapter elsewhere provided shall apply to all or any of such classes of stock. Any preferred or special stock may be made subject to redemption at such time or times and at such price or prices, and may be issued in such series, with such designations, preferences, and relative, participating, optional or other special rights, qualifications,

limitations or restrictions thereof as shall be stated and expressed in the certificate or articles of incorporation, or any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided. The holders of preferred or special stocks of any class or series thereof shall be entitled to receive dividends at such rates, on such conditions and at such times as shall be expressed in the certificate or articles of incorporation, or in any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided, payable in preference to, or in such relation to, the dividends payable on any other class or classes of stock, and cumulative or noncumulative as shall be so expressed. When dividends upon the preferred and special stocks, if any, to the extent of the preference to which such stocks are entitled, shall have been paid or declared and set apart for payment, a dividend on any remaining class or classes of stock may then be paid out of the remaining assets of the corporation available for dividends. The holders of the preferred or special stocks of any class or series thereof shall be entitled to such rights upon the dissolution of, or upon any distribution of the assets of, the corporation as shall be stated and expressed in the certificate or articles of incorporation, or any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided; and any preferred or special stocks of any class or series thereof, if there are other classes or series, may be made convertible into, or exchangeable for, shares of any other class or classes or of any other series of the same or any other class or classes of stock of the corporation at such price or prices or at such rates of exchange and with such adjustments as shall be stated and expressed in the certificate or articles of incorporation, or any amendment thereto, or in the resolution or resolutions providing for the issue of such stocks adopted by the board of directors as hereinabove provided. If the corporation shall be authorized to issue more than one class of stock or more than one series of any class, the designations, preferences and relative, participating, optional or other special rights of the various classes of stock or series thereof and the qualifications, limitations or restrictions of such rights shall be set forth in full or summarized on the face or back of the certificate which the corporation shall issue to represent such stock and, if the corporation shall be authorized to issue only special stock, such certificate shall set forth in full or summarize the rights of the holders of such stock and, when stock of any class or series thereof is issued, the designations, preferences and rights of which shall not have been set forth in the certificate or articles of incorporation or an amendment thereto, the designations, preferences and relative, participating, optional or other special rights of such stock and the qualifications, limitations or restrictions of such rights shall be set forth in a certificate made under

the seal of the corporation and signed by its president, or a vice president, and its secretary, or an assistant secretary, and acknowledged by such president or vice president before an officer authorized by the laws of Nevada to take acknowledgments of deeds, and such certificate shall be filed and a copy thereof recorded in the same manner as certificates or articles of incorporation are required to be filed and recorded. No corporation shall create any preferred or special stock unless the creation of such stock shall be authorized by the certificate or articles of incorporation or an amendment thereto.

The above quoted section of the General Incorporation Law places no restriction on the issuance of no par stock, and clearly it authorizes various kinds of stock, preferred and otherwise. We find no provisions in the Nevada Insurance Act qualifying the provisions found in the General Incorporation Law with respect to the question of the insurance of different kinds of stock having a par or no par value.

Your question numbered 3 is answered in the affirmative.

Section 12, subparagraph (5) of the Nevada Insurance Act provides, in part, as follows:

(5) (a) A stock company shall have the power to open books to receive subscriptions to its capital stock, to keep them open until the whole of such stocks, or so much thereof as may be necessary to satisfy the minimum capital requirements, has been subscribed for, to receive payments for such subscriptions to the capital stock, or to invest the moneys in the manner prescribed in this act and to expend money or to incur liabilities necessary or proper as organization expenses, to be paid out of the proceeds of subscriptions to capital stock, such expenses not to exceed the maximum amount prescribed in the permit hereinafter mentioned.

The company shall not solicit subscriptions to its capital stock until it has received a permit therefor from the commissioner. Such permit shall be issued on the following conditions:

The company shall have submitted an estimate for the total amount to be expended for organization expenses, and the commissioner shall have approved the same. Such estimates shall be recited in the permit; it shall also fix the maximum amount which may be expended for organization expenses which shall in no event exceed twenty (20%) percent of the total amount paid in subscriptions.

It is our understanding of the above quoted subparagraph (5) that organization expense is to be paid from the proceeds of subscriptions to capital stock in an amount fixed by the commissioner in his permit not to exceed 20% of the total paid in capital from subscriptions.

Separate and apart from the expenditure for organizational expense, we perceive no reason why the organizers of the corporation may not be stockholders to such extent as they are able to pay for or to such extent as the consideration for services, as prescribed by the directors of the corporation, may permit.

We understand from further communication with you that perhaps

the most important question upon which you desire our opinion is whether or not the directors of such a corporation could effect the issuance of no par stock having equal voting privileges, a block of which would carry a slight value to be taken by the directors for control purposes, and with the remainder to be sold at an increased value to such a number of different subscribers as would assure a concentration of control in the directors.

Section 13 of the General Corporation Law provides as follows:

Section 13. Corporations may issue and dispose of their authorized shares without nominal or par value, for such considerations as may be prescribed in the certificate or articles of incorporation, or in any amendment thereof, or, if no consideration is so prescribed, then for such consideration as may be fixed by the board of directors.

We are unable to find legal objection to this type of an arrangement, provided that the stock so taken or sold is not what is termed "bonus stock." That is to say, stock taken without some fair or reasonable consideration in return would be objectionable. However, aside from this, if the articles provide for the issuance of no par stock and provide its consideration, or the directors fix the consideration, we see no objection to considerations in varying amounts or the taking or purchase of certain portions by the directors or organizers. Fraud or misrepresentation is another matter, which, of course, we could not anticipate or assume to be present or contemplated. The sale of stock is a contract the terms of which are contained in the stock certificate. Whatever grievances the stockholders may have under these contracts are matters concerning which they have their own remedies under the law.

This is, of course, all aside from the protection of the persons purchasing insurance policies from the corporation, concerning which protection other provisions of the law are present.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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

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143. State Planning—Local and Regional Planning—Federal Grants in Aid—
The State Planning Board of Nevada is empowered under state law to fulfill requirements of the Federal Government which would render the Board qualified as an applicant for federal aid under Section 701 of the Federal Housing Act of 1954.

CARSON CITY, January 31, 1956.

STATE PLANNING BOARD, *Carson City, Nevada.*

Attention: Mr. M. George Bissell, Engineer Manager.

GENTLEMEN: You have requested that this office express an opinion as to whether the Nevada State Planning Board, under state law, would be authorized to fulfill the requirements prescribed by the Federal Government and thereby render the Board qualified to become an

the most important question upon which you desire our opinion is whether or not the directors of such a corporation could effect the issuance of no par stock having equal voting privileges, a block of which would carry a slight value to be taken by the directors for control purposes, and with the remainder to be sold at an increased value to such a number of different subscribers as would assure a concentration of control in the directors.

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Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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

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143. State Planning—Local and Regional Planning—Federal Grants in Aid—The State Planning Board of Nevada is empowered under state law to fulfill requirements of the Federal Government which would render the Board qualified as an applicant for federal aid under Section 701 of the Federal Housing Act of 1954.

CARSON CITY, January 31, 1956.

STATE PLANNING BOARD, *Carson City, Nevada.*

Attention: Mr. M. George Bissell, Engineer Manager.

GENTLEMEN: You have requested that this office express an opinion as to whether the Nevada State Planning Board, under state law, would be authorized to fulfill the requirements prescribed by the Federal Government and thereby render the Board qualified to become an

applicant for federal aid under Section 701 of the Federal Housing Act of 1954.

It will be necessary to determine this question in light of the qualifications required by the Federal Government, which qualifications are set forth and dealt with separately in the following opinion. Further, this opinion will attempt to answer the question of the state agency's qualifications as an applicant for such aid, first, for small municipalities which are under 25,000 population, and, second, for metropolitan or regional areas in that order.

It will perhaps be helpful to list the statutes and comparable sections of the Nevada Compiled Laws referred to in this opinion. They are:

1. State Planning Board Act.

1937 Statutes of Nevada, Chapter 102, page 184, as amended by 1947 Statutes, Chapter 81, page 283 and 1953 Statutes, Chapter 14, page 11; N.C.L. 1931-1941 Supp., Sections 6975.01-6975.08, N.C.L. 1943-1949 Supp., Sections 6975.04, 6975.05. The 1953 amendments are not contained in the N.C.L.

2. Planning and Zoning Act.

1941 Statutes of Nevada, Chapter 110, page 249, as amended by 1947 Statutes, Chapter 267, page 834; N.C.L. 1931-1941 Supp., Sections 5063-5063.35, N.C.L. 1943-1949 Supp., Section 5063 and following.

3. Appropriation Act of 1955.

1955 Statutes of Nevada, Chapter 324 at page 538.

OPINION

The first question to be determined is this: Under state law and the requirements of the Federal Government under Section 701 of the Federal Housing Act of 1954 (68 Statutes, part 1, page 640; Public Law 560, Section 701, 83d Congress), is the Nevada State Planning Board qualified to become an applicant for federal aid for planning assistance to small municipalities (under 25,000)?

In the opinion of this office the answer is in the affirmative.

The qualifications required by the Federal Government and the reasons why the State of Nevada meets the requirements under state law are as follows:

1. An applicant for a federal grant must be an official state planning agency.

The Nevada Planning Board was officially created by an Act of the Nevada Legislature in 1937. 1937 Statutes of Nevada, Chapter 102, page 184; as amended by 1947 Statutes, Chapter 81, page 283; as amended by 1953 Statutes, Chapter 14, page 11.

Hereinafter this Nevada Statute will be referred to as the "State Planning Board Act." Section 1 of the State Planning Board Act provides, in part, as follows:

"A board is hereby created to be known as the state planning board;"

2. The state planning agency must be empowered, under its state laws, to provide planning assistance to small municipalities in the solution of their local planning problems.

Section 5(a) of the State Planning Board Act provides as follows:

SEC. 5. It shall be the function and duty of the state planning board:

(a) To make a comprehensive state plan for the economic and social development of the State of Nevada. To this end, it shall conduct research and studies relating to natural resources and to other factors in the progress of the state.

Section 5(d) of the same Act provides as follows:

(d) To cooperate with other departments and agencies of the state in their planning efforts, and to advise and cooperate with municipal, county, and other local planning commissions within the state for the purpose of promoting coordination between the state and the local plans and developments.—Amend. Chapter 81, 1947 Statutes.

Section 6 of the same Act provides, in part, as follows:

In general, the board shall have such powers as may be necessary to enable it to fulfill its functions and to carry out the purposes of this act.

Encompassed within the duty of the State Planning Board to provide a plan for state-wide development is the duty of providing advice and cooperation to the local planning agencies to the end that coordination between state and local planning be effected. Inasmuch as the local planning is an integral part of the state program, and inasmuch as the local planning must be accomplished in order to affect the state program, the cooperation to be provided by the state organization would necessarily include planning assistance to the local agencies where needed. 1941 Statutes, Chapter 110, page 249, as amended, provides for city, county and regional planning. Therein, local planning commissions are authorized for cities and counties having a 15,000 population either more or less, and in those cities and counties having less than 15,000 the city council or the County Commissioners may act as a planning commission if the appointment of a separate commission is not expedient.

Thus we conclude that the State is required to render whatever planning assistance is necessary to the localities to the end that local planning be accomplished and a comprehensive state plan be developed.

3. The state planning agency must be legally empowered to receive and expend federal funds and expend other funds for the purpose stated in requirement No. 2, above, and to contract with the United States with respect thereto.

Section 6 of the State Planning Board Act provides, in part, as follows:

The board is hereby empowered to receive and accept, in the name of the state, grants of money or services to enable it to carry on its work under this Act. In general, the board shall have such powers as may be necessary to enable it to fulfill its functions and to carry out the purposes of this Act.

By these provisions the State Planning Board is specifically authorized to accept grants for planning purposes together with broad powers

necessary to effect the acceptance of such grants. Therein lies the power of the Planning Board to contract with a grantor for the acceptance and expenditure of the grant so long as it is consistent with the purposes and objectives of the state statute. The contractual power is necessarily implied. See 42 American Jurisprudence 316, "Public Administrative Law," Section 26.

Moreover, under Section 6 of the State Planning Board Act the Board is authorized to participate in national planning projects. Section 6 reads, in part, as follows:

The board is hereby authorized to participate in * * * national planning projects for the purpose of conserving and promoting * * * general welfare of the people.

4. The state planning agency must be in a position to provide state or other non-federal funds in an amount at least equal to one-half the estimated cost of the planning work for which the federal grant is requested.

The State Planning Board is an agency supported by direct biennial appropriation. For the present biennium, under 1955 Statutes, Chapter 324, at page 538, there has been appropriated to the State Planning Board \$58,403. While a very little of this amount could be used directly for matching fund purposes, it is expended in part to employ qualified men accomplished in the field of city and regional planning. Moreover, such federal assistance as could be received would place the planning program in a position wherein it will make it feasible for the State Legislature to provide more extensive funds in the future for planning purposes.

Direct legislative appropriation is not, however, where the bulk of the nonfederal funds will come from. Under Section 5(d) and Section 6 of the State Planning Board Act, above quoted, the State Planning Board is in a position to contract with the local agencies to supply such matching funds as may be needed. As this office understands it, estimates of the costs of each project would be made in detail prior to application for federal participation. Thus, local and state agreement could be reached on this basis prior to application.

5. The state planning agency must be technically qualified to perform the planning work, either with its own staff or through acceptable contractual arrangements with other qualified agencies or with private professional organizations or individuals.

While the State Planning Board presently employs technicians qualified in city and regional planning work, Section 4 of the State Planning Board Act provides, in part, as follows:

The board may appoint such technical and clerical assistants and make such other expenditures as may be necessary to carry into effect the purposes of their Acts.

Thus, with funds available, there is no question but that the Board is authorized to employ technical assistants.

6. The state planning agency must be ready and able to assume full responsibility for the proper execution of the program for which the grant is made and for carrying out the terms of the federal grant contract.

As the above quoted provisions of the State Planning Board Act disclose, the Nevada State Planning Board is authorized to contract and be responsible for the execution of any planning program for which a federal grant is made.

The second question to be determined is whether or not the Nevada State Planning Board, under state law, meets the qualifications as an applicant required by the Federal Government under Section 701 of the Federal Housing Act of 1954 for planning assistance to metropolitan or regional areas.

The answer is in the affirmative.

The required qualifications are as follows, that:

(1) an applicant for a federal grant be an "official State, metropolitan or regional planning agency";

(2) such planning agency be empowered under state or local laws to perform planning work in metropolitan or regional areas;

(3) such planning work in metropolitan or regional areas be within the purview of the federal law, namely, "surveys, land use studies, urban renewal plans, technical services and other planning work" exclusive of plans for specific public works;

(4) the planning agency is empowered to fulfill the obligations imposed under the grant contract with the Federal Government prescribing the terms and conditions thereof, which are in substantial accord with Section 2 of the aforementioned Guide; and

(5) appropriate provision be made by the planning agency to cause to be provided as needed the portion of the cost of the planning work not covered by the federal grant.

Clearly, under Section 1 of the State Planning Board Act, above quoted, the Nevada State Planning Board is an official state planning agency. Qualification No. 1 is, therefore, satisfied.

Qualification No. 2 is satisfied under Sections 5(a), 5(d) and 6 of the State Planning Board Act, above quoted. Not only would the state planning program require the state agency to embark upon metropolitan or regional planning in order to effectuate a proper comprehensive state program when such metropolitan or regional planning is not carried on by a local agency, but, where the local agency is operative, the cooperation required to be extended to the local metropolitan or regional agency by the state agency would necessarily include active participation in the local planning, when necessary, in order to accomplish the state program.

Qualification No. 3 is satisfied by Section 5(a) of the State Planning Board Act, above quoted. Section 5(a) of that Act is intentionally broad for the purpose of permitting whatever methods and practices are necessary to accomplish the comprehensive state planning program. Clearly, the factors required for a proper planning program are those set out in qualification numbered 3, and therefore required by the state statute as factors to be used by the state agency in developing the state program.

Qualification No. 4 is satisfied by Section 6 of the State Planning Board Act. Section 6 of that Act is again quoted, in part, as follows:

The board is hereby authorized to participate in interstate, regional, and national planning projects for the purpose of conserving and promoting public health and safety, convenience and general welfare of the people * * *. The Board is hereby empowered to receive and accept, in the name of the state, grants of money or services to enable it to carry on its work under this Act. In general, the Board shall have such powers as may be necessary to enable it to fulfill its functions and to carry out the purposes of this Act.

Clearly, the power to contract and fulfill the conditions of the contract prescribed by the grantor, insofar as those conditions are directed toward the objectives and purposes of the state statute, are concomitant with the power to accept the grant. It is also clear that the purposes of the state statute and the objectives of the Federal Government, exclusive of planning for specific public works, are the same.

Qualification No. 5 is satisfied by reason of the fact that, aside from state legislative appropriation which may be made available, the state agency, as heretofore set forth in this opinion, is in a position to contract with local planning agencies for the purpose of providing the necessary funds for whatever project or projects are within the economic means of the state and the local agencies consistent with the federal requirements.

In connection with the above, answers to certain other questions are requested. These questions will be stated and considered separately as follows:

1. Is applicant authorized to contract in its own name?

The Nevada State Planning Board, under Section 6 of the State Planning Board Act, above quoted, is given the broad power to do that which will fulfill the purposes of the statute. The State Board is, therefore, empowered to enter into such contracts in its own name on behalf of the State as are necessary to effect the purposes of the statute.

2. Is applicant empowered to enter into contracts with the Federal Government for planning grants under Section 701?

The answer is in the affirmative as heretofore set forth in this opinion.

3. Is applicant authorized to expend donations and grants as well as funds appropriated or received from local sources, especially if the statute contains a provision limiting the payment of expenditures to funds appropriated or received from local public bodies?

The answer is in the affirmative. The State Planning Board Act contains no such limitation.

4. Does the statute sufficiently define the area over which a planning body may exercise planning powers, or does it provide adequate standards or tests for delineating such an area?

The above quoted provisions of the State Planning Board Act clearly define the area over which the State Planning Board shall exercise planning powers to be state-wide.

5. Is the area of the proposed planning assistance project a metropolitan or regional area within the meaning of the state law? Does a state law require that a metropolitan or regional area be a contiguous area for planning purposes?

The portion of this question pertinent to this opinion is contained in the last sentence. Section 5, Chapter 110, Statutes of Nevada 1941, as amended by Chapter 267, Statutes of 1947, at page 837, provides, in part, as follows:

The formation of regional planning districts is hereby authorized and a regional planning commission may be created, in accordance with the provisions of this act. Such districts shall consist of a portion of a political subdivision, two or more contiguous political subdivisions or contiguous portions of two or more political subdivisions. All territory embraced within a regional planning district shall be contiguous except where the regional district is composed of two or more municipalities such territories need not be contiguous.

6. What, if any, concurrences or approvals of state or local officials or bodies are prerequisite to the applicant creating contractual obligations?

Insofar as the State Planning Board is concerned, authority to contract is delegated to the Board by the State Planning Board Act. Applicable provisions above quoted. The state agency as the applicant for a planning project in a particular local area would of necessity, under its present financial set-up, be required to seek the approval of the local commission and come to a definite agreement with such local commission concerning the amount of funds to be provided by the local area. The provisions of Chapter 110, Statutes of Nevada 1941, as amended (cited above) providing for the creation of local planning commissions are in as equally broad terms as the State Planning Board Act, and in which is found the power of the commissions to do that which is necessary to effect the local planning program with funds appropriated by the local governing body or bodies involved.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

144. **Taxation—Assessors—County.** The county treasurer is authorized to accept tax money upon real property and to credit only as reflected by assessment.

CARSON CITY, February 1, 1956.

HONORABLE GEORGE G. HOLDEN, *District Attorney, Lander County, Austin, Nevada.*

DEAR MR. HOLDEN: We have your inquiry of January 24, 1956, asking an opinion of this office, presenting a problem as stated in the letter, a portion of which reads as follows:

5. Is the area of the proposed planning assistance project a metropolitan or regional area within the meaning of the state law? Does a state law require that a metropolitan or regional area be a contiguous area for planning purposes?

The portion of this question pertinent to this opinion is contained in the last sentence. Section 5, Chapter 110, Statutes of Nevada 1941, as amended by Chapter 267, Statutes of 1947, at page 837, provides, in part, as follows:

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DEAR MR. HOLDEN: We have your inquiry of January 24, 1956, asking an opinion of this office, presenting a problem as stated in the letter, a portion of which reads as follows:

The County Assessor has been asking me what we should do in certain cases where two people have insisted on paying the taxes and being on the tax roll for one piece of property.

The letter then poses the question of whether the tax money, upon the one parcel of land, should be accepted from both persons. Also there is a question presented about refunds of tax money, upon which we will make certain comments.

OPINION

We first make the distinction between two persons owning a parcel of land together, in a case in which both acknowledge the rights and equities of the other, and a case in which two persons each claim to own the parcel and refuse to concede or recognize any rights in the other. In the former case a deed may run to John Doe and Richard Roe, as tenants in common, each receiving an undivided one-half interest in a certain parcel of land. In this case the assessment would run to both and payment by either of the full amount of the tax should be accepted by the County Treasurer. Payment in full (for the full taxable year) by one of the joint owners would, of course, discharge the obligation of both or all, and the obligation for the payment of taxes, for the particular parcel, would be discharged for the full annual period. When so paid in full, for the year, no further payment for the same taxable year, upon the same property, should be accepted from anyone.

Incidentally, the County Treasurer would not be authorized to accept one-half of the amount of the tax installments from one. The treasurer is authorized to accept the full amount of the tax as equalized, not one-half and not double. In cases in which the parties by the record each claim to own a one-half undivided interest in the property, either could pay it. How and in what manner they may settle the obligation between each other is no affair of the County Treasurer.

Secondly, the County Treasurer is not concerned with who pays the tax, so long as timely paid, but the Treasurer would have no authority to credit the payment to a stranger to the assessment roll.

Section 5 of Chapter 344, Statutes of 1953, page 597 at 601, in part, reads as follows:

* * * and he shall then determine the full cash value of all such property and he shall then list and assess the same to the person, firm, corporation, association, or company owning it.

Under this section it is the duty of the assessor to assess all property within the county, except that which is exempt from taxation. In assessing it he does not assess the same to two persons unless they own it jointly. He assesses same to the "person, firm, corporation, association, or company owning it." This work of assessing as provided by law is an administrative procedure. If he commits error, a court of competent jurisdiction may, in a proper case, determine ownership and if the judgment shows an error of the assessor in determining ownership, he will correct the record to conform to the judgment.

Money tendered, but not for credit to the assessed owner, should be

rejected. Moneys accepted upon account of taxes should be credited to the assessed owner and to no other.

Sections 6645 to 6650, N.C.L. 1929, make provisions for the refund of money, in certain cases, when doubly paid upon one parcel of land.

Sections 6651 to 6657, N.C.L. 1929, make provisions for the refund of money, in certain cases, when doubly paid upon patented mining claims.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

145. Sales and Use Tax Act—Sale of entire business by owner is an occasional sale, not in the usual course of business, and is not, despite inclusion of certain tangible personal property, subject to sales tax.

CARSON CITY, February 2, 1956.

MR. GERALD J. MCBRIDE, *Executive Secretary, Nevada Real Estate Commission, 309 W. Telegraph Street, Carson City, Nevada*.

DEAR MR. MCBRIDE: You have submitted to this office for a formal opinion the following questions:

1. Is the sale of a business in its entirety an occasional sale?
2. If the answer is in the affirmative, is it exempt from the sales and use tax?

OPINION

This subject is of such importance as to merit a full discussion, and a careful reading of the Sales and Use Tax Act with an attendant study of available cases touching on this problem.

Under Chapter 397 of the 1955 Statutes, known as the Sales and Use Tax Act, a retail sale is defined as a sale for any purpose other than resale *in the regular course of business* of tangible personal property.

An occasional sale is defined under the Act as a sale of property not held or used by the seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit.

Section 63 of the Act reads, "There are exempted from the taxes imposed by this act the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this state of tangible personal property, the transfer of which to the purchaser is an occasional sale."

Let us first consider whether the sale of an entire business is a sale of tangible personal property "in the regular course of business." Under the doctrine enunciated in the case of *Novak v. Redwine*, Revenue Commissioner, 81 S.E. 2d 222, it is not. The court there pointed out:

The sale by plaintiff in error of his bakery fixtures and equipment after he had ceased to do a bakery business, which sale was not a transaction by one engaged in the business of

rejected. Moneys accepted upon account of taxes should be credited to the assessed owner and to no other.

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The sale by plaintiff in error of his bakery fixtures and equipment after he had ceased to do a bakery business, which sale was not a transaction by one engaged in the business of

buying and selling bakery fixtures and equipment, was not taxable, and the trial court erred in sustaining the general demurrer to the petition seeking a refund of the amount of tax levied and collected by the defendant in error.

In *State Board of Equalization v. Boteler*, 131 F.2d 386, the Circuit Court of Appeals sustained a decision of the Federal District Court for the Southern District of California, Central Division, holding that the sale of the assets of a bankrupt business by the referee in bankruptcy were not subject to the sales tax because the referee was not "carrying on a business." The Court refers to *Bigsby v. Johnson*, 118 P.2d 289, and points out that in that case the Court specifically declined to decide the question as to the taxability under the statute of gross receipts from casual retail sales that have no relation whatever to a retailer's business operations. The Court went on to expound:

In our opinion the fact that these assets had previously been utilized by the bankrupt in the conduct of a business no longer in existence has no materiality in the case. His activities did not render him taxable under the terms of the California Retail Sales Act. * * *

This was a 1942 case and prior to enactment of the "casual sales" provision of the California law in 1947.

The same Court of Appeals has held in *California State Board of Equalization v. Goggin*, 191 F.2d 726, that the tax is not applicable where the sales are made not in the course of conducting a business but in the process of putting an end to a business. These Federal cases go beyond the "casual sale" doctrine which is now applicable.

From the Act itself the intention is clear that it is the gross proceeds from retail sales carried on as a business or occupation which is designed to be taxed. It is well established that the doing of a single Act pertaining to a particular business is not the equivalent of engaging in or carrying on a business. It appears to me, therefore, that the sale of an entire business is not such a sale of tangible personal property as was intended by the Legislature to be taxed, but is an occasional or isolated sale which is exempt under the law.

The Sales and Use Tax Division of the State Tax Commission cites its authority for rule 43 the case of *Market Street Railway Company v. State Board of Equalization*, 290 P.2d 20. This case is to be differentiated from the present ruling of the Sales and Use Tax Division of the State Tax Commission in that at the time of the sale of the Market Street Railway facilities to the City of San Francisco the California Act had no exemption of casual and occasional sales. This exemption was not incorporated in the California law until 1947 (Sec. 6367 as amended.)

While the decision of the California Supreme Court in *Bigsby v. Johnson*, 118 P.2d 289, was to the effect that the sale of obsolete printing equipment by one engaging in the sale of printed matter was taxable, the Court, in the Market Street case above referred to, pointed out that the 1947 amendment as to casual sales was clearly intended to, and did, modify the definition of "business" set for in the *Bigsby* case. The same reasoning was pointed out as modifying and changing the definition of business as set forth in the case of *Los Angeles, etc., School District v. State Board of Equalization*, 163 P.2d 45, wherein

it had been held that the district's transfers were taxable although they amounted to but two or three quarterly.

It is the contention of the Sales and Use Tax Division of the State Tax Commission that where one is engaged, for instance, in the candy business or the bakery business, or a retail dress business, that upon the sale of the business, the counters, show cases, dress racks, lighting lamps, etc., are subject to the sales tax because they were used by a retailer requiring a retail permit in the operation of his business. But I believe the line of demarcation lies in the realm explored by the Court in the Novak case. The retailer has not been engaged in the business of selling show cases, counters, dress racks, lighting lamps, etc. The sale of these, with the business, is a means of winding up the business and not in carrying on a business. It is an occasional sale and not subject to the sales tax.

Revenue measures are to be strictly construed so as to resolve doubt in favor of the taxpayer, and their meaning is not to be extended by implication.

Respectfully submitted,

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146. State Senator—If Senator selected by County Commissioners to fill unexpired term of Senator removed by death or resignation meets qualifications of Section 1 of Article II of Constitution of Nevada, he is qualified elector, whether registered or not.

CARSON CITY, February 6, 1956.

HONORABLE WALTER WHITACRE, *Chairman, Committee on Credentials, Nevada State Senate, Carson City, Nevada*.

DEAR MR. WHITACRE: You have requested of this office an opinion as to the qualification of Mr. E. L. Cord to sit in this special session of the Legislature as the State Senator from Esmeralda County.

The facts, as made known to me, are as follows: That Mr. Cord, while residing in Esmeralda County for a good many years, did not vote at the last general election in 1954, and did not reregister until January 21, 1956, which date coincided with his application to the County Commissioners of Esmeralda County to be appointed State Senator to fill the vacancy caused by the death of Senator Harry W. Wiley. The Commissioners on January 21, 1956 appointed Mr. Cord to fill the unexpired term of Senator Wiley.

OPINION

Let me preface this opinion by pointing out to the Senate that Section 6 of Article IV of the Constitution of Nevada provides:

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

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

This power to judge of the eligibility of its members is final and not subject to review by the Courts (see *French v. Senate*, 146 Cal. 604, 80 P. 1031, Anno. 107 A.L.R. 216, and *State v. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189). I call the Senate's attention to this so as not to seem presumptuous in attempting to aid the credentials committee of the Senate by further discussion.

Section 5 of Article III of the Constitution of Nevada prescribes that Senators and members of the Assembly shall be duly qualified electors in the respective counties and districts which they represent. This gives rise to the definition of a qualified elector, and such is found in Section 1 of Article II of the Constitution of Nevada, which reads as follows:

All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; provided, that no person who has been nor may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no idiot or insane person shall be entitled to the privilege of an elector. There shall be no denial of the elective franchise at any election on account of sex.

In the case of *State ex rel Boyle v. Board of Examiners*, 21 Nev. 67, the Court pointed out that, "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."

Justice McCarran in the case of *Parus v. District Court*, 42 Nev. 229, points out that Section 27 of Article IV of our Constitution precludes those who are not qualified electors from serving on juries, and goes on to point out that under Section 4929, now Section 8476 of our compiled laws, it is provided, "Every qualified elector of the state, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides, or the county to which it is attached for judicial purposes."

Section 12 of Article IV of the Constitution of Nevada, which provides for the interim appointment of a Senator or Assemblyman in case of the death or resignation of an incumbent, reads as follows:

In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such

vacancy; provided, that this section shall apply only in cases where no biennial election or any regular election at which county officers are to be elected takes place between the time of such death or resignation and the next succeeding session of the legislature.

It is apparent from the foregoing that if Mr. Cord meets the qualifications set up in Section 1 of Article II of the Constitution of Nevada, he is a qualified elector, even though unregistered at the time of his appointment. In short, the Honorable Credentials Committee of the Senate should ask only these questions:

1. Is Mr. Cord a citizen of the United States not laboring under any of the disabilities named in the Constitution?
2. Is he twenty-one years of age or over?
3. Has he resided in the state actually, and not constructively, for a period of six months, and in Esmeralda County for thirty days next preceding his selection?
4. Was he selected to fill the vacancy in accordance with Section 12 of Article IV of the Constitution?

If the answer to all these questions is in the affirmative, then Mr. Cord is a qualified elector, and should legally be seated as the interim Senator from Esmeralda County.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

147. Legislature—State Officials—Construction of Chapter 200, 1953 Statutes, as amended by Chapter 244, 1955 Statutes, pertaining to mileage and per diem expense allowance to members of the Legislature.

CARSON CITY, February 10, 1956.

HONORABLE WILLIAM EMBRY, *Assemblyman, Nevada State Legislature, Carson City, Nevada*.

DEAR SIR: You have requested the opinion of this office on the following facts and questions.

FACTS

A special session of the State Legislature convened at 12 o'clock noon on February 6, 1956, in accordance with the Governor's call. Many members from distant counties arrived in Carson City, or in the vicinity of Carson City, on Sunday, February 5, 1956.

QUESTION

For what per diem expense and travel or mileage expense are members of the Legislature to be reimbursed?

OPINION

The pertinent sections of Chapter 200, 1953 Statutes, as amended by Chapter 244, 1955 Statutes at page 400, provide as follows:

vacancy; provided, that this section shall apply only in cases where no biennial election or any regular election at which county officers are to be elected takes place between the time of such death or resignation and the next succeeding session of the legislature.

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QUESTION

For what per diem expense and travel or mileage expense are members of the Legislature to be reimbursed?

OPINION

The pertinent sections of Chapter 200, 1953 Statutes, as amended by Chapter 244, 1955 Statutes at page 400, provide as follows:

SECTION 1. The per diem expense allowance and the travel expenses of assemblymen and senators duly elected or appointed, and in attendance at any session of the Nevada state legislature, shall be allowed in the manner set forth in this act.

SEC. 2. If an assemblyman or senator travels daily from his home to sessions of the legislature, he shall be allowed for each mile between the capital and his home, for each day the house of the legislature to which he belongs is actually convened or for each day he travels to the capital on official legislative business, the same mileage allowance made to state officers and employees traveling by private conveyance on state business.

SEC. 3. If the assemblyman or senator does not travel from his home daily, but takes up a temporary residence in the vicinity of the capital for the duration of the legislative session, he shall be allowed the per diem expense allowance made to officers and employees of the state for each day he is away from his home and for the entire period that the state legislature is in session.

Under the above quoted provisions it appears to be clear that, as to those members who travel daily from their homes to the session, mileage allowance only and not per diem allowance is to be provided. However, we do not understand the law to mean that if such member remains in Carson City rather than commuting to his home that he would not be allowed his per diem expense. Thus, for those days during which he remains in Carson City without returning home the per diem allowance would be made. By the same token, when the trip home is not made there is no travel and the mileage allowance would not be made. According to Section 2, above quoted, the mileage allowance is to be made to each such member (those commuting from home) when his particular house of the Legislature is actually convened or when he is transacting official legislative business in Carson City.

Now, as to those members who take up temporary residence in the vicinity of Carson City for the duration of the legislative session, it is also clear that a per diem allowance is to be made. The particular question arising at this point is: Does the law mean that the per diem allowance is to be made only during the period from the beginning of the session to its close, or does the time on which per diem allowance is to be computed also include the time required for the member to come to Carson City from his home prior to the beginning of the session and the time required to return to his home after the close of the session?

This office is of the opinion that under Section 3, above quoted, there is no question but that such time includes the required time to come to Carson City from his home and to return home from Carson City. If this were not true, the wording in Section 3 which reads, "for each day he is away from home," would be meaningless. Certainly if the session convened at noon on February 6, such member would be away from his home for a period of time prior thereto.

We are aware that the wording of the law is not precisely in terms

of time element which would be required to travel from the distant home and return. However, consonance with the purpose of the law requires such interpretation. Further, we submit that the time required to make the trip to Carson City, as a reasonable and practical matter, must also include a reasonable time necessary to settle in the temporary residence.

Such construction of the law is in line with the manner of computing the per diem allowance made to other State officials who are required to be away from home in the course of business.

The above quoted law makes no provision for mileage allowance to those members for their travel expense from their distant homes and return. However, there appears to be no question in anyone's mind but that the allowance is authorized, if on no other basis than tradition. It has always been allowed.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

148. Cosmetology—State Board of—"Demonstrator" must be licensed. Initial fee \$15. Annual renewal fee \$2.50.

CARSON CITY, February 14, 1956.

MRS. BERNICE RANDALL, *Secretary-Treasurer, Nevada State Board of Cosmetology, Post Office Box No. 1814, Reno, Nevada*.

DEAR MRS. RANDALL: You have today explained that certain agents or employees of beauty preparation companies, do frequently by appointment, conduct a demonstration in Nevada without charge to the subject, in the presence of licensed cosmeticians, the demonstration usually taking the form of "bleaching, tinting, or coloring" of the hair of the subject. Also that at the time of the demonstration the product is not sold, although recognized by all to be available for sale by the company that employs the demonstrator. That an agent stands by during the demonstration and is ready to write up orders during or after the demonstration. It is clear, and you were in accord with the conclusion that the purpose of the demonstration is to create good will for and sales of the products offered by the particular company thus represented.

From this background of facts a certain question is presented as follows:

QUESTION

It is mandatory under the law that the State Board of Cosmetology require that each demonstrator be duly licensed, and that the board charge initially for such license the sum of fifteen dollars?

OPINION

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

Subsection (g) of Section 2 of the Cosmetology Act as last amended (Stats. 1933, Ch. 174, p. 237) reads as follows:

of time element which would be required to travel from the distant home and return. However, consonance with the purpose of the law requires such interpretation. Further, we submit that the time required to make the trip to Carson City, as a reasonable and practical matter, must also include a reasonable time necessary to settle in the temporary residence.

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From this background of facts a certain question is presented as follows:

QUESTION

It is mandatory under the law that the State Board of Cosmetology require that each demonstrator be duly licensed, and that the board charge initially for such license the sum of fifteen dollars?

OPINION

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

Subsection (g) of Section 2 of the Cosmetology Act as last amended (Stats. 1933, Ch. 174, p. 237) reads as follows:

(g) The word "demonstrator" is defined as any person who, for the purpose of advertising, promoting, or selling any drug, lotions, compound, preparation, or substance, performs or carries on any of the practices hereinbefore enumerated or defined, in order to advertise, promote, or sell such drug, lotion, compound, preparation or substance.

Under Section 2(b) of the Act the word "cosmetology" is defined as follows:

(b) The word "cosmetology," as used in this act, is defined as the following practices, namely: Arranging, dressing, curling, waving, cleansing, singeing, bleaching, tinting, coloring, straightening, or similar work incident to or necessary for the proper carrying out of the practice or occupation provided by the terms of this act, the hair of any person with the hands or with mechanical or electrical apparatus or appliances, or by any means; massaging, cleansing or stimulating the scalp, face, neck, arms, bust, or upper part of the human body, by the use of cosmetic preparations, antiseptics, tonics, lotions or creams; cleansing or beautifying the hair by the use of cosmetic preparations, antiseptics, tonics, lotions or creams, beautifying the face, neck, arms, bust, or upper part of the human body by the use of cosmetic preparations, antiseptics, tonics, lotions or creams; * * *.

The fifth paragraph of Section 13 of the Act (Stats. 1939, Ch. 160, p. 242) reads as follows:

Each demonstrator, as herein defined, must obtain a license to engage as such in this state before engaging in the business of demonstrator, by which said license the board shall receive the sum of fifteen dollars and for each annual renewal thereof the sum of two dollars and fifty cents.

We entertain no question but that an agent or employee of a cosmetic company that puts on a demonstration as we have outlined it in the first paragraph of this opinion is a "demonstrator" within the purview of the definition, and as such must be licensed. The language of the fifth paragraph of Section 13 is mandatory and the sum set in this provision is fifteen (\$15) dollars.

We understand that the payment of the sum named will license the "demonstrator" for the remainder of the fiscal year and permit the "demonstrator" to carry on as many demonstrations as he may wish during the period limited, and that thereafter the cost is nominal, being only two dollars and fifty cents per year.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

149. Workmans Compensation—Amount to be paid as compensation to temporarily totally disabled workers under Section 1 (11b) of Chapter 432 of 1955 Statutes is 90 percent of worker's average monthly wage, and cannot exceed that amount despite dependents.

CARSON CITY, February 15, 1956.

HONORABLE THOMAS M. GODBEY, *Assemblyman, Clark County, Assembly Chamber, Carson City, Nevada.*

MY DEAR MR. GODBEY: You have requested this office to advise you as to the amount of compensation to be paid to workers suffering temporary total disability, under Section 1(11b) of Chapter 432 of the 1955 Statutes of Nevada. This section amends Section 59 of the Act creating the Nevada Industrial Insurance Commission.

OPINION

Section 1(11b) of Chapter 432 of the 1955 Statutes reads as follows:

(b) Temporary Total Disability. During the period of temporary total disability, but in no event for more than one hundred (100) months, ninety (90) per centum of the average monthly wage; and, if there one or or more persons residing in the United States dependent upon the workman at the time of the injury, an additional 15 per centum for each dependent, but no more than 90 per centum of the average monthly wage. Any excess of wages over \$200 a month shall not be taken into account in computing such compensation.

There can be no question after reading this section that the enrolled bill now on file with the Secretary of State contains the quoted language. Such enrolled bill has been passed by a majority vote of both houses of the Legislature, and has been signed by the presiding officers of the respective branches of the Legislature, and by the Secretary of the Senate and Clerk of the Assembly, in accordance with Section 18 of Article IV of the Constitution of Nevada. The question then arises as to whether the Nevada Industrial Commission can go behind the enrolled bill, and interpret the intent of the Legislature, so as to sanction a payment of less than 90 percent of the average monthly wages to workers temporarily totally disabled.

The Governor of Nevada was advised by John F. Cory, Chairman of the Nevada Industrial Commission, on June 20, 1955, that in accordance with an interpretation of the Act by the Commission's attorney, Richard R. Hanna, that the Nevada Industrial Commission, despite the wording of the Act would interpret Section 1(11b) of the Act so as to pay to temporarily totally disabled workers, during the period of temporary total disability, but in no event for more than 100 months, 65 percent of the average monthly wage, with an additional 15 percent for each dependent, but no more than 90 percent of the average monthly wage.

This office in a strongly worded letter to Mr. Cory suggested that the Act be amended at this Special Session of the Legislature, in order to avoid what we considered would be legitimate future suits by claimants claiming payments of 90 percent of the average monthly wage. We also pointed out that the responsibility of interpreting the laws, prior

to Court determination, should rest with the Attorney General, and not with private attorneys hired by various state agencies.

The basis of the Nevada Industrial Commission's stand, as set out in Mr. Cory's letter to Governor Russell, was that there was a discrepancy in the language of Section 1(11b) of Chapter 432 of the 1955 Statutes, as discussed by various legislative committees, and as appearing in the enrolled bill, and in support of this Mr. Cory attached a statement by Leola H. Wohlfeil, Secretary of the Legislative Counsel Bureau, as to how the discrepancy occurred. It is interesting to note that Mrs. Wohlfeil concluded by admitting that a part of the explanation was merely conjecture.

Perhaps in all reported legal cases there is no finer exposition of the law applicable to this case than in *State v. Swift*, 10 Nevada 176. Justice Beatty, in his learned opinion, points out that the English law, prior to American independence, held that the record, which, as long as it existed, was held to import absolute verity, which not only dispensed with, but excluded all other evidence which could neither be aided nor impeached by the Journals of Parliament, was the copy of the act enrolled by the Clerk of the Parliament and delivered over into Chancery. The question frequently arose in England, but the rule was uniformly maintained that the Courts could look to the statute-roll, and to that alone.

If applicable to our condition and not abrogated by constitutional or statutory provisions, it was, and is binding upon the Courts of every state that have adopted the common law was the rule of decision. Moreover, being founded upon the gravest considerations of public policy, and expressing the wisdom derived from centuries of experience, it would seem that such a rule should not be lightly departed from.

It must appear from circumstances that with regard to the body of a bill, there is no evidence of any kind but that which the Legislature itself furnishes in the enrolled bill deposited in the state archives. It has been signed by the presiding officers of both legislative branches, by the Secretary of the Senate, by the Clerk of the Assembly, and by the Governor. The loosely kept minutes of committees and the recorded entries in the Journals of both houses could scarcely be said to be dependable in arriving at the authenticity of a legislative act. They are not required to be vouched for, and in seeking legislative intent in construing other statutes, this office has often requested reported minutes of legislative committees, only to find that they were non-existent or so sketchy as to be no help. To accept such evidence as setting aside the unqualified language of an enrolled bill would, in the language of Justice Beatty in the *Swift* case, "* * * unsettle the entire statute law of the State."

What assurance is there that a critical examination of legislative records might not reveal many errors of this description? There could lie, also, the danger of intentional corruption of evidence pertaining to statutes. As Justice Beatty pointed out, the Court could not consent to expose state legislation to the hazards of probable error or facile fraud.

Justice Beatty ends his learned discussion of the *Swift* case with these words:

From this discussion it appears that the decided weight of authority, as well as every consideration of expediency, is opposed to the doctrine that this, or any court, for the purpose of informing itself of the existence or terms of a law, can look beyond the enrolled act certified by those officers who are charged by the Constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted.

In accordance with the foregoing see *State v. Howell*, 26 Nevada 93, *State v. Beck*, 25 Nevada 68, *State v. Glenn*, 18 Nevada 34.

In *State v. Middleton*, 94 Mont. 607, 28 P(2) 186, the Court said, "This court can look behind the enrolled bills for one purpose only, and that is to see whether the constitutional mandate requiring that on final passage of a measure, the vote has been taken by ayes and nays and the names entered on the Journal."

Sutherland in his exhaustive treatise on statutory construction points out at Section 1407, page 233, of Vol. 1, that "evidence procured from private memorandum of members or clerks is seldom admitted, nor is the absence of supporting evidence in the Journals a ground from which the invalidity of an enrolled bill will be inferred." He also points out in Section 1408 at page 235 that, "* * * even the original or the engrossed bill is inadmissible to impeach the enrolled act * * *."

It is therefore the opinion of this office that under Section 1(11b) of Chapter 432 of the 1955 Statutes, the amount to be paid as compensation to temporarily totally disabled workers is 90 percent of the average monthly wage, and that the amount of compensation, despite dependents, cannot exceed that amount.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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150. **State Welfare Department—Adoption of children.** Under Chapter 332, Statutes of 1953, consent unless given to one of the three described agencies must be to a "specific adoption."

CARSON CITY, February 15, 1956.

MRS. BARBARA C. COUGHLAN, *State Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

DEAR MRS. COUGHLAN: We have your letter of February 13, 1956, requesting an opinion of this department and requiring a construction of the adoption statute of 1953. Specifically your concise question is stated as follows:

QUESTION

Section 4 of Chapter 332, 1953 Statutes of Nevada sets forth the conditions under which written consent to adoption shall be required. Would a consent signed without the name of the

From this discussion it appears that the decided weight of authority, as well as every consideration of expediency, is opposed to the doctrine that this, or any court, for the purpose of informing itself of the existence or terms of a law, can look beyond the enrolled act certified by those officers who are charged by the Constitution with the duty of certifying, and therefore, of course, with the duty of deciding what laws have been enacted.

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QUESTION

Section 4 of Chapter 332, 1953 Statutes of Nevada sets forth the conditions under which written consent to adoption shall be required. Would a consent signed without the name of the

adopting parents being known to the person or persons consenting be valid under this section?

OPINION

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

Section 4 of the Act reads as follows:

Written Consent; When Required.

1. Written consent to the *specific adoption* proposed by the petition, sworn to by the persons consenting, shall be required from:

- (a) Both parents if both are living; or
- (b) One parent if the other is dead; or
- (c) The mother only of a child born out of wedlock; or
- (d) The guardian of the person of a child duly appointed by a court of competent jurisdiction.

2. Consent shall not be required of a parent who has been adjudged insane for a period of two years, and the court is satisfied by proof that such insanity is incurable.

(Italics supplied.)

Over-all this section means that assuming capacity to contract the parent or parents or other persons having rights over the child must consent to the "specific adoption" and without such consent to the "specific adoption" the Court cannot acquire jurisdiction to enter the order of adoption.

Section 5 of the adoption statute reads as follows:

Agencies Which May Accept Relinquishments and Consents to Adoption. The following may accept relinquishments for the adoption of children from parents and guardians and may consent to the adoption of children:

- 1. The state welfare department of the State of Nevada, to whom the child has been relinquished for adoption; or
- 2. A corporation organized and existing under and by virtue of the laws of the State of Nevada as a child-caring agency, to whom the child has been relinquished for adoption; or
- 3. Any child-placing agency authorized under the laws of another state to accept relinquishments and make placements, to whom the child has been relinquished for adoption.

The two sections (4 and 5) when read as complementary each to the other then delineate those exceptions to the rule in which consent, if required, must be in writing, and for a "specific adoption." The exceptions are three in number and are exclusive.

We therefore arrive at the conclusion that if the consent by the proper person or persons, in writing, if not given to one of the three described agencies, it has no validity unless it be a consent to a "specific adoption." A consent signed by the proper person or persons, in blank, so prepared to permit the names of accepted persons to later be inserted would not meet the requirement that it must be a consent to a "specific adoption."

Incidentally, the wording that has been employed in the two sections quoted, and the construction that we have placed upon it, is compatible with an apparent legislative intent of minimizing the danger and evil of "baby sales" rackets.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

151. Cities and Towns—Mayor and Councilmen of cities of first and second class elected in accordance with Chapter 125 of the 1907 Statutes, as amended, are elected for a term of four years.

CARSON CITY, February 21, 1956.

HONORABLE WILLIAM BYRNE, *Assemblyman, Clark County, Assembly Chamber, Carson City, Nevada.*

MY DEAR MR. BYRNE: You have requested this office to determine the length of the terms of office of city councilmen of Henderson, Nevada, elected in May of 1953, according to existing law.

STATEMENT

Henderson was incorporated in 1953 under the provisions of Chapter 125 of the 1907 Statutes of Nevada, and that early Act provided in Section 3 that "* * * all municipal elections in cities incorporated under this act shall be held on the first Tuesday after the first Monday in May of each odd numbered year." At the time of incorporation Henderson was designated as a city of the second class, to wit, having between 5,000 and 20,000 population.

Section 36 of the 1907 Act provided that all elective officers in cities of the first and second class should hold their respective offices for a period of two years. The elective officers there designated were the Mayor and City Council and the city clerk, city treasurer, judge of the municipal court, and in cities of the first and second class a city attorney and city auditor.

In 1915 Section 36 of the law was amended by Chapter 47 of the statutes of that year by dropping from the elective officers of cities of the first and second class, the city auditor. The term of office of two years however, was unchanged.

The law remained in this form until 1951 when the Legislature, by Chapter 47 of the 1951 Statutes, amended Section 36 of the Act by extending the term of office of the Mayor and City Council in cities of the first and second class to four years. Inasmuch as this law was in effect in 1953 when Henderson was incorporated, it must apply to the Mayor and City Council now serving.

Sutherland in Statutory Construction points out that a statute which has been amended is to be read in the future as though it were originally enacted in the amended form and intervening amendments are treated as incorporated in the original Act. Section 36 of the original Act, setting the terms of Mayor and Councilmen at two years, may

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Section 36 of the 1907 Act provided that all elective officers in cities of the first and second class should hold their respective offices for a period of two years. The elective officers there designated were the Mayor and City Council and the city clerk, city treasurer, judge of the municipal court, and in cities of the first and second class a city attorney and city auditor.

In 1915 Section 36 of the law was amended by Chapter 47 of the statutes of that year by dropping from the elective officers of cities of the first and second class, the city auditor. The term of office of two years however, was unchanged.

The law remained in this form until 1951 when the Legislature, by Chapter 47 of the 1951 Statutes, amended Section 36 of the Act by extending the term of office of the Mayor and City Council in cities of the first and second class to four years. Inasmuch as this law was in effect in 1953 when Henderson was incorporated, it must apply to the Mayor and City Council now serving.

Sutherland in Statutory Construction points out that a statute which has been amended is to be read in the future as though it were originally enacted in the amended form and intervening amendments are treated as incorporated in the original Act. Section 36 of the original Act, setting the terms of Mayor and Councilmen at two years, may

therefore be considered as repealed and replaced by the amendment of 1951.

What effect does this have on Section 1102 N.C.L. 1929 (Section 3 of the 1907 Act) insofar as the provisions of that section conflict with Section 36 as amended? It will be noted that Section 3 of the original Act provided in part, "At such election the qualified electors of such city or town residing within the limits of such city or town shall choose officers therefor, to hold until the first annual election of officers *according to its grade*, as hereafter in this act prescribed."

The Act of 1951, which is a later Act than the 1907 Act and therefore controlling, extends the term of office of the Mayor and City Councilmen of cities of the second class to four years, and is not inconsistent with the foregoing citation of a pertinent part of the 1907 statute.

Under Chapter 73 of the 1947 Statutes, there is a provision that the term of office of all appointive offices shall be until the municipal election next following their appointments and until their successors are duly appointed and qualified (unless sooner removed by the Mayor, with the concurrence of a majority of the members of the City Council, and further provided that a removal by resolution of all members of the City Council is possible.

OPINION

It is, therefore, the opinion of this office that the Mayor and City Councilmen of Henderson, Nevada, were elected to a four-year term, and that the appointed officials serve until the expiration of the terms of the Mayor and Councilmen, unless removed as provided for in Chapter 73 of the 1947 Statutes.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

152. Children's Home, Nevada State—Under Section 7592 N.C.L. 1929, the primary obligation to pay the Nevada State Children's Home, rested upon the county, despite statutory amendment not invoked by amendatory court order.

CARSON CITY, February 24, 1956.

MR. R. VAN DER SMISSEN, *Superintendent, Nevada State Children's Home, Carson City, Nevada*.

DEAR MR. VAN DER SMISSEN: On October 19, 1955 you directed to us a letter inquiring about responsibility for support of children in a certain case, as will appear hereafter by factual statement. You enclosed a copy of letter received from the Board of County Commissioners of Storey County, written by the County Clerk, in which the Commissioners had rejected a billing of the Children's Home for the first two quarters of 1955, in the amount of \$630.06, for the reason stated that such was a responsibility of the father of such children. We replied to this communication asking detailed information from you by interposing some 13 questions.

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On February 8, 1956 we received from you a letter dated December 21, 1955, in which our questions are answered. This then gives us the factual information upon which the controversy as to liability is founded, and from which deductions may be drawn as to liability.

FACTS

The matter to be determined is the liability for the support of three children for a portion of the time that the children were under the care of the Nevada State Children's Home. The dates given, the number of children, and the county of Storey will sufficiently identify the children for the records of the public officers interested.

The said children were by order of the District Court admitted to the Nevada State Children's Home on November 5, 1948. On May 24, 1949 the children were by minute order of the Court released (presumably to the custody of their parents). A short time before the readmission of the children to the Children's Home, the mother of the children died. Upon petition of the father, the District Court entered an order on September 23, 1949 readmitting said children to the Nevada State Children's Home. A portion of said order provided that "maintenance of said children be paid by petitioner." All sums due to the said home were paid regularly upon billing by the home, by the county of Storey, as ordered by its Board of County Commissioners, to and including December 31, 1954. The children were released to the custody of their father on July 8, 1955. Payments by the county of Storey for the first two quarters of the year 1955, in the amount of \$630.06, has been refused by the Board of County Commissioners, as formerly stated. (Apparently the billing was by quarter years and although 7 days in July 1955 are also due to the home, the payment for the two preceding quarters having been refused, the Superintendent of the Home has not billed the county of Storey on account of the 7 days. It also appears that the father of the children has not been billed for support of the children.)

OPINION

We first point out that the question of duty to pay the bill for care of the children from September 23, 1949 to December 31, 1954, is not presented here. It has been paid, without controversy by the county of Storey, despite the order of the court that the "maintenance of said children be paid by petitioner."

The statute in force at the time of the entry of the court order of September 23, 1949, being Section 13 of an Act entitled "An Act for the government and maintenance of the state orphans' home" (Section 7592 N.C.L. 1929) is controlling of this question. Said Section 13 in part reads as follows:

Children admitted to the state orphans' home under the provisions of section twelve of this act, as amended, are hereby declared and adjudged to be wards of the state as fully as whole orphans; provided, that no child shall be received by the board of directors unless committed by the district court of the county in which such child resides; provided further,

that if the district judge is absent from the county, or from any cause is unable to act when an application is made for the commitment of any dependent or neglected child to the orphans' home, the county commissioners are hereby authorized to commit such child to said orphans' home; but any such commitment by any board of county commissioners is subject to review by the district court of the county from which such children were committed; provided further, that the expenses, transportation, and maintenance of such children, when committed to this institution by any district court or board of county commissioners of the state, *shall become a charge against the county from which such children are committed*, such charge for maintenance to be a reasonable rate to be fixed from time to time by the board of directors of said orphans' home; provided, that such rate shall not be less than one-half of the cost of such maintenance by the state; provided, that the district court, in its discretion, may order the parent, parents, guardian or guardians to reimburse the said county for the amount of the maintenance of such child or children in said orphans' home as fixed by the board of directors thereof; * * *." (Italics supplied.)

From this section it is clear that the primary obligation is that of the county, although the Court may order the parent or guardian to reimburse the county. The order of the Court of September 23, 1949 would therefore bear construction in light of the powers of the Courts as expressed in the statute. It is therefore our opinion that the intent of the Court when the order was entered was to render the father liable to the county and in turn the county was liable to the home. In fact the conduct of the county in discharging the account to the home from the date of the order to the date of December 31, 1954, without question, a period of more than five years three months, is an indication that the County Commissioners believed the county to be primarily liable.

If there were no subsequent statute, what we have said would be determinative of the matter, but Chapter 209, Statutes of 1953, page 263, amendatory of Section 13, which became effective March 25, 1953, and was therefore effective during the six month seven day period in question, must also be considered. This statute reads as follows:

Children other than orphans shall be admitted to the Nevada state children's home when committed by the district court of the county in which such child resides, as a dependent or neglected child. The order of commitment shall require the parent or parents of the child to pay to the board \$50 monthly for the care and support of each child committed; provided, that when it shall appear to the district court that the parent or parents are unable to pay \$50 per month, the order shall require the payment of such lesser amount as may be found to be reasonable, and the county where the child was committed shall then pay to the board the difference between the amount so ordered paid and the sum of \$50, or, if the parents

be found unable to pay anything, the county where the child was committed shall be liable for the whole amount of the support of the child. No child shall be ordered committed to the Nevada state children's home who is insane, idiotic, or so mentally and physically deformed as to be incapable of receiving the elements of an education, or who has any contagious disease. When any parent of a child committed under this section shall fail to pay the amount ordered for support, or if no support be ordered, shall fail to make any contribution for support, for a period of 3 years, that failure shall be prima facie proof of abandonment of the child by the parents.

It is true that under this section the District Court is given the power and authority to order and require the parent to pay \$50 monthly (or any lesser amount found proper) for the support of each child, and jurisdiction to order it paid directly to the board. Under this statute, for commitment made of children to the home subsequent to March 25, 1953, an order requiring a parent to pay a definite amount for each child per month, to the home, would, as to such commitment, have lodged the primary obligation to pay the home in the parent. In other words, we concede that such an order could have been entered after March 25, 1953 with reference to the three children in question, and that if it had been so entered it would have been effectual in placing the primary obligation to pay the home upon the parent. Even so, when the parent does not discharge the primary obligation to the home, if so ordered, the county is secondarily liable, and in this respect the statute of 1953 is clear. BUT, no such order has been entered, and the obligation of the county of Storey, for the period in question is therefore fixed by the Statute of 1919 (Sec. 7592 N.C.L. of 1929) which has heretofore been set out, the later statute never having been invoked.

The said Section 13 of the Act has been further amended by Chapter 209, Statutes of 1955, page 325, approved March 24, 1955, but by reason of the date the amendment has no relevance here.

We are also of the opinion that the recognition by the Board of County Commissioners of Storey County of a duty to discharge the account arising from the care of the children and the fact that without notice to the Nevada State Children's Home the Board attempted to disclaim any duty to pay and without benefit of any amendatory District Court order, that upon equitable principles of laches, estoppel, etc., the conclusions that we have formerly arrived at are strengthened.

It is therefore our opinion that for the reasons given the primary legal responsibility to discharge the obligation to the Nevada State Children's Home in the care of the said children for the period beginning January 1, 1955 and ending July 8, 1955, rests upon the county of Storey, which in turn under the Court order the said county would have a right to collect from the father of the children.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

153. State Welfare Department—Adoption—Clarifies Opinion No. 150 dated February 15, 1956. Signature of living natural parents not required on consent to adoption where children have been relinquished to agencies enumerated in Section 5 of Chapter 332 of 1953 Statutes.

CARSON CITY, February 27, 1956.

MRS. BARBARA C. COUGHLAN, *State Director, Nevada State Welfare Department, P. O. Box 1331, Reno, Nevada.*

DEAR MRS. COUGHLAN: On February 13, 1956, you addressed an inquiry to this office as follows:

Section 4 of Chapter 332, 1953 Statutes of Nevada sets forth the conditions under which written consent to adoption shall be required. Would a consent signed without the name of the adopting parents being known to the person or persons consenting be valid under this section?

OPINION

This office, in an opinion written by Deputy Attorney General D. W. Priest, answered the question in the negative. While I agree with the opinion insofar as it went, the matter is of such importance that it should be clarified and extended, so as to leave no doubt in the minds of the public as to procedures to be followed to protect all parties concerned, but especially the children.

Let it first be remembered that the adoption cases decided by our Supreme Court and which have heretofore been determinative, were decided prior to the enactment of Chapter 332 of the 1953 Statutes of Nevada, but in order to more fully and completely understand the problems involved, portions of these decisions which are here pertinent should be reviewed.

In the case of *In Re Swall*, 36 Nev. 171, Judge Norcross held that an oral relinquishment of a child by its natural parent when the child was five or six years old, estopped him from taking the child from the foster parents after a period of ten years. In commenting on this ruling Judge Norcross said:

The weight of modern authority * * * recognizes the superior right of natural parents, all other matters being equal, but places the interest of the child as the first consideration, and where it appears that the interest of the child will manifestly be advanced by enforcing such agreement.

The habeas corpus proceeding of the natural father was dismissed.

Perhaps the most important case on adoption in Nevada was the Schultz case (*Ex Parte Schultz*, 64 Nev. 264). A mother who had signed a relinquishment to her child sought to have the relinquishment revoked and the child returned to her. The Supreme Court posed three questions: (1) Was the release and relinquishment valid? (2) If valid, is it revocable? (3) If revocable is it for the best interest and welfare of the child to allow it to be revoked? In a majority opinion by Mr. Justice Eather, concurred in by Mr. Justice Badt, and strongly dissented to by Mr. Justice Horsey, the Supreme Court answered the first question in the affirmative and the second and third questions in the negative.

The Court pointed out that section of the statute which enabled a parent or guardian to relinquish a child to a recognized organization,

institution or society of this state or another state, or to the State Department of Welfare, for adoption. In such cases, the Court pointed out, it was not necessary in adopting said child, to obtain the permission of the parent or guardian who had relinquished the child. The Court stressed the finding in *Stanford v. Gray*, 42 Utah 228, 129 Pac. 423, to the effect that:

Ordinarily the law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another. Where, however, a parent, by writing or otherwise, has voluntarily transferred and delivered his minor child into the custody and under the control of another, as in the case at bar, and then seeks to recover possession of the child by writ of habeas corpus, such parent is invoking the exercise of the equitable discretion of the court to disrupt private domestic relations which he has voluntarily brought about, and the court will not grant the relief, unless upon a hearing of all the facts it is of the opinion that the best interests of the child would be promoted thereby.

The 1953 Legislature rewrote the adoption law (Chapter 332, 1953 Statutes of Nevada), and under Section 4 of the Act, as pointed out by Judge Priest in Opinion 150 of this office, where adopting parents are to secure the children directly from the natural parents, (defined as a "specific" adoption) the written consent of the natural parents living is necessary and for good reason. If the natural living parents were to sign a consent to the adoption of their children to unnamed persons, it would give rise to prospective evils of the greatest magnitude. Unscrupulous persons, playing on the poverty or unfortunate circumstances in which parents often find themselves, could find prospective adopting parents willing to pay for children. This is the evil which the 1953 law was intended to, and did, meet.

On the other hand, recognizing the problems which confront adopting parents when the natural parents know the recipients of their children, such as attempts to regain the children's love and affection, to seek later custody, etc., the Legislature provided by Section 5 of the Act, a method whereby certain reputable, and closely supervised, agencies may accept relinquishments and consents to adoption from natural parents. These agencies are then in a position to place the children for adoption and to, themselves, consent to such adoption. This procedure draws a cloak of protection between the adopting parents and the natural parents, and at the same time eliminates the unscrupulous intermediary.

Opinion No. 150 issued on February 15, 1956, answered your specific question as to Section 4 of the Act, the "anti-racket" provision of the Statute, and answered it correctly. However, in view of requests for further information, I felt it incumbent on this office to point out the preferred method of adoption set forth in Section 5 of the Act, and to that extent Opinion No. 150 is clarified.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

154. Nevada Industrial Commission—Police Power of State—Jurisdiction to legislate respecting interstate commerce is in the Federal Government, but under the police powers of a state, it may act in the protection of its citizens, if the general government has failed to legislate. Rights and duties of interstate motor carriers, respecting Nevada Industrial Commission Insurance to employees under Chapter 168, Statutes of 1947, as amended, defined.

CARSON CITY, March 15, 1956.

HONORABLE GUY A. PERKINS, *Chairman, Nevada Industrial Commission, Carson City, Nevada.*

DEAR MR. PERKINS: We are in receipt of your letter of March 5, 1956, requesting an opinion of this department, as a guide to your Employer Accounts Manager and with respect to interstate trucking firms.

You have called our attention to the necessity of construing Section 23 of the Act, hereinafter quoted, and specifically you ask three questions, which we quote from your inquiry as follows:

QUESTIONS

1. Whether or not trucks traveling through Nevada, with no Nevada terminal, are required to secure Nevada coverage on employees driving through Nevada.
2. Whether or not Nevada coverage would be required for trucks traveling through Nevada, and who maintain a Nevada terminal, or in either case, would an employer be subject to a suit if Nevada coverage was not carried and if an accident should occur.
3. If an out-of-state trucking organization with home base other than Nevada had a terminal in Nevada and some of the men worked only within Nevada on intrastate work for this organization, should the employer be required to carry N.I.C. coverage for the intrastate personnel permanently based in Nevada?

OPINION

The Nevada Industrial Insurance Act is Chapter 168, Statutes of 1947, page 569.

Section 23 of the Act to which you have referred reads as follows:

This act shall not be construed to apply to employments which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons while they are so engaged. Nor shall it be construed to apply to employments covered by private disability and death benefit plans which comprehend payments of compensation of equal or greater amounts for the purposes covered in this act, and which has been in effect for one year prior to the effective date of this act.

The former sentence in this section merits detailed treatment, which hereafter it will receive, but the latter sentence in this section also must be closely scrutinized and analyzed.

The first sentence recognizes in a vague way that employments involving interstate commerce are beyond the jurisdiction of the

State Legislature, then in the second sentence a second situation in which the Act has no application is declared.

We construe the second sentence to include an additional type of employment that is not affected by the terms of the Act, being those employments in which the employers have "private disability and death benefit plans which comprehend payments of compensation of equal or greater amounts for the purposes covered in this Act and which * * * (have) been in effect for one year prior to the effective date of this act." The Act became effective on March 27, 1947. We are of the opinion that this provision in regard to one year must now be construed to mean that the plan must have been in effect at least one year prior to the date in which the Employer Accounts Manager has under consideration the question of whether or not the Act is to apply to the particular employer who reveals a particular plan under which he claims exemption from the provisions of the Act. In effect we have said that this latter sentence referring to a plan affording equal or better benefits than the benefits provided in the Act, is not limited to industries involving interstate commerce, although it falls in the same paragraph. It is logically in the same paragraph only in that it sets up a second situation in which the Act has no application, in which premiums may not be collected or insurance effected.

The first sentence of Section 23 provides that the Act shall have no application to "employment which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons while they are so engaged." Section 74(b), although it is not exhaustive of the limitations of the power of the state in this respect, leaving certain situations of employment of the employees of interstate carriers without an applicable provision, as will hereafter appear, it does clear the question of applicability of the provisions of the Act, in one respect.

Section 74(a) makes provision for the protection of employees hired and regularly employed in Nevada, covered by the protections afforded by the Nevada Industrial Insurance Act, who may be injured in the course of their employment while working outside of the State of Nevada. It is therefore the counterpart of Section 74(b) which affords protection for those workmen who are covered by an industrial insurance act of another state and injured here. The two sections taken together are to avoid double coverage and the excess burden of insurance, and also to avoid conflicts in jurisdiction and resulting confusion.

Section 74(a) reads as follows:

(a) If an employee who has been hired or is regularly employed in this state, receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six (6) months after leaving this state, unless prior to the expiration of such six-months period the employer has filed with the industrial commission of Nevada notice that he has elected to extend such coverage a greater period of time.

Section 74(b) is followed by another paragraph which sets forth that proof may be received from "an industrial commission or similar department of another state" showing the employees mentioned in Section 74(b) to be fully covered extraterritorially. In effect this latter paragraph means that when proof of such coverage of an employee working "temporarily" in this State is supplied to the Nevada Industrial Commission, in the manner provided in the paragraph, such employer would be excused from coming under the jurisdiction of the Nevada Commission. The paragraph reads as follows:

(b) Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this act while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance or similar laws of a state other than Nevada, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this act are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance or similar laws of such other state. The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima-facie evidence that such employer carries such industrial insurance.

These two provisions (Section 74(b) and the paragraph following) being in effect provisions to remove certain of the employees from the benefits of the Act, are to be strictly construed carrying nothing by inference, removing only those employees from the benefits of the Act that are clearly designated therein, and then only in the manner and to the extent therein designated. Section 6604 Statutory Construction—Sutherland—Third Edition, Volume 3.

We conclude that only when all of the conditions that are specifically mentioned in Section 74(b) are present may the employer avoid the premium payment provisions of the Act, if reliance is had upon this section. If, on the other hand, relying upon interstate commerce provisions, an employer may be excused from the provisions of the Act, such avoidance must be based upon the general law appertaining to such subject, for we find no other provisions of the Nevada Industrial Insurance Act, which cast any light upon this question. We therefore must look to the case law as determinative of rights and duties of an interstate motor carrier and of his employees under the Nevada Industrial Insurance Act.

A nonresident owner and his nonresident employee driver of a motor truck engaged in hauling household goods in Washington, solely

in interstate commerce are not amenable, answerable or responsible to the Workmen's Compensation Act.

Being not answerable a suit against such defendants under the theory of negligence does lie.

The decision does not pass upon the question of whether or not the state has authority to require such nonresident employers to comply with the Workmen's Compensation Act, while engaged in operating trucks upon the highways of the state, solely in interstate commerce.

McClung v. Pratt, 270 P.2d 1063.

Where employer was engaged exclusively in interstate commerce, and employee was, prior to his death, driving regular bus route between Los Angeles, California and Phoenix, Arizona, and was covered by California Workmen's Compensation Act, for Arizona Industrial Commission to assume jurisdiction under Arizona Workmen's Compensation Act would constitute an undue burden on interstate commerce, even though employee was killed in accident occurring in Arizona. *Collins v. American Buslines* (June 28, 1955) 286 P.2d 214.

Application of Workmen's Compensation Act is not limited to injuries occurring within Arizona but has extraterritorial coverage for employees hired in Arizona, since, presumably, employees hired in Arizona are citizens of Arizona and entitled to benefits of Arizona law regardless of whether their employment takes them into another state. *Collins v. American Buslines*, *supra*.

This *Collins* case (not without strong dissent) follows the holding in the *Watson* case (*Industrial Commission v. Watson Brothers Transportation Company, Inc.*, 1953, 256 P.2d 730) which presented the question of whether or not the Arizona Industrial Commission could compel an interstate carrier while carrying within the state but in interstate commerce, to pay a premium to the Arizona Commission, to cover injuries to employees hired in another state, covered by the industrial insurance laws of another state, holding that it could not, for the reason that such would entail double premiums and thus constitute an undue burden to interstate commerce; and held that since the Commission had been denied the right to collect a premium, it would not be required to accept a burden growing out of the same type of contingency or risk.

From the prevailing opinion in the *Collins* case we quote:

There appears to be no federal legislation specifically or impliedly prohibiting the states from applying workmen's compensation laws to the employees of interstate motor carriers. The Federal Motor Carriers Act of 1935, 49 U.S.C.A. Sec. 301 et seq., does not alter this view for it contains no provisions for compensating injured employees or language which restricts the states. (Citing authorities). This has been recognized by us in *Industrial Commission v. Watson Brothers Transportation Co.*, *supra*.

In *Industrial Commission v. Watson Brothers Transportation Company*, 256 P.2d 730, the respondent did not question the right of the commission to collect premiums upon the classifications (a) and (b). It did question the right of the commission to collect premiums upon the classifications (c) and (d). As to the latter two classifications the

Supreme Court (Arizona) held that such premiums could not be collected, upon the theory that same would place an undue burden upon interstate commerce. We take it that the law is settled that as to classifications (a) and (b) the Industrial Commission of Arizona, under that statute, the premiums were collectible. The classifications set forth by the industrial commission of Arizona were as follows:

(a) Employees employed within the State of Arizona whose duties are confined to the territorial limits of the State of Arizona.

(b) Employees employed within the State of Arizona whose duties require travel within and without the State of Arizona.

(c) Employees employed outside the State of Arizona whose duties involve travel via terminal points within the State of Arizona.

(d) Employees employed without the State of Arizona whose terminal point is outside the State of Arizona but whose travel requires employment in passing through the State of Arizona.

We now reach the specific questions that you asked and after every effort to reconcile the statutory and case law and to distinguish the holdings in the cases when in conflict with Nevada statutory law, we restate the specific questions as follows:

Question Number 1.

Are the owners of motor trucks traveling through Nevada, with no Nevada terminal, required to secure Nevada coverage on employees driving those trucks through Nevada?

Despite the fact that this question involves solely interstate commerce, upon the authority affecting the right of the state to legislate in this respect when the Federal Government has failed to do so, as enunciated in the prevailing opinion in the Collins case, and despite the ruling in *McClung v. Pratt*, we conclude under the doctrine of strict construction applied to Section 74(b), that such an employer is required to carry the insurance unless he can prove himself to fall under the provisions of Section 74(b). We believe, however, that in almost all cases such employers will be able to prove in the manner provided in the paragraph following Section 74(b) that they are excused by compliance with the provisions of Section 74(b). The duty is upon such employers to prove to the commission that they are in compliance with the provision, when requested so to do.

Question Number 2.

Are the owners of motor trucks traveling through Nevada, who maintain a Nevada terminal, required to obtain Nevada Industrial Commission coverage, to afford protection to the employees if injured during the course of employment in Nevada, or in either case would an employer be subject to suit if Nevada coverage was not carried if an accident should occur?

The maintenance of a Nevada terminal or absence of it appears to have no bearing upon the answer to this and the former question. The answer to the first part of the question is therefore the same as to question number 1.

With reference to the latter part of the question and suit if not

insured by the Nevada Industrial Commission, we are of the opinion that such companies are required to carry the insurance in the Nevada Industrial Commission, unless they can prove that they fall under the provisions of Section 74(b), and in this event the coverage is by a similar commission of another state. If carried by an industrial commission of another state the provisions of those laws constitute the "exclusive remedy."

Question Number 3.

If an out-of-state trucking organization with home base other than Nevada had a terminal in Nevada and some of the men worked only within Nevada on intrastate work for this organization, should the employer be required to carry N.I.C. coverage for the intrastate personnel permanently based in Nevada?

Yes, for in no case could such an employee be classified and qualified under the provisions of Section 74(b). Such an employee is probably not hired outside the state in any event he does not work "temporarily" within the state. For the employer to cover such employees under the industrial commission laws of another state, in all particulars as provided in Section 74(b) would not be in compliance with Nevada law.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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155. Counties—County Clerk—Marriage Licenses—Nevada law does not authorize the establishment of a sub-office by county clerks in communities outside of county seats for the purpose of issuing marriage licenses.

CARSON CITY, March 19, 1956.

HONORABLE H. K. BROWN, *County Clerk, Washoe County, Reno, Nevada*.

DEAR MR. BROWN: This office is in receipt of your letter dated March 7, 1956 requesting the opinion of this office on the following facts and questions.

STATEMENT OF FACTS

Various groups representing the people of the City of Sparks, Nevada, requested the County Commissioners and the County Clerk to establish a marriage license bureau in the City of Sparks. It appears that this sub-office has been established; that it is operated by one person who, insofar as her work for the county is concerned, performs only the duties of issuing marriage licenses as a deputy county clerk and registering electors as a deputy registrar; that the operation of this sub-office creates absolutely no additional expense to the county either in salary or maintenance of office; that the marriage licenses issued in this sub-office are duly recorded with the County Recorder and the applications are filed of record in the County Clerk's office in Reno; that the deputy so operating this sub-office is fully trained in her duties and the operation is satisfactory and expeditious.

insured by the Nevada Industrial Commission, we are of the opinion that such companies are required to carry the insurance in the Nevada Industrial Commission, unless they can prove that they fall under the provisions of Section 74(b), and in this event the coverage is by a similar commission of another state. If carried by an industrial commission of another state the provisions of those laws constitute the "exclusive remedy."

Question Number 3.

If an out-of-state trucking organization with home base other than Nevada had a terminal in Nevada and some of the men worked only within Nevada on intrastate work for this organization, should the employer be required to carry N.I.C. coverage for the intrastate personnel permanently based in Nevada?

Yes, for in no case could such an employee be classified and qualified under the provisions of Section 74(b). Such an employee is probably not hired outside the state in any event he does not work "temporarily" within the state. For the employer to cover such employees under the industrial commission laws of another state, in all particulars as provided in Section 74(b) would not be in compliance with Nevada law.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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155. Counties—County Clerk—Marriage Licenses—Nevada law does not authorize the establishment of a sub-office by county clerks in communities outside of county seats for the purpose of issuing marriage licenses.

CARSON CITY, March 19, 1956.

HONORABLE H. K. BROWN, *County Clerk, Washoe County, Reno, Nevada.*

DEAR MR. BROWN: This office is in receipt of your letter dated March 7, 1956 requesting the opinion of this office on the following facts and questions.

STATEMENT OF FACTS

Various groups representing the people of the City of Sparks, Nevada, requested the County Commissioners and the County Clerk to establish a marriage license bureau in the City of Sparks. It appears that this sub-office has been established; that it is operated by one person who, insofar as her work for the county is concerned, performs only the duties of issuing marriage licenses as a deputy county clerk and registering electors as a deputy registrar; that the operation of this sub-office creates absolutely no additional expense to the county either in salary or maintenance of office; that the marriage licenses issued in this sub-office are duly recorded with the County Recorder and the applications are filed of record in the County Clerk's office in Reno; that the deputy so operating this sub-office is fully trained in her duties and the operation is satisfactory and expeditious.

It is stated by the letter requesting this opinion that the reason for the establishment of this sub-office is the convenience of the Sparks residents to the end that they not be required to stand in line at the marriage license office in Reno, and that the operation of the sub-office would bring a certain amount of business in other forms to the Sparks merchants. The letter of request also states that the District Attorney of Washoe County has heretofore orally expressed his doubt as to the legality of this sub-office.

The following questions are quoted from the letter requesting this opinion:

1. May the Washoe County Clerk legally establish an office in a city or town other than the county seat for the purpose of issuing Marriage Licenses when there is absolutely no additional expense to the county either in payment of a salary or expense of an office, and wherein there was over 37,000 registered voters in said county at the last general election?
2. Is the authority of the County Clerk limited to the boundary of the county seat in performance of any official act?

The District Attorney of Washoe County has also requested that this office express an opinion on this subject. The District Attorney of Elko County also joins in this request.

OPINION

The answer to question No. 1 is in the negative.

The answer to question No. 2 will be stated at the end of this opinion.

This office can only be concerned with the interpretation of the law on this subject. The matter of the merit of the proposition that the County Clerks should provide sub-offices in communities other than the county seat for the convenience of the public is not a matter with which this office is permitted to concern itself. The consideration of the merit of the proposition is a matter for consideration by the Legislature.

The counties are political subdivisions of the state. The powers of which together with their officers are specifically governed by constitution and statute. We are required to start with the basic principle that the authority of the County Clerk extends only so far as the specific provisions of the law allow or is necessarily implied from those specific provisions. *Schweiss v. First Judicial District Court*, 23 Nev. 226, 45 P. 289. See also 20 C.J.S. 943.

What then are the provisions of the law appertaining to the powers and duties of the County Clerks which bear upon the question of his authority to conduct a sub-office in communities other than the county seat? They are as follows:

Section 7, Article XV of the Nevada Constitution provides as follows:

All county officers shall hold their offices at the county-seat of their respective counties.

Can we say that so long as the County Clerk maintains his principal

office at the county seat that this provision of the constitution is satisfied even though he maintains sub-offices elsewhere than at the county seat? It appears to this office that the answer to that question is that the provision does not say that the officers shall hold their principal offices at the county seat but rather that "their offices" are to be held there. Unless something is read into this provision, the County Clerk is required to hold his office at the county seat and not, by the device of sub-offices, to hold his office also in various places in the county outside of the county seat.

The reason why this provision of the constitution is worded as it is is not entirely clear. The constitutional debates are not very illuminating on this point. The provision was first drawn to include only certain officers to be required to hold their offices at the county seat, one of which was the County Clerk. This was changed by committee to include all officers. After debate the provision including all officers was adopted. The debate hinged upon the question of whether certain of the county offices need be held at the county seat at all. It is not disclosed whether the proposition of principal and sub-offices crossed any of their minds.

In any event, this office does not feel authorized to enlarge upon the wording contained in the provision.

Section 1, Chapter 178, 1907 Stats. as amended by Chapter 290, 1955 Stats. provides, in part, as follows:

The sheriff, county recorders and county auditors, county clerks, assessors, and county treasurers shall keep *an* office at the county seat of their county * * * (*Italics supplied.*)

The use of the words "an office" in this provision instead of the words "their offices" as used in the constitution would indicate more leeway. However, the succeeding section, considered as follows, does not bear out this indication.

Section 1.5 of the same Act, as last amended by Chapter 290, 1955 Stats., provides an exception to the location of the office of District Attorney, and provides that he need not keep his office at the county seat but may keep it elsewhere within the county under certain conditions. We are not here concerned with the constitutionality of this provision. The provision is referred to in this opinion for the sole purpose of pointing out that the exception to the maintenance of the office at the county seat in the case of only one office, that of the District Attorney, tends as a matter of statutory construction to require that all other offices are excluded from the exception. See Sutherland Statutory Construction, Section 3915. We are distinctly aware that this reasoning does not bear precisely upon the proposition wherein the county officer wishes to maintain more than one office with the principal office at the county seat. However, the reasoning shows that not only is there no specific authorization for sub-offices as such but that, on the contrary, the specific statute bearing on the question of the location of the county offices indicates that the establishment of sub-offices by the County Clerks is not authorized either specifically or by necessary implication.

Section 8 of the Registration Law, being Chapter 231, 1917 Stats.,

as amended, provides that the County Clerk of each county is the ex officio county registrar of such county. Section 10 of the same Act provides that the County Clerk may appoint deputy registrars and that the deputy registrars so appointed may be authorized to work in specific precincts or in the county at large. Here we find specific authority for some portion of the clerk's function as ex officio registrar to be performed by deputies outside of the county seat. It is not understood by this office that this specific authority concerning registration of electors provides also the authority by implication to appoint deputies to issue marriage licenses elsewhere in the county than the county seat.

The law pertaining to the duties of the County Clerk in connection with the issuance of marriage licenses is contained in Section 5, Chapter 33, 1861 Statutes. Therein, we are unable to find provision either express or implied which would authorize the establishment of a clerk's office elsewhere than in the county seat for the purpose of issuing marriage licenses.

If it were necessary in order that the clerk perform his duties in connection with the issuance of the marriage licenses that he have sub-offices for that purpose there would be a basis for determining that he is authorized to establish such offices; for the reason that since he is authorized to do the job he would, by implication, be authorized to do those things necessary to its performance. This, however, does not appear to be the case. It appears from your letter that the reason for such sub-office is for the convenience of the public. However admirable this may be, the fact still remains that the law requires that the business of the county is to be carried on from the county seat and that this requirement is to be uniform throughout the various counties of the State. Succinctly, the law as it now stands contemplates that the residents of the county, when they have business to transact with the county shall come to the county seat, and not that the county seat and its functions as such be brought to the residents.

Relating now to question No. 2, this office is of the opinion that the authority of the County Clerk, being a county officer, extends throughout the county. However, the place wherein he is to perform his duties and carry on that portion of the county business delegated to him is, except when otherwise authorized by law, at the county seat.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

156. **Taxation—Service in Korean action for tax credit. Period begins June 1, 1950 and ends July 27, 1953.**

CARSON CITY, March 29, 1956.

HONORABLE HOMER D. BOWERS, *Director, Division of Assessment Standards, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. BOWERS: We have your letter of March 28, 1956 requesting an opinion from this department upon two questions which we quote as follows:

1. Between what dates was it necessary for a veteran of the Korean action to have served in the armed forces of the United States to entitle him to claim exemption from taxation of property under the exemption law?
2. Is there a termination date on exemptions granted to persons entering the armed services of the United States after June 1st 1950?

OPINION

Under Section 6418 N.C.L. 1931-1941 Supplement, the exemption was allowed to a veteran irrespective of whether or not he served as much as ninety days, assuming that his service was in time of war and within dates to be established in a prescribed manner. We find this true also of other statutes preceding the year 1955. See: Section 6418 N.C.L. 1949 Supplement, Statutes of 1951, p. 300, Statutes of 1953, p. 166.

The present statute is Chapter 217, Statutes of 1955, page 340, from which we quote in part from Section 1, paragraph "Seventh," as follows:

The property of any person who has served a minimum of 90 days on active duty (unless sooner discharged or retired by reason of service-incurred disability) in the armed forces of the United States in time of war, the definition of service in time of war to be determined from the dates of beginning of wars as determined by presidential proclamation or by act or resolution of congress, or who has served in the armed forces of the United States after June 1, 1950, and prior to such date as shall thereafter be determined by presidential proclamation or by act or resolution of congress, and upon severance of such service has received an honorable discharge or certificate of service from such armed forces, or who, having so served, is still serving in such armed forces, shall be exempt from taxation to the extent of one thousand (\$1,000) dollars assessed valuation of such property; provided, however, that for the purpose of this section the first one thousand (\$1,000) dollars assessed valuation of property in which such person has any interest shall be deemed the property of such person. Such exemptions shall be allowed only to claimants who shall make an affidavit annually, on or before the first Monday in October for the purpose of being exempt on the tax roll; provided, however, that said affidavit be made at any time by a person claiming exemptions from taxation on personal property. Said affidavit to be made before the county assessor to the effect that they are actual bona

fide residents of the State of Nevada and have been an actual bona fide resident of the State of Nevada and established his residence for a period of more than 3 years immediately preceding the making of said affidavit, that such exemption is claimed in no other county within this state; * * *.

It will thus be seen, that as to all exemptions of ex-service men and women, irrespective of when the service was performed, that is during the first world war, the second or the Korean action, three elements must be present to grant the exemption, namely:

(a) The service must have covered a minimum of ninety days.

(b) Ninety days or more of the service must have been in time of war, to be established in a prescribed manner, and

(c) Applicant for the tax benefit must have been honorably discharged, unless still serving.

Under an earlier opinion of this department, numbered 717 of January 5, 1949, we ruled that under President Truman's proclamation, hostilities in World War II ceased on December 31, 1946. The war began on December 7, 1941. These two dates then are the limits within which the ninety days of service must have existed to qualify one to tax exemption rights based upon service in that war.

With reference to the Korean action, the Statute of 1955 from which we have quoted fixes the date of June 1, 1950 as the earliest date to be considered in the computation of time for tax exemption (or credit) based upon service in the armed forces of the United States in the Korean conflict.

By Presidential Proclamation of January 7, 1955, it is established in accordance with the provisions of the Nevada statute, from which we have quoted, that hostilities terminated in Korea on July 27, 1953. (See: U. S. Code, Congressional and Administrative News, Vol. 1, 84th Congress, First Session, page 985.)

The dates are thus fixed, for purposes of computation for allowance or disallowance of a claim of an ex-service man or woman for tax exemption or credit based upon service in the Korean conflict, as follows: (a) Date of beginning—June 1, 1950. (b) Date of termination of hostilities—July 27, 1953.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

157. **Public Lands—Surveyor General—Records of State Land Office open to inspection of the press under such circumstances as will not interrupt the operation of that office.**

CARSON CITY, March 30, 1956.

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

DEAR MR. FERRARI: This office is in receipt of your letter dated March 29, 1956 pertaining to the question of the availability of the records of your office to members of the press.

fide residents of the State of Nevada and have been an actual bona fide resident of the State of Nevada and established his residence for a period of more than 3 years immediately preceding the making of said affidavit, that such exemption is claimed in no other county within this state; * * *.

It will thus be seen, that as to all exemptions of ex-service men and women, irrespective of when the service was performed, that is during the first world war, the second or the Korean action, three elements must be present to grant the exemption, namely:

- (a) The service must have covered a minimum of ninety days.
- (b) Ninety days or more of the service must have been in time of war, to be established in a prescribed manner, and
- (c) Applicant for the tax benefit must have been honorably discharged, unless still serving.

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The dates are thus fixed, for purposes of computation for allowance or disallowance of a claim of an ex-service man or woman for tax exemption or credit based upon service in the Korean conflict, as follows: (a) Date of beginning—June 1, 1950. (b) Date of termination of hostilities—July 27, 1953.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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157. **Public Lands—Surveyor General—Records of State Land Office open to inspection of the press under such circumstances as will not interrupt the operation of that office.**

CARSON CITY, March 30, 1956.

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

DEAR MR. FERRARI: This office is in receipt of your letter dated March 29, 1956 pertaining to the question of the availability of the records of your office to members of the press.

For the convenience of stating the facts and question involved we will quote the body of your letter as follows:

This office has on file certain exchange applications for various citizens, to exchange state-owned lands for public domain, under Section 8 of the Taylor Grazing Act. There are also a few state selections pending, which are the remaining grants due the State of Nevada.

None of the exchanges or selections have been approved to the State, and a great number of these filings may be rejected by the Federal Government.

Is it mandatory to expose these files to newspaper reporters until such time as these filings are approved by the Federal Government to the State of Nevada?

OPINION

Section 2, Chapter 85, Statutes of 1885, being Section 5513 N.C.L. 1929 pertaining to certain duties of the Surveyor General as ex officio Land Register provides, in part, as follows:

He shall keep a record of all applications and contracts and of lands which have been or may hereafter be approved to the State, and of all lands which have been sold by the State, which together with all plats, papers, and documents relating to the business of his office, shall be open to public inspection during office hours without fee therefor; * * *

Clearly, this provision is in mandatory language and to the effect that all the records of your office pertaining to the business thereof are to be open to public inspection during the regular office hours.

However, this office is of the opinion that this provision was and is designed primarily for the purpose affording to all who are interested in the acquisition of public lands an opportunity of determining for themselves what lands have been acquired and what lands are still available for acquisition.

Now, while this office is of the opinion that the records of your office are required to be open to the inspection of the newsmen, and while we are aware of the heavy responsibility of the press to keep the public informed on all things of a public nature, we are also of the opinion that the above-quoted provision of the law was not designed primarily for the benefit of the newsmen.

Having this understanding of the purpose of the law in mind, we are inclined to the view that even concerning those persons who would be inspecting the records of your office in the line of endeavor for which the public land laws were primarily designed, it would, as a practical matter, be your duty, as the custodian of such records, to so supervise the public inspection of them that they would not be placed in disorder or damaged. For such persons and under such circumstances, you and your staff would be required to devote such time and such effort as would be necessarily involved in aid and supervision of such inspection.

Concerning the inspection of the records of your office by newsmen who it may appear to you have only that interest in the records which is devoted to informing the public on some topic of public interest

or concern, we believe you have an added duty; that duty of placing the functions of your office first and the supervision of inspection of records by the newsmen second. Thus, if there is some particularly valid reason such as a heavy press of work at the particular time during which such newsmen desire to make an inspection, we consider that the function of your office should not be interrupted for purpose of such inspection. Under such circumstances, it would, in our opinion, be quite proper for you to request the newsmen to make their inspection at a more convenient time. Perhaps, under such circumstances, arrangement could be made for one of the newsmen to make the inspection rather than several at one time, and thereafter to disseminate the desired information among the others.

We wish to be understood, however, that this type of restriction should be employed only when there is a good reason for it. Otherwise we consider that the law contemplates that the press shall have, under your supervision, the freedom to inspect any or all of the records of your office.

You should also be aware that newspaper men earnestly wishing to inspect such records for personal reasons of their own rather than in the capacity of newsmen seeking news are in no different position than any other member of the public to whom the records of your office are open to inspection.

Therefore, this office is of the opinion that the law requires that the records pertaining to the business of your office are to be open to the inspection of the press under reasonable supervision, and at such times and under such circumstances as will not interfere with the proper operation of your office.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

158. **Public Service Commission—Operation of courtesy cars without charge to public as convenience during taxicab strike cannot be halted by Public Service Commission.**

CARSON CITY, April 9, 1956.

HONORABLE WILLIAM B. BYRNE, *Assemblyman, Clark County, Henderson, Nevada*.

MY DEAR MR. BYRNE: This office is in receipt of your inquiry as to whether courtesy cars operated by striking cab companies, and transporting passengers from the city of Las Vegas to points outside the city, and visa versa, are subject to the rules and regulations of the Public Service Commission of Nevada for motor vehicles in carrier service for hire.

OPINION

The answer to this question depends largely on the question of whether the transportation of persons on the public highway outside the city limits is for compensation. Section 4437.03, N.C.L. 1931-1941 Supp. reads as follows:

or concern, we believe you have an added duty; that duty of placing the functions of your office first and the supervision of inspection of records by the newsmen second. Thus, if there is some particularly valid reason such as a heavy press of work at the particular time during which such newsmen desire to make an inspection, we consider that the function of your office should not be interrupted for purpose of such inspection. Under such circumstances, it would, in our opinion, be quite proper for you to request the newsmen to make their inspection at a more convenient time. Perhaps, under such circumstances, arrangement could be made for one of the newsmen to make the inspection rather than several at one time, and thereafter to disseminate the desired information among the others.

We wish to be understood, however, that this type of restriction should be employed only when there is a good reason for it. Otherwise we consider that the law contemplates that the press shall have, under your supervision, the freedom to inspect any or all of the records of your office.

You should also be aware that newspaper men earnestly wishing to inspect such records for personal reasons of their own rather than in the capacity of newsmen seeking news are in no different position than any other member of the public to whom the records of your office are open to inspection.

Therefore, this office is of the opinion that the law requires that the records pertaining to the business of your office are to be open to the inspection of the press under reasonable supervision, and at such times and under such circumstances as will not interfere with the proper operation of your office.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

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158. **Public Service Commission—Operation of courtesy cars without charge to public as convenience during taxicab strike cannot be halted by Public Service Commission.**

CARSON CITY, April 9, 1956.

HONORABLE WILLIAM B. BYRNE, *Assemblyman, Clark County, Henderson, Nevada*.

MY DEAR MR. BYRNE: This office is in receipt of your inquiry as to whether courtesy cars operated by striking cab companies, and transporting passengers from the city of Las Vegas to points outside the city, and visa versa, are subject to the rules and regulations of the Public Service Commission of Nevada for motor vehicles in carrier service for hire.

OPINION

The answer to this question depends largely on the question of whether the transportation of persons on the public highway outside the city limits is for compensation. Section 4437.03, N.C.L. 1931-1941 Supp. reads as follows:

No common motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

On November 28, 1949, Attorney General Alan Bible issued an opinion that courtesy cars operated on the public highways outside the city limits of Reno and Las Vegas by striking cab companies were subject to Section 7½ of Chapter 244 of the 1949 Statutes. Said statute read as follows:

It shall be unlawful for a taxicab motor carrier to transport passengers, either with or without compensation, between any point or place within the limits of any city or town in the State of Nevada to any other point or place in said state without having first applied for and received the certificate of public convenience and necessity provided for in said above-entitled act.

It will be noted that the opinion classifies the courtesy cars as taxicab motor carriers. The Motor Vehicle Law, Section 4437.01, subparagraph (i) defines a taxicab motor carrier as follows:

(i) The term "taxicab motor carrier" when used in this act shall be construed to mean any person operating a motor vehicle or vehicles designated and/or constructed to accommodate and transport not more than five passengers in number, including the driver, and fitted with taximeters or having some other device, method or system to indicate and determine the passenger fare charged for distance traveled; provided, that neither common motor carriers of passengers and/or contract motor carriers conducting fixed route operations as hereinbefore defined shall be considered taxicab motor carriers.

The determination of the learned Attorney General at that time was correct, for the so-called courtesy cars carried boxes into which the riders could voluntarily place their fares or contributions, and were undoubtedly expected so to do or the boxes would not have been there. This brought the courtesy cars within the provisions of both Section 4437.03, for there was compensation, and within the provisions of Section 4437.01, subparagraph (i), for there was a device to indicate and determine the fare.

But in the present taxicab strike in Las Vegas you advise that the courtesy cars are private cars rendering free service to the public; that there are no boxes or other devices in the car and that the driver does not solicit compensation for the ride or accept gratuities. The operation is not a gainful operation.

It is the opinion of this office that if the facts stated in your letter are true then the cars used are not taxicab motor carriers and the Public Service Commissioner does not have legal authority to order the free transportation of citizens as a convenience during the taxicab strike to cease.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

159. Secretary of State—Fee Bill—A consolidated or merged corporation is entitled to credit on any fee paid prior to consolidation or merger by one of the constituent corporations forming the merged or consolidated corporation.

CARSON CITY, April 10, 1956.

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

MY DEAR MR. KOONTZ: You have requested of this office an interpretation of that portion of Section 1 of "An Act to provide a uniform fee bill for the office of secretary of state," approved March 10, 1933, as amended by Chapter 275 of the 1951 Statutes of Nevada, which reads as follows:

The fee for filing a certificate of consolidation or merger of two or more corporations shall be an amount equal to the difference between the fee computed at the foregoing rates upon the aggregate authorized capital stock of the corporation created by such consolidation or merger and the fee so computed upon the aggregate amount of the total authorized capital stock of the constituent corporations; provided, however, that in no case shall the amount paid be less than twenty-five dollars.

The relevant facts which gave birth to your inquiry were, according to our understanding of your problem, as follows: A Nevada corporation had qualified and paid a fee to the Secretary of State under the law heretofore cited in the sum of \$1,725. Thereafter the Nevada corporation consolidated with a Delaware corporation and the new consolidated corporation (a Delaware corporation) filed an agreement of consolidation with the Secretary of State of Nevada, and paid a fee upon the aggregate authorized capital stock of the consolidated corporation in an amount of \$4,725. The company maintains that under the provisions of Section 1 of the Act, as hereinbefore set forth, that the fee should have been the amount charged less the \$1,725 previously paid by the Nevada corporation prior to consolidation.

OPINION

It appears clear to this office that the contention of the consolidated company has merit unless we read into the law something that is not there. The law does not make an exception as to consolidated or merged corporations where a Nevada corporation by the consolidation or merger becomes an integral part of a foreign corporation. In filing the consolidation agreement with the Secretary of State so as to be able to continue to do business in this State, the new corporation has the right, under the law, to receive credit for the amount previously paid by one of the constituent corporations to the Secretary of State as a fee under Section 1 of the Act.

It is, therefore, the opinion of this office that the sum overpaid should be refunded to the consolidated corporation.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

160. Real estate salesmen operating out of a real estate broker's office on a commission basis without salary, and with hours of employment uncontrolled, are independent contractors, and not "employees" within the meaning of the Unemployment Compensation Laws.

CARSON CITY, April 13, 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 April 5, 1956, requesting an opinion of this department upon a question hereinafter stated, and presenting the following facts.

FACTS

A duly licensed real estate broker has salesmen working in and out of his office under the following arrangement:

1. These salesmen sell real estate only.
2. Salesmen have no definite hours that they are required to be working in my behalf or in the office.
3. Salesmen are absolutely free to contact anyone they desire to contact. However, leads are sometimes furnished to salesmen.
4. Office and telephone facilities are furnished salesmen without cost to them, although any other expense they may incur is strictly their own.
5. Salesmen work on commission only, receiving an equal share of the commissions with the broker.
6. Ten percent of total commission on a sale is paid to the salesmen who obtain listing for the office.
7. One of the salesmen engages in a business of his own, making his work with the broker a sideline. One of the salesmen is a housewife and a third salesman speculates in properties and upon these transactions in which he speculates the broker's office does not enjoy any commissions or profits.

On November 13, 1950, this duly licensed real estate broker submitted the above information as to his operation to the Commissioner of Internal Revenue, Bureau of Internal Revenue, Washington, D. C., and inquired or asked for an official ruling as to whether or not the law imposed a duty upon him to make deductions, and to add to these deductions his own contributions and to file the appropriate record under the Social Security Law, and to make deductions and file proper records under the Withholding Income Tax Law, under the theory of existence of an employer-employee relationship existing as to himself and his salesmen.

To this inquiry this broker received a reply on December 4, 1950, citing *Dimmitt-Rickhoff-Bayer Real Estate Company v. Finnegan*, 170 F.2d 882, 71 S.Ct.Rep. 57, as authority for the ruling that real estate salesmen operating under the arrangement and contract hereinbefore stated were not employees within the meaning of the Social Security Tax Law, but were "independent contractors." The ruling also stated that it was applicable to Section 1662 of the Internal Revenue Code, and that as a result there was no duty to withhold income tax payments from the income of such salesmen.

It is clear in this correspondence, copies of which you have submitted to us for our study, that the ruling as to this licensed broker was based upon the showing that the services, circumstances, and conditions appertaining to the broker and his salesmen were not "materially different" from those existing in the Dimmitt case.

QUESTION

Are real estate salesmen who work with a broker under an arrangement not materially different from that hereinbefore set out "employees" of the broker within the meaning of the Unemployment Compensation Law of Nevada?

OPINION

An exhaustive study of the cases decided subsequent to the Dimmitt case (February 8, 1950), citing the Dimmitt case, lead us to the conclusion that the holding of that case is still the law and in fact it has become a ruling case. It follows that the letter written by the Internal Revenue Department (November 13, 1950), hereinbefore mentioned, ruling upon the questions asked, is still the ruling of that department upon those questions.

The Legislature of 1947 enacted Chapter 150, page 484, creating the state real estate board, and in 1949 designated it State Real Estate Commission. The Act was amended in 1949 by Chapter 204, page 443. Section 3 of the Act reads as follows:

A real estate salesman within the meaning of this act is any person who is *employed or engaged* by a licensed real estate broker to do or to deal in any act, acts or transactions set out or comprehended by the definition of a real estate broker in section 2 of this act, for compensation or otherwise. (Italics supplied.)

We also find in Section 17 of the Act (Stats. of 1949, p. 440) in which reference is made to the salesman's license, the words: "* * * name of the real estate broker by whom he is employed." And in the next paragraph referring to the real estate salesman's pocket card the words appear: "* * * it shall contain the name and address of his employer." Again in Chapter 55, Statutes of 1955, page 76, Section 27.5, subparagraph 2, we find the following:

Every salesman promptly on receipt by him of a deposit on any transaction in which he is engaged on behalf of his *broker-employer* shall pay over the deposit to the broker. (Italics supplied.)

We have not attempted to set out all of the language contained in the statute and amendments thereto, in which the language is used appearing to designate the broker as "employer" and the salesman as "employee." We do only mention that such language appears a number of times. This merely presents the question and in no way answers it.

Under Chapter 129, Statutes of 1937, page 262, the Legislature enacted the Unemployment Compensation Law, amended a number of times, having for its purpose alleviation of suffering and economic

insecurity due to unemployment. As the law now exists and is administered by the Executive Director, the Employment Security Department collects a percentage of "wages" from all employers (with certain exceptions not pertinent here) and makes disbursements under the provisions of the Act to employees who can qualify under the Act, when unemployed. We find nothing in the Act leading to a direct answer to the question of whether or not a duly licensed real estate salesman is an "employee" of a duly licensed real estate broker within the meaning of the Unemployment Compensation Law. Although Section 2.8 (Statutes of Nevada, 1955, page 700) defines "employer," we do not find it helpful to the solution of the question here presented.

In the Dimmitt case, heretofore cited, suit was brought by the real estate company against the Collector of Internal Revenue to collect alleged overpayment of employment taxes made by the plaintiff for the years 1943 and 1944. The treasury regulations construing the statute, under which the tax was collected, are set out as a footnote of the decision. Also the full contract under which the real estate company and the salesmen operated and divided the profit, not unsuitable to the local practice and conditions, is set out in full. The court said that the usual common law rule for determining the existence of the relationship of employer and employee must be applied and that, as stated by the Supreme Court of the United States in *Singer Manufacturing Company v. Rahn*, 132 U. S. 518, 523, 10 S.Ct. 175, 176, 33 L.Ed. 440, is as follows:

* * * And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *New Orleans, M. and C. Railroad Co. v. Hanning*, 15 Wall 649, 656 (21 L.Ed. 220).

We will not unduly lengthen the opinion by setting forth the details of the relationship between the salesmen and the Dimmitt Company, suffice it to say that there was very little control by the company over the salesmen, and no control at all on how the work should be done. The earlier decisions, including *Harrison v. Greyvan Lines, Inc.*, 331 U. S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757, were based upon the theory that "* * * an employee is an individual in a service relationship who is dependent, as a matter of economic reality, upon the business to which he renders service and not upon his own business as an independent contractor. * * *." This rule was repudiated by the Congress on June 14, 1948, by a joint resolution, which included the words: "but such term (employee) does not include (1) an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor * * *." The decision then follows from the foregoing reasons that the Dimmitt company was not an employer, and that the salesmen were independent contractors and that hence there was no duty upon the company to pay an employment tax.

In *Zipser v. Ewing* (June 23, 1952), 197 F.2d 728, the plaintiff was a salesman of insurance working under conditions not "materially different," from those in the instant case, and under the Social Security statute was held to be an independent contractor.

In *Ramblin v. Ewing* (August 5, 1952), 106 F. Supp. 268, a saleslady of Avon products was not an employee of the company for purposes of Social Security benefits, for the reputed employee was not subject to control or the right to control by the company, the reputed employer.

In *Levin v. Manning*, 124 F. Supp. 192, contractors who built homes for owner company, the owner having no control over the details of the employment, same being upon fixed contract price, were not employees within the meaning of the Social Security tax laws.

In *Louis A. Demute, Inc., v. Michigan Employment Security Commissioner*, 64 N.W.(2d) 545, the plaintiff paid the unemployment compensation contribution only because, under the Michigan statute, it was payable if a Social Security tax was due to the collector of that tax. When the latter tax was refunded and no longer requested under the authority of the *Dimmitt* case, plaintiff sued to collect from the state agency. The matter involved real estate salesmen operating under conditions not materially different from the *Dimmitt* case or the case here under consideration. There being no control by the company against the salesmen, the Social Security tax was not properly levied and with it fell the levy of the state under the Unemployment Compensation Law.

See also, *Unemployment Compensation-Salesmen*, 29 A.L.R.2d 753, at 772, Article 6, *Real Estate Brokers and Salesmen*, from which we quote:

In the majority of the later cases in which the question has arisen, real estate salesmen or brokers working on a commission basis have been held not to be within unemployment or social security acts. (Cases cited are from states of California, Kentucky, New York, Oklahoma, Tennessee and Washington.)

In *Realty Mortgage and Sales Company v. Oklahoma Employment Security Commissioner* (1945), 169 P.2d 761, the court said:

There is no contract of hire, express or implied. Rather the association of plaintiff and the salesmen is in the nature of a joint venture, in which each party to the arrangement makes certain contributions and performs certain services in order to produce a result mutually profitable to them. Plaintiff contributes its offices, office equipment and personnel, and such information as it may have, or such real estate listings as it may receive, and its efforts to close deals made by the salesmen, and to collect the commissions. The salesmen contribute their time and effort, the expense of seeking out prospective purchasers or borrowers and procuring from them contracts for the purchase of real estate or applications for loans. Each apparently considers that the arrangement is to their advantage. If it develops that it is not, either may terminate it at any time. Plaintiff is no more the employer of the salesmen than it is their employee. Neither is in the employment of the other. Each performs his function, and receives his remuneration, not from the other, but from a third party. Plaintiff collects the commissions, and turns over to the salesmen their proportion thereof, but in so doing it acts

merely as a collecting agency pursuant to its agreement with the salesmen. If no commission is collected, the loss falls, not on plaintiff, but on both. Neither is performing the work of the other. Each is performing his allotted function in the joint enterprise.

We find three cases listed and cited in the A.L.R. annotation to the contrary, which are distinguishable, as follows:

(1) In *Babb v. Huiet* (1942), 67 Ga.App. 861, 21 S.E.2d 663, a much greater degree of control was exercised over the salesmen by the real estate firm than in the case under consideration.

(2) In *McClain v. Church* (1951), 72 Arizona 354, 236 P.2d 44, 29 A.L.R.2d 746, judgment went to the Employment Security Commission, State of Arizona, under the statute which provided that "wages" would be construed to include "commissions." The Nevada statute makes no such provision.

(3) In *Rahoutis v. Unemployment Compensation Commission* (1943), 171 Or. 93, 136 P.2d 426, it was held that the salesmen of real estate were "employees" of the broker, since the statute required such salesmen to work full time, and precluded them from working at any independently established business. Our statute does not so provide.

All of this would indicate that the salesmen of real estate in the case under consideration are not employees of the broker, within the meaning of the Unemployment Compensation statute. But the State Real Estate Commission Act of 1947, as now amended, refers to the relationship between broker and salesman, not once but a number of times, as "employment," in the manner hereinbefore noted.

In *Louis A. Demute, Inc. v. Michigan Employment Security Commission*, 64 N.W.2d 545, the court was faced with this problem and said: (page 549 -6-)

There is no conclusive reason why the terms of the real estate license law should be read into the Michigan employment security act. The statutes were not designed to effectuate a common result. The terms of the real estate license law must be taken as only one factor along with the many others, in determining whether the common law employer-employee relationship existed between the broker and salesmen. It is not alone determinative of the relationship. As was stated in the case of *California Employment Stabilization Commission v. Morris*, 28 Cal.2d 812, 172 P.2d 497, 500:

"The Real Estate Act, supra, does not establish as a matter of law the status of every salesman as being in employment within the meaning of the Unemployment Insurance Act. The licensing statute was not promulgated for that purpose; it was designed for the protection of the public, the primary function being to allow only those persons to operate as real estate brokers and salesmen who are honest, truthful, and of good reputation. * * * The act operates in a comparatively narrow field and the legislation should not be interpreted so as to give a meaning beyond its realm and scope."

For the reasons given it is the opinion of this office that real estate salesmen operating out of a real estate broker's office on a commission basis, and without salary, and with uncontrolled hours of employment, are independent contractors, and not "employees" within the meaning of the Unemployment Compensation Laws of Nevada.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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161. **Taxation—School Districts—No authority in Nevada Tax Commission to reduce tax rate supported by budget when prescribed by school district trustees under Section 127, 1956 School Law.**

CARSON CITY, April 18, 1956.

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

DEAR MR. CAHILL: This office is in receipt of your letter dated April 13, 1956, requesting the opinion of this office on the following matter. For simplicity we quote the body of your letter which states succinctly the facts and question involved:

It appears that the Tax Commission in its meeting on Monday, April 23d will again have to consider the problem of reducing the combined tax rate of the City of Sparks and the City of Reno to the constitutional maximum of \$5 on each \$100 of assessed valuation.

Our query concerning this meeting is as follows: Are the tax levies made under the provisions of Section 127 of the 1956 School Code subject to negotiations or reduction in order to reduce the overall tax levy to a constitutional maximum of \$5?

OPINION

Section 127, Chapter 32, 1956 Statutes (1956 School Law) provides as follows:

SEC. 127. Mandatory Tax Levies for Support of County School Districts.

1. At the time of levying county taxes, the board of county commissioners of each county shall levy a county school district tax.

2. In 1956 and in each year thereafter when the board of county commissioners levies county taxes:

(a) It shall be mandatory for each board of county commissioners to levy a 70-cent tax on each \$100 of assessed valuation of taxable property within the county, which taxes shall be used by the county school district for the maintenance and operation of the public schools within the county school district; and

For the reasons given it is the opinion of this office that real estate salesmen operating out of a real estate broker's office on a commission basis, and without salary, and with uncontrolled hours of employment, are independent contractors, and not "employees" within the meaning of the Unemployment Compensation Laws of Nevada.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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2. In 1956 and in each year thereafter when the board of county commissioners levies county taxes:

(a) It shall be mandatory for each board of county commissioners to levy a 70-cent tax on each \$100 of assessed valuation of taxable property within the county, which taxes shall be used by the county school district for the maintenance and operation of the public schools within the county school district; and

(b) When recommended by the board of trustees of the county school district, in addition to the mandatory levy of taxes provided in paragraph (a), each board of county commissioners shall levy a tax of not to exceed 80 cents on each \$100 of assessed valuation of taxable property within the county for the support of the public schools within the county school district.

(c) In addition to the taxes levied in accordance with the provisions of paragraphs (a) and (b), each board of county commissioners shall levy a tax for the payment of interest and redemption of outstanding bonds of the county school district.

It is certainly clear that, irrespective of what the school district budget may disclose, a 70 cent tax is to be levied for school purposes. Whatever the power of the Tax Commission may be under Section 6544 N.C.L. to adjust the tax rates of the political subdivision, it does not include a reduction of the 70 cent rate set by subparagraph (a) above quoted. That provision speaks for itself in mandatory language. Nor do we understand that there would be any question but that a sufficient tax will be levied to cover the payment of interest and principal due on the bonded indebtedness of the school district.

It is, of course, the 80 cent provision which is in question.

Under Section 159 of the 1956 School Law the school district is required to prepare a budget as provided in Chapter 335, 1953 Statutes and as last amended by Chapter 34, 1956 Statutes. Section 3 of the latter Act requires that the budget be submitted in such detail as is prescribed by the Nevada Tax Commission. Now, inasmuch as Section 127, above quoted, appears clearly to place a maximum tax of \$1.50 for school purposes, it follows that the Tax Commission is to perform some function of adjustment in connection with the 80 cent tax. Otherwise there would be no point in the provision of the 1956 School Law requiring the budget to be submitted in such detail as the Tax Commission prescribes. See, on this point, *Las Vegas Ex. Rel. v. Clark Co.*, 58 Nev. 469, 83 P.2d 1050.

What power of adjustment, then, does the Tax Commission possess in connection with the 80 cent tax. Clearly the tax must be supported by a budget of the school district. If it is not so supported, it is clearly the function of the Tax Commission under Section 6544 N.C.L. 1929 to adjust the tax to provide the revenue which a budget discloses is needed. Section 6544 N.C.L. 1929 provides, in part, as follows:

Said Nevada tax commission * * * is hereby empowered:
* * * to require county boards of education and district school trustees and all school officers having control over any school expenditures in any district in which a special tax is to be levied during the current year, to submit a budget estimate of the expenses for which such tax is levied in such detail and form as may be required by the commission.

This same section contains the same provision for counties, cities and towns, but specifically adds, in connection with these, the authority of the Tax Commission to require their governing boards to increase or decrease the tax rate to produce the net revenue necessary as appears from the budget. Though this latter provision is not specifically contained in the section in connection with the school district

tax, we conclude, under authority of the Clark County case, above cited, that the authority of the Tax Commission to increase or decrease the school district tax is included. The Nevada Supreme Court in this Clark County case stated:

We think the provisions of said subdivision seven, considered in connection with the other provisions of the act heretofore set out, and its spirit and purpose manifest an intention to bring the county revenue system as well as the revenue system of cities, towns, municipalities and school districts under review and final adjustment by the tax commission; and that this applies to rates as well as to valuations and other matters connected with the machinery of raising revenue for their support.

The tax commission is well adapted to that end and the constitutional provision limiting the total tax levy for all purposes, including levies for bonds, within the state, or any subdivision thereof, to not to exceed five cents on one dollar of assessed valuation, makes the duty of adjustment all the more imperative. If this should prove inequitable in practical operation, the legislature will doubtless devise some method of refinancing the political body which may be affected.

It follows, therefore, that if the tax prescribed by the school district budget will not produce the revenue required by the school district or if the needs are not prescribed by the budget to support the tax, the tax will be subject to adjustment by the Tax Commission either up or down.

This, however, does not answer the real question involved in this problem for the reason that the situation is one in which the Commission is faced with the problem of reducing the combined rate to the constitutional limit, and for the reason that we are dealing with a somewhat special or unique provision in Section 127 of the 1956 School Law.

The real question is this: The school district budget having been submitted which prescribes and supports a tax including a part or all of the additional 80 cent tax, can the Tax Commission reduce that tax to bring the combined tax rate within the constitutional limit?

This office is of the opinion that it cannot.

In Section 127 of the 1956 School Law the Legislature clearly expressed itself to the effect that at least 70 cents would be levied and if more was required for school purposes, an additional tax would be levied. Thus by a special provision pertaining to school districts the Legislature has placed the schools and their needs in a somewhat preferred position. If this were not so, subparagraph (b) of Section 127 need never have been written because the governing bodies of the political subdivisions have always had the authority to submit whatever budget requirements they felt necessary including a tax of \$1.50 subject to the adjustment by the Tax Commission.

Thus, if the school district budget calls for a tax of \$1.50 supported by the needs expressed in the budget, the Tax Commission has no authority to reduce that amount. In this connection, also, this office is of the opinion that, if the school district budget states the needs of the district, the Tax Commission does not possess the authority to go

behind the budget to determine whether or not, in its opinion, the need actually exists. Not only would this tend to circumvent the clear intention of the Legislature, but the proposition is supported by the 1956 addition to Chapter 335, 1953 Statutes, above cited, which requires a public hearing on a tentative budget of the school district at which hearing any person may register objection to it.

There is one other aspect of this problem which, perhaps, requires discussion. Whatever the meaning may be of the word "recommended" in subparagraph (b) of Section 127, or with whatever body the discretion to place the additional 80 cent tax is lodged, the foregoing reasoning precludes the power of the Tax Commission to reduce the tax as prescribed and supported by the budget.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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

162. Insurance Commissioner. Sale of automobiles in Nevada carrying free insurance as part of car price constitutes sale of insurance by an unlicensed agent.

CARSON CITY, April 19, 1956.

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

DEAR MR. HAMMEL: We are in receipt of certain documents and papers from you, as follows:

1. A clipping taken from the Reno Evening Gazette edition of March 27, 1956, of content as hereinafter discussed.
2. A letter written to you by American Casualty Company of March 27, 1956, of content as hereinafter discussed.
3. Another letter by American Casualty Company dated April 2, 1956.
4. Certain newspaper clippings.

These documents and information contained therein are sent to us to assist us factually in our study of the legality of the operation of the American Motors Corporation and more particularly respecting compliance with or evasion of the insurance regulations of the State of Nevada.

The documents and papers that you have submitted to us appear to show the existence of certain facts, as follows:

FACTS

That American Motors Corporation is a manufacturer of automobiles, having its principal place of business in Detroit, Michigan.

That as a part of its advertising program for the sale of its products the American Motors Corporation caused to be published in the Reno Evening Gazette of March 27, 1956, the following:

CARS SO STRONG SO SAFE HUSBAND AND WIFE
BOTH Get Personal Automobile Accident Insurance Against

behind the budget to determine whether or not, in its opinion, the need actually exists. Not only would this tend to circumvent the clear intention of the Legislature, but the proposition is supported by the 1956 addition to Chapter 335, 1953 Statutes, above cited, which requires a public hearing on a tentative budget of the school district at which hearing any person may register objection to it.

There is one other aspect of this problem which, perhaps, requires discussion. Whatever the meaning may be of the word "recommended" in subparagraph (b) of Section 127, or with whatever body the discretion to place the additional 80 cent tax is lodged, the foregoing reasoning precludes the power of the Tax Commission to reduce the tax as prescribed and supported by the budget.

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BOTH Get Personal Automobile Accident Insurance Against

Fatal Injury AT NO EXTRA COST. Only American Motors dares make this offer because only American Motors cars are built the better way with frame and body a single, rigid, all-welded unit. Offer subject to state insurance laws.

That on March 13 the Insurance Commissioner of the State of Nevada, directed a letter to American Motors Corporation, Detroit Michigan, asking for full and detailed information in regard to the program to supply insurance with each new car sold by the corporation, and upon March 27, 1956, received a reply from Mr. M. Thomas Valaske, Counsel, Legal Department of the American Casualty Company, of Reading, Pennsylvania, which in part reads as follows:

Honorable Paul A. Hammel
Insurance Commissioner
Insurance Department
Carson City, Nevada

American Motors Corporation
Michigan Blanket Policy
Policy Number: 900025

Dear Commissioner Hammel:

Your letter of March 13 addressed to American Motors Corporation, Detroit, Michigan has been passed along to us for reply.

We have issued to American Motors Corporation a blanket policy authorized under the laws of Michigan and heretofore initially approved by Commissioner Joseph Navarre of the Michigan Insurance Department.

The policy is issued through the Detroit Insurance Agency of Detroit, Michigan which handles all of the mechanical details connected with the issuance of Certificates under the master blanket policy.

Coverage under the policy is provided for the original registered owner, or spouse, of a new American Motors passenger vehicle purchased within the forty-eight states, the District of Columbia or the Territory of Alaska (specifically described on the Certificate) against fatal injury resulting within one hundred days from an accident while driving, or riding, the described vehicle anywhere in the world.

Indemnity in the amount of \$12,500 is provided for either the original, registered owner, or spouse (or both in the amount of \$25,000).

Coverage becomes effective from the date of the delivery of the vehicle to the original purchaser and extends from such date for a period of one year. There is no option to the purchaser with reference to the coverage; it is automatically provided by the policyholder, American Motors Corporation, which pays the entire premium; and a Certificate of coverage is issued by the Detroit Insurance Agency and mailed directly to the original purchaser.

Other than the conditions already outlined above, there are

no limitations of any kind in the policy and there are *no exclusions whatever*.

Coverage under the Certificate terminates only upon the expiration of one year from the date of delivery of the vehicle or upon the transfer of title of the described vehicle, whichever first occurs. There are no other termination or cancellation provisions in the policy.

It appears to us that the insurance provided by American Motors Corporation to the purchasers of its new passenger vehicles is most desirable and in the public interest and it was with this thought particularly in mind that we attempted to design a policy which would be as nearly free of restrictions and limitations as could reasonably be conceived within the framework of basic underwriting principles.

It is our opinion that the policy fully complies with the laws of Nevada; that its handling by the Detroit Insurance Agency is in complete accord with regularly established agency principles and state regulations; and that it serves a more than passing need in the public interest.

For your additional information, it should be further stated that we are not in any manner connected with any similar insurance program of any other car manufacturer which might have been brought to your attention.

We trust that this letter has answered whatever questions may have arisen in your mind and that these are now fully resolved; however, should you desire any additional information, we will be pleased to answer at your convenience.

Very truly yours,

/s/ M. Thomas Valaske

M. THOMAS VALASKE

MTV:mks

That American Casualty Company has complied with Section 23, et seq., Statutes of 1941 (Section 3656.22 N.C.L. 1931-1941 Supp.) and has been issued a license to transact business in the State of Nevada.

That on March 27 the Insurance Commissioner, State of Nevada directed a letter to Mr. H. G. Evans, President, American Casualty Company, and on March 30 directed a similar letter to Counsel in which he informed both that in his opinion the disposition of insurance in the manner set out in the advertising and letter were in violation of the insurance laws of the State of Nevada.

That to these communications on April 2, counsel replied that the insurance corporation and/or the automobile manufacturer had no desire or intent to violate the law and asking that the conclusion of illegality be made more specific.

That thereafter and upon this background of facts you have stated the question requiring an opinion of this department.

QUESTION

Is the disposition of insurance by the American Motors Corporation and/or American Casualty Company in the manner heretofore outlined in violation of the law of Nevada?

OPINION

Manifestly, even though American Casualty Company is licensed to transact insurance business in Nevada, its authority to do so does not authorize a violation of the statutory law regulating the sale of insurance.

The problem then resolves itself to this: is the disposition of insurance protection in the manner contemplated, a transaction of insurance business in Nevada, and if so, is it in conformity with law? We first concern ourselves with the first part of this question.

The operation contemplated by the literature and the letter of explanation appears to bring the operation into the class of operations followed by the Chrysler Corporation beginning in or about 1924. In 1924 the Palmetto Fire Insurance Company, a corporation organized under the laws of the State of South Carolina, applied to the Superintendent of Insurance of the State of Ohio for a license to engage in the business of reinsurance in Ohio and was duly licensed. Thereafter it entered into a contract with the Chrysler Sales Corporation, which was under contract to buy all of the automobiles of the Chrysler Motor Corporation, to insure all Chrysler automobiles as to fire and theft, for the full cash value, effective as of the date of passage of title or transfer of possession, whichever first occurred, running to purchaser and/or financial institution interested therein, as their interests might appear at the time of loss, as the beneficiaries. Premium was paid by the Chrysler Sales Corporation, and policy benefits were to run with the sale of all new Chrysler cars, in all states, and was included in the purchase price of the car in a package deal. Insurance went with the car without the purchasers request and at a cost not separable from the price that the car might sell for without the insurance. In due time after sale the policy was issued to the purchaser or financial institution and by a system of bookkeeping between the Chrysler Sales Corporation and the Palmetto Fire Insurance Company, the premiums were paid by the former to the latter.

The Superintendent of Insurance of the State of Ohio after investigation and deeming the operation to be in violation of the insurance laws of the State of Ohio, revoked the license of Palmetto to do an insurance business in that state. Thereafter in equity, Palmetto applied for a mandatory injunction to require the Superintendent of Insurance to reinstate it to its privilege of transacting business in Ohio.

Palmetto contended that under the arrangement notwithstanding the fact that as to a specific automobile no insurance was effective until it was sold by a dealer in Ohio, that the insurance coverage thereon was not an Ohio contract. The court declined to pass upon this contention but held that no insurance could be legally placed effective upon property within the state, except with a legally authorized agent, that the insurance was not so placed or sold and was hence a violation of statutory law regulating insurance. Application for an injunction was denied and case dismissed. See: *Palmetto Fire Insurance Company v. Conn*, 9 F.(2d) 202. (October 19, 1925.)

In *Chrysler Sales Corporation v. Smith*, Insurance Commissioner of Wisconsin, 9 F.(2d) 666 (November 18, 1925) the complainant, a Michigan corporation, sought to enjoin defendant from asserting that

the insurance issued by Palmetto Fire Insurance Company, to Wisconsin residents owning Chrysler automobiles, sold in Wisconsin, was issued contrary to the laws of Wisconsin, and to enjoin the said Insurance Commissioner from threatening to prosecute Wisconsin dealers in Chrysler cars from violating Wisconsin statutes with reference to the sale of insurance. The facts were not different from the facts presented in the Conn case, in so far as pertinent here.

The court held: that insurance in legal concept does not attach to property but to persons, and that it is a contract seeking to insure a person from damage, and that there could therefore be no effective insurance as to a specific car until sold, for until that time the identity of the insured is unknown, and the effective date is not made certain. The court said: "The dealer in Wisconsin clearly does these things in Wisconsin: (1) He sells the car, including the insurance. (2) He collects the price including the premium (that he does not remit it is of small moment, having already advanced it, receiving nothing for it). (3) He fixes the term of the insurance. (4) He selects the beneficiaries—purchaser and financier. (5) He notifies complainant of these details by mail. All of these things, except the last, are essentials to the completion of the insurance contract, and bring it into actual existence, and occur in Wisconsin, between residents of that state; the dealer acting with authority under the Michigan contract." The court then concluded, (page 672) "In our opinion, the insurance on cars sold by Wisconsin dealers, in Wisconsin to Wisconsin purchasers, is consummated within that state." The court concludes that the salesmen of the Chrysler cars do scarcely realize that they are selling insurance, for they believe themselves to be selling Chrysler cars, and that being in compliance with a plan of action set up by Palmetto they are in fact agents of such company, and as insurance agents must comply with the local statutes in regard to the sale of insurance.

In *Chrysler Sales Corporation v. Spencer*, Insurance Commissioner of Maine, 9 F.(2d) 674, (December 19, 1925), the facts are much the same as in the two preceding cases stated. The retail automobile dealer was held "agent" of the Palmetto company, as to the disposition of the insurance in the manner detailed. The court also held that a contract of insurance is a personal contract between insurer and insured and the minds of the parties must meet, and that since the identity of the insured is uncertain until purchase is made, contract arises then and cannot exist at an earlier time. That the retail dealer who incidentally sells the insurance must comply with the insurance statutes of Maine. The motion for injunctive relief was denied.

The three cases hereinabove cited were reviewed by the Supreme Court of the United States in *Palmetto Fire Insurance Company v. Conn*, 272 U. S. 243 (October 25, 1926) and affirmed.

A check of the Shepard Citations shows no change of this law, and it must therefore be regarded to be the present ruling case law upon the subject.

We are not unmindful of the fact that in the case under consideration the insurance coverage is of a different kind, being here life insurance, and there fire and theft insurance. We do not find the distinction to in any manner modify the conclusion.

We are also not unmindful of the fact that the insurance coverage

here is part of a "package deal," and so far as is ascertainable does not increase the price of the car. An identical situation existed in the cases cited. In addition this is contemplated and is covered in the statutory law. See Chapter 189, Statutes of 1941, (4), (Section 3656.10 N.C.L. 1931-1941 Supp.) from which we quote:

In the application of this act the fact that no profit is derived from the making of insurance contracts, agreements or transactions, or that no separate or direct consideration is received therefor, shall not be deemed conclusively to show that the making thereof does not constitute the doing of an insurance business.

For the reasons given, we are of the opinion that to dispose of insurance in the manner set forth herein is the transaction of insurance business in Nevada by those sales agencies that sell the automobiles of the American Motors Corporation, effective when sale is made or possession of car is transferred, and that in so effecting insurance those automobile sales agencies involved act as agents of insurance, and that the Detroit Insurance Agency is in such transactions the "nonresident broker."

Section 141 of the Act as amended, Chapter 310, Statutes of 1951, p. 499, defines certain terms essential to the determination of this question, as follows:

The term "agent," as used in this article means any person, partnership, association or corporation who or which solicits, negotiates or effects in this state, on behalf of any company, contracts for insurance of any of the classifications listed in section 5 of article I. The term "solicitor," as used in this article, means any person engaged in the solicitation of contracts of the kind or kinds hereinabove enumerated for any agent, broker, or nonresident broker.

The term "nonresident agent," as used in this article means any agent as defined above, residing in the District of Columbia, or the territories, or any state in the United States other than Nevada.

The term "broker" as used in this article, means a person who, for compensation and on behalf of another person, transacts insurance with, but not on behalf of, any insurer.

The term "nonresident broker," as used in this article, means any person, partnership, association or corporation, not a resident of or a domiciled company in this state, who or which for money, commission, brokerage or anything of value acts or aids in any manner any solicitation or negotiation, on behalf of the assured, of contracts of any of the kind or kinds enumerated in section 5.

Section 143 of the Act as amended in Chapter 310, Statutes of 1951, p. 499, in part reads as follows:

No person, partnership, association, or corporation shall act as an agent, nonresident agent, broker, solicitor, or nonresident broker without first procuring a license so to act from the commissioner.

See also the subsequent sections. The statutes are long and provide for the manner and means of regulation by the Insurance Commissioner of all of such persons. No useful purpose would be served by showing in detail the manner, degree and means of such control. Suffice to conclude that the sale of insurance in this manner by a car salesman, who does not pretend to be licensed in any phase of insurance, is illegal and unauthorized. In addition it defeats the state of its right to license fees, etc.

Another substantial reason exists for suppressing the unauthorized sale of insurance in the manner under inspection, and that is the circumvention of Section 59, Statutes of 1941, at p. 489, in which it is provided that the insurance commissioner shall collect two (2%) percent of the total premiums paid on all insurance covering property risks within this State.

The question then must be answered in the affirmative, for the reasons given.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

163. Commissioner of Insurance—Political subdivisions in Nevada may subscribe for reciprocal insurance. Opinion No. 78 reversed.

CARSON CITY, April 24, 1956.

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

DEAR MR. HAMMEL: On June 29, 1955, we released from this office Opinion Number 78, pursuant to your request of June 21, 1955, in which you asked the following question:

Your opinion is requested as to whether or not Section 10 of Article 8 of the Constitution of the State of Nevada would prohibit a county or city of Nevada from buying insurance in a reciprocal insurance exchange.

For your information and guidance, a copy of an application form from the Farmers Insurance Exchange and the Truck Insurance Exchange showing the wording of the limited Power of Attorney are enclosed.

In Opinion No. 78 we stated, after quoting a portion of what is authorized in the limited Power of Attorney, that:

It is therefore clear that the contracts entitled, "Application for Membership and Insurance" are contracts in which a liability may arise, beyond the amount of money paid thereon at the time of application and periodically thereafter, under the heading shown on the blank of "Premium Deposit."

We then quoted Section 10 of Article 8 of the Constitution of Nevada (Section 140, N.C.L. 1929) reading as follows:

See also the subsequent sections. The statutes are long and provide for the manner and means of regulation by the Insurance Commissioner of all of such persons. No useful purpose would be served by showing in detail the manner, degree and means of such control. Suffice to conclude that the sale of insurance in this manner by a car salesman, who does not pretend to be licensed in any phase of insurance, is illegal and unauthorized. In addition it defeats the state of its right to license fees, etc.

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We then quoted Section 10 of Article 8 of the Constitution of Nevada (Section 140, N.C.L. 1929) reading as follows:

No county, city, town, or other municipal corporation shall become a stockholder in any joint-stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations.

We then referred to Opinion No. 47 of April 22, 1955, which points out that the budgetary provisions of the law appertaining to the state, counties, municipalities, school districts and other political subdivisions, are mandatory; and that these political subdivisions are required to operate upon a budgetary and cash basis.

We then quoted Section 4, Chapter 335, Statutes of 1953, which appertains to the failure of a political subdivision to operate upon a cash and budgetary basis, and penalties thereunder, which reads as follows:

SEC. 4. It shall be unlawful for any commissioner, or any board of county commissioners, or any officer of the county to authorize, allow, or contract for any expenditure unless the money for the payment thereof is in the treasury and specifically set aside for such payment. Any county commissioner or officer violating the provisions of this section shall be removed from office in a suit to be instituted by the district attorney for the county wherein such commissioner or officer resides, upon the request of the attorney general, or upon complaint of any interested party.

From the foregoing conclusions we arrived at final conclusions as set out in the last two paragraphs of the opinion which final two paragraphs read as follows:

The conclusion follows from the reasons given that for a county or city to become a party to this type of contract of "interinsurance" is a "loan of its credit" forbidden by Section 10, Article 8 of the Constitution of the State of Nevada and that for a governing body to contract in this manner for an indefinite and indeterminate sum, would clearly be a violation of Section 4, Chapter 335, Statutes of 1953, in that money would be or could be expended thereunder, not budgeted for or "specifically set aside for such payment."

A county or city is therefore under the law not authorized to enter into a contract of this content. A violation by a county commissioner or other officer of the governmental board of the political subdivision renders the officer removable from office.

Such then were the conclusions reached in that opinion which it is urged were erroneous final conclusions by reason of the erroneous intervening conclusion that the "Application for Membership and Insurance" were contracts in which a liability might arise, beyond the amount of money paid thereon at the time of application and periodically thereafter under the heading entitled "Premium Deposit." There is no denial but that the final conclusions are dependent upon this intervening conclusion and if it be erroneous the final conclusions must fall.

After the said Opinion No. 78 was released, we received a request from the Farmers Insurance Group, 4680 Wilshire Boulevard, Los Angeles 54, California, that the opinion be reviewed. This Farmers Insurance Group is a Reciprocal or Interinsurance Group of exchanges, including the following:

Farmers Insurance Exchange
Truck Insurance Exchange
Fire Insurance Exchange

After such request for review of the said opinion, we have received, in response to our request, copies of the uniform forms of "Application for Membership" and Power of Attorney, and form of policy issued by each of the three exchanges named.

Thereafter on September 6, 1955 we received a brief by the Legal Department of the Farmers Insurance Group, touching upon the said opinion and the conclusions therein reached.

Thereafter pursuant to correspondence a conference was held on December 19, 1955, in this office, between the undersigned and counsel representing the Farmers Insurance Group, in which three matters were discussed, appertaining to the problem, viz:

1. That that theory of Reciprocal Insurance is that a subscriber and member of an exchange is both an insurer and an insured.
2. That municipal officers are vested with express powers and that such powers do not include becoming insurers of property in California and other states.
3. Whether or not the appointment of an attorney in fact by Nevada municipal officers is an attempted delegation of nondelegable power.

Thereafter the Legal Department of the Farmers Insurance Group supplied to this office a brief, particularly directed to the above three propositions. We are indebted to the Exchange(s) as above set out for forms, legal statements, and a more full understanding of this entire procedure than was made clear to us at the time of the release of the said Opinion No. 78.

Upon this background then we now undertake a review of the said Opinion No. 78, and upon the same question formerly presented.

Subsequent to June 29, 1955, a great deal of study and analytical reflection has been devoted to this subject, much more in fact than will appear from this opinion.

OPINION REVIEWING OPINION NUMBER 78

A full understanding of the nature of reciprocal or interinsurance and its distinguishing characteristics is required for a proper determination of this problem. Accordingly we quote from 94 A.L.R. p. 826:

By the term "reciprocal insurance," or "interinsurance" or "interindemnity," as it is sometimes called, is meant that system whereby individuals, partnerships, or corporations engaged in a similar line of business undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts, usually through

the medium of a common attorney in fact appointed for that purpose by each of the underwriters, under agreements whereby each member separately becomes both an insured and an insurer with several liability only. (Citing cases.)

Definitions substantially in the form above stated are given on *Re Minnesota Insurance Underwriters* (1929; D.C.) 36 F.(2d) 371, 15 Am. Bankr. Rep. (N.S.) 18; *Wysong v. Automobile Underwriters (Ind.)* (reported herewith) ante, 826; and *Thomas Canning Co. v. Cannery Exchange Subscribers* (1922) 219 Mich. 214, 189 N.W. 214. See also 1 Couch, Ins. Art. 33 and 58 Cent L.J. p. 323. In the latter article the set-up of a reciprocal exchange is described as follows: "A and B form an interinsurance organization, each taking a policy. A and B separately and severally undertake to indemnify C; B and C separately and severally undertake to indemnify A; and A and C separately and severally undertake to indemnify B. They proceed by appointing D their attorney in fact for that particular purpose and business, and he takes the place of an insurance company in every particular. The power of attorney is the charter, so to speak, and limits D's rights and powers, and prescribes his duties and provides for his compensation," etc. And in *W. R. Roach & Co. v. Harding* (1932) 348 Ill. 454, 181 N.E. 331, the court describes a somewhat typical reciprocal insurance system, in part, as follows: "By this contract the subscriber agrees to exchange insurance of the character therein mentioned with other subscribers. As, for example, subscriber A agrees to insure each of the other subscribers in the amount desired by such subscriber, but in the proportion, only, with A's insurance bears to the whole amount of insurance on all of such contracts. A's liability to be several and for such proportion, only, of all losses, including his own, as the amount of his insurance bears to the total insurance of all. A stipulates that he and other subscribers shall not be a corporation, mutual company, or an association, but shall make, and do make, separate contracts, each subscriber exchanging indemnity with each of the other subscribers. Each contract defines the separate individual liability of its maker on each other policy put out, and stipulates that if a loss occurs, its maker, as a subscriber, shall pay his part and shall not be responsible for the liability of any other subscriber. Each contract stipulates that for convenience, and by reason of necessity arising out of the fact that the subscribers are scattered over the United States and elsewhere, the subscriber agrees to give, and does give, to a common agent or attorney in fact a separate power of attorney to sign and issue policies and to perform other acts and exercise other powers designated in the contract. Each agrees that he, with all others signing like contracts, is to become a subscriber to the policies issued at the office of such agent or attorney. Each promise to indemnify has for its consideration a like promise of other subscribers. The

contract provides that no premium shall be paid and no insurance purchased from an outside company or person. There is no common agreement signed by all, but each subscriber makes a separate agreement as to his separate liabilities and rights."

Thus, while the reciprocal system of insurance resembles both Lloyds and mutual insurance, it differs materially from both. For instance, in Lloyds all the underwriting members are insurers, but all are not insured, whereas in reciprocal insurance all the members are both insurers and insured. Under the latter system there is only a separate and several liability, whereas the liability of members of mutual companies is joint and several. Again, mutual companies often are incorporated, whereas reciprocal associations or exchanges have no corporate existence, although the attorney as such often does become incorporated. (Citing authorities.)

From the above and the many cases we have studied in support of the above, certain conclusions are inescapable, viz:

(a) That the rights, powers, privileges, duties and immunities of a subscriber to a reciprocal insurance exchange are delineated and determined by the terms of the contract between the subscriber and other subscribers, unless modified by statutory law.

(b) That the power of attorney under the general law of agency, recites and limits the duties of the subscriber to the exchange and to other subscribers, fully effective as to both, unless in conflict with statutory law.

(c) That the policy issued by the attorney in fact to the subscriber, delineates the duties of the exchange and all other subscribers to the particular subscriber to whom it is issued, unless modified by statutory law.

(d) That if there is any contingent liability of a municipal corporation located in Nevada, beyond and in addition to the amount of the premium deposit of the subscriber, such liability must be founded upon the provisions of the power of attorney to which it is signatory or some provision of the statutory law supplemental to the duties and obligations contained in the power of attorney. If both of these alternatives fail it follows that there can be no liability in addition to the premium deposit.

It appears from the literature, forms of power of attorney and policies issued thereunder, which has been supplied to this office from the exchanges heretofore mentioned, that the Farmers Insurance Exchange affords insurance as indemnity of the usual risks incident upon the ownership of an automobile, including, (A) Bodily Injury, (B) Property Damage, (C and D) Fire and Theft, (E) Comprehensive, (F) Collision and Upset, (G and H) Medical Payments. The blank used for application of this type of insurance with this exchange is entitled "Application for Membership and Insurance." Opposite each of these fields of coverage, is a column entitled "Premium Deposit," and also a column entitled "Membership Fees." Upon the side we find the following statement "BINDER The insurance herein applied for is bound for thirty days unless previously cancelled." At the foot of this application is set forth the Power of Attorney not so entitled but in fact it is such, which as to this particular exchange, reads as follows:

For and in consideration of the benefits to be derived therefrom the subscriber covenants and agrees with the Farmers Insurance Exchange and other subscribers thereto through their and each of their attorney-in-fact, the Farmers Underwriters Association, to exchange with all other subscribers' policies of insurance or reinsurance containing such terms and conditions therein as may be specified by said attorney-in-fact and approved by the Board of Governors or its Executive Committee for any loss insured against, and subscriber hereby designates, constitutes and appoints said Association to be attorney-in-fact for subscriber, granting to it power to substitute another in its place, and in subscriber's name, place and stead to do all things which the subscriber or subscribers might or could do severally or jointly with reference to all policies issued, including cancellation thereof, collection and receipt of all monies due the Exchange from whatever source and disbursement of all loss and expense payments, effect reinsurance and all other acts incidental to the management of the Exchange and the business of interinsurance; subscriber further agrees that there shall be paid to said Association, as compensation for its becoming and acting as attorney-in-fact, the membership fees and twenty per centum of the Premium Deposit for the Insurance provided and twenty per centum of the premiums required for continuance thereof.

The remaining portion of the Premium Deposit and of additional term payments made by or on behalf of the subscriber shall be applied to the payment of losses and expenses and *to the establishment of reserves and general surplus*. Such reserves and surplus may be invested and reinvested by a Board of Governors duly elected by and from subscriber in accordance with provisions of policies issued, which Board or its Executive Committee or an agent or agency appointed by written authority of said Executive Committee shall have full powers to negotiate purchases, sales, trades, exchanges and transfers of investments, properties, titles and securities, together with full powers to execute all necessary instruments. The expenses above referred to shall include all taxes, license fees, attorneys' fees and adjustment expenses and charges, expenses of members' and governors' meetings, agents' commissions, and such other specified fees, dues and expenses as may be authorized by the Board of Governors. All other expenses incurred in connection with the conduct of the Exchange and such of the above expenses as shall from time to time be agreed upon by and between the Association and the Board of Governors or its Executive Committee shall be borne by the Association.

The principal office of the Exchange and its attorney-in-fact shall be maintained in the City of Los Angeles, County of Los Angeles, State of California.

This agreement can be signed upon any number of counterparts with the same effect as if the signature of all subscribers

were upon one and the same instrument, and shall be binding upon the parties thereto, severally and ratably as provided in policies issued. Wherever the word "subscriber" is used the same shall mean members of the Exchange, the subscriber hereto, and all other subscribers to this or any other like agreement. *Any policy issued hereon shall be nonassessable.*

Subscribed to (Time).....M., this.....day of.....19.....

Witness:.....

Subscriber Bus. Phone()

Res. Phone()

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Regional Office Copy

(Italics supplied)

We have carefully examined the form of the policy issued under the above arrangement, and contract and find two endorsements upon it stating nonassessability, as follows: "Non Assessable Farmers Insurance Exchange, Los Angeles, California," and at the end of all of its enumerated provisions the wording: "This policy is non-assessable."

As to the literature and forms supplied to us in respect to the Truck Insurance Exchange, the same facts appear as we have enumerated them appertaining to the Farmers Insurance Exchange. The Power of Attorney is changed only as regards the name of the exchange. As to the policy issued thereunder it recites as in the previous case, two times, that the policy is nonassessable.

What we have said with reference to the Truck Insurance Exchange also applies to the Fire Insurance Exchange. In the Power of Attorney and policy issued thereunder, appear the recitations that the policy is nonassessable.

As to all of the three exchanges named we are then impelled to the conclusion that in so far as the contract and intent of the parties is concerned, the policies are nonassessable. In *Wyson v. Automobile Underwriters* (1933) 204 Ind. 493, 184 N.E. 783, the Supreme Court of Indiana held that the subscribers have a right to limit liability and that the liability of a subscriber of a reciprocal insurance association is determined by the terms of the Power of Attorney executed by, and the policy issued to, him.

In arriving at this conclusion we are not unmindful of the fact that a nonassessable policy has been held to be assessable. Keystone Indemnity Exchange was a Pennsylvania reciprocal or inter-insurance exchange which did business in Pennsylvania and several other states. Its policy contract stated on its face that it was nonassessable. The exchange became insolvent, and in May, 1933 the Court of Common Pleas of Dauphin County, Pennsylvania, appointed the Insurance Commissioner as Statutory Liquidator. The Insurance Commissioner took the position that the policies were assessable, inasmuch as Section 1004 of the Insurance Company Law of May 17, 1921, P. L. 682, required that the Power of Attorney, which was part of the contract, should make provision for contingent liability on the part of the subscribers or policyholders. The Supreme Court of Pennsylvania upheld the position of the Insurance Commissioner and decided that even

though the policy contract stated on its face that it was nonassessable, it was subject to assessment. See: *Commonwealth ex rel. Schnader v. Keystone Indemnity Exchange*, 335 Pa. 333, 6 A.(2d) 821 (1939). Maryland subscribers were held liable to assessment in the case of *Taggart v. Wachter, Hoskins and Russell*, 179 Md. 608, 21 A.(2d) 141 (1941).

Thereafter the Legislature of Pennsylvania amended Section 1004, referred to above, by Act of June 24, 1939, P. L. 683, so as to provide that where an exchange has a surplus equal to the minimum capital and surplus required of a stock insurance company transacting the same kind or kinds of business, its Power of Attorney need not provide for contingent liability of subscribers.

On January 5, 1940, the Attorney General's Office of the State of Pennsylvania rendered formal Opinion No. 309, in which the Deputy Attorney General set forth the requirements with respect to the surplus which must be maintained in order that nonassessable policies could be issued by reciprocal exchanges.

The cases of course are distinguishable in that the holding was based upon a mandatory provision of the statute then in existence in Pennsylvania to the effect that the Power of Attorney should make provision for assessments. In Nevada we have no such statute. In fact we have no statute specifically regulating reciprocal or interinsurance exchanges as such. Section 69, Chapter 189, Statutes of 1941 makes reference to reciprocals with reference to service of process upon orders to show cause, with reference to reorganization or liquidation. The term also appears under the definition of "company," Section 3, Chapter 341, Statutes of 1951.

Section 23 (Statutes of 1949, Ch. 62, p. 73) of the Insurance Act makes provision for the admission of foreign or alien companies to do business in Nevada. A reciprocal is a "company" under Section 3. The admission requirements are exacting as regards reserves and require that the foreign companies meet the same tests which the Legislature has deemed sufficient to protect the purchasers of the service, as provided for domestic companies.

We are informed that the "Farmers Insurance Group" of reciprocals is "domestic" to California where it has operated for many years in full compliance with the insurance statutes of that jurisdiction. Fully realizing that the "Exchange" is not a corporation, yet by statute in Nevada for purposes of admission and regulation here it has and occupies that status. We are also informed that each of these entities is admitted and has duly qualified to do business in Nevada, and is now doing business herein. This opinion then only purports to deal with the limitation upon that business which the said Opinion No. 73 has brought about. When a corporation duly incorporated under the laws of a state which constitutes its legal domicile, regularly acquiring therein certain powers and privileges, thereafter duly qualifies to do business in another state, in the absence of some of those powers and functions being forbidden by the law of the state in which it has qualified, it carries with it into the state in which it has qualified all of the powers which it could lawfully exercise in the state of domicile. See: 23 Am.Jur. Section 385, p. 392; 18 A.L.R. 131; 126 A.L.R. 1503. See 14a C.J. (Corporations) Article 3928, at page 1218.

from which we quote: "Upon compliance with such statutes (authorizing a foreign corporation to enter a state and do business therein) the foreign corporation may transact business with the state as if under a franchise from the state, and ordinarily in the same manner as if it were a domestic corporation." We quote further from Section 3929: "A foreign corporation will not be recognized as a corporation, or its acts upheld in the exercise of comity, when to do so would be contrary to local laws or policy or prejudicial to local interests * * *." See also, *Commonwealth Acceptance Corporation v. Jordan* (Cal.) 246 P. 796.

We therefore conclude that under the contract, the agency created and the law, the municipal entity in Nevada (city, county, school board, etc.) could not by the application and acceptance of insurance through any of the three reciprocal exchanges in question, or any other similarly situated, incur a liability in addition to membership fee and annual renewal fees (premium deposits) and that this alone being the basis for the original conclusion in Opinion No. 78, the conclusion was and is error.

Such financial requirements of the subscriber are from the beginning clear, and therefore cannot violate the budgetary laws of the State of Nevada.

That the governing body of the entities named has power and authority to preserve and protect the public buildings from loss, damage, etc., we think too obvious to require proof or the citation of authority and that such administrative duty includes necessary insurance. Chapter 161, Statutes of 1933, p. 203, sets out the powers and duties of the Board of County Commissioners, by amending Section 8 of an Act of 1865. Section 8, "First," reads as follows:

To make orders respecting the property of the county in conformity with any law of this state, and to take care of and preserve such property.

Indeed we think the placing of necessary (not excessive) insurance upon the public property one of the primary duties of the governing boards of such entities.

Finally, in the absence of any risk of liability of the subscriber (county, city, school district, etc.) involving reciprocal insurance, for sums in addition to membership fees and premium deposits, the status of a subscriber as an "insurer" of property becomes entirely theoretical and outmoded. This theory could then not require that such municipal officers be precluded from subscribing to reciprocal or interinsurance exchanges.

We have never been impressed with the proposition that the appointment of an attorney in fact by Nevada municipal officers is an attempted delegation of nondelegable powers. So long as insurance is effected there will be claims for losses. Such claims will be of all degrees of merit. The insurer will of necessity consider the merits and will pay some without reduction, reduce others and settle by compromise, deny others and settle by litigation. The same problems will appear without regard to whether the insured is a public body or an individual, whether insurance is carried by a stock company or a reciprocal exchange. The appointment of an agent to perform these functions is therefore necessary in any event, and exists in fact if

not in theory when insurance is carried by a corporate stock company. It being only a theory and not changing the essential facts of the transactions encompassed in insurance, we discard the point as untenable.

For the reasons given we are of the opinion that Attorney General's Opinion No. 78, of June 21, 1955, was erroneous in its conclusion, and accordingly reverse the same, holding that municipal bodies (municipalities, county commissioners for counties, school districts, etc.) may lawfully subscribe for insurance with reciprocal or inter-insurance exchanges that have been licensed to do business in Nevada, if the contract (Power of Attorney and policy) recite that the policy is nonassessable.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

164. Agriculture, Department of—Pest Control Act construed (Statutes of Nevada 1955, Chapter 215, p. 334).

CARSON CITY, April 25, 1956.

MR. LEE M. BURGE, *Supervising Inspector, Division of Plant Industry, Department of Agriculture, P. O. Box 1027, Reno, Nevada*.

DEAR MR. BURGE: We have your letter of April 12, 1956, requesting an opinion of this department, construing Section 10 of the Custom Pest Control Act, being Chapter 215, Statutes of 1955, page 334. You have stated:

We have interpreted this Section (Section 10) to mean that pest control operators applying insecticides or fungicides to building interiors such as restaurants etc., are excluded from the provisions of the act. We have also interpreted under this Section that building contractors applying chlordane to the soil under concrete slab floorings are also exempt from the provisions of the act. We have required spray operators applying insecticides and fungicides to exteriors of buildings, yards, gardens, etc., to become licensed.

QUESTION

Is our interpretation correct as regards the exemptions allowed under Section 10 to certain types of operations?

OPINION

The purpose of the Act is briefly stated in Section 1, which reads as follows:

Policy. It is the policy of this state and the purpose of this act to regulate, in the public interest, the custom application of insecticides, fungicides and herbicides, which, although valuable for the control of insects, fungi and weeds, may seriously injure men, animals and crops over wide areas if not properly applied."

not in theory when insurance is carried by a corporate stock company. It being only a theory and not changing the essential facts of the transactions encompassed in insurance, we discard the point as untenable.

For the reasons given we are of the opinion that Attorney General's Opinion No. 78, of June 21, 1955, was erroneous in its conclusion, and accordingly reverse the same, holding that municipal bodies (municipalities, county commissioners for counties, school districts, etc.) may lawfully subscribe for insurance with reciprocal or inter-insurance exchanges that have been licensed to do business in Nevada, if the contract (Power of Attorney and policy) recite that the policy is nonassessable.

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CARSON CITY, April 25, 1956.

MR. LEE M. BURGE, *Supervising Inspector, Division of Plant Industry, Department of Agriculture, P. O. Box 1027, Reno, Nevada*.

DEAR MR. BURGE: We have your letter of April 12, 1956, requesting an opinion of this department, construing Section 10 of the Custom Pest Control Act, being Chapter 215, Statutes of 1955, page 334. You have stated:

We have interpreted this Section (Section 10) to mean that pest control operators applying insecticides or fungicides to building interiors such as restaurants etc., are excluded from the provisions of the act. We have also interpreted under this Section that building contractors applying chlordane to the soil under concrete slab floorings are also exempt from the provisions of the act. We have required spray operators applying insecticides and fungicides to exteriors of buildings, yards, gardens, etc., to become licensed.

QUESTION

Is our interpretation correct as regards the exemptions allowed under Section 10 to certain types of operations?

OPINION

The purpose of the Act is briefly stated in Section 1, which reads as follows:

Policy. It is the policy of this state and the purpose of this act to regulate, in the public interest, the custom application of insecticides, fungicides and herbicides, which, although valuable for the control of insects, fungi and weeds, may seriously injure men, animals and crops over wide areas if not properly applied."

Section 3 provides for examinations, licensing and bonding of those who desire to engage in this work, and places the administration of the Act in the hands of the director of plant industry of the State Department of Agriculture.

Section 3 (1) is all inclusive respecting licensing and provides:

No person shall engage in custom application of insecticides, fungicides or herbicides within this state at any time without a license issued by the director. Application for a license shall be made to the director and shall contain information regarding the applicant's qualifications and proposed operations and other relevant matters as required pursuant to regulations promulgated by the director.

Section 10 provides exceptions or exemptions from the licensing and other regulatory powers of the Act, and reads as follows:

Exemptions. This act shall not apply to custom application of insecticides, fungicides or herbicides to prevent, destroy, repel or mitigate insects or fungi within or under buildings, except farm buildings other than dwellings, or within vehicles, ships, aircraft or other means of transporting persons or property by land, water or air.

The language employed in this section is a little unfortunate in that it involves a "multiple negative." When broken down and reassembled in more understandable language it appears to mean this:

This act shall not apply to custom application of insecticides, fungicides or herbicides to prevent, destroy, repel, or mitigate insects or fungi within or under buildings, farm dwellings, vehicles, ships, aircraft or other means of transporting persons or property by land, water or air. Provided, however, that farm buildings other than farm dwellings are not included within this exemption.

It is a well known principle of statutory construction that enumerated exceptions to the application of a rule or directive are exclusive. That is, the Legislature having undertaken to enumerate exceptions is presumed to have enumerated all of the exceptions to the application of the rule. Section 3(1) then applies to all of those persons included within the operation set forth in the statute, unless the person falls within the exception. Nothing remains but to consider the operators that you have enumerated and determine whether or not they fall within the exceptions enumerated.

Considering first the first part of your question, we have this question: Are pest control operators applying insecticides or fungicides to building interiors such as restaurants, etc., excluded from the provisions of the Act? Your determination has been to answer this question in the affirmative. We are of the opinion that this is correct. However, such pest control operators, making such applications "within or under" farm buildings, not including farm dwellings, would not be exempted, i.e., such operators would be within the provisions of the Act.

Considering the second part of your question, we restate the inquiry as follows: Are building contractors applying chlordane to the soil under concrete slab floorings exempt from the provisions of the Act? Your answer is in the affirmative. With this conclusion we are in accord.

The test that you would apply in any case in which one is operating for hire in this type of business is this: The operation which he proposes to carry on either falls within the exception as we have restated it or it does not. The burden is upon him who claims the exception to prove to your satisfaction that it is such. If the proposed operation falls within the exception, the operator goes his way without being required to comply with the provisions of the Act. If the proposed operation does not fall within the enumerated provisions of exception, the operator then must comply with the provisions of the Act.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

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165. Nevada State Children's Home. Trustees designated to administer property left by will in behalf of Children's Home, being persons other than governing board of home, are limited only by the terms of the instrument creating the trust.

CARSON CITY, May 2, 1956.

HONORABLE R. VAN DER SMISSEN, *Superintendent, Nevada State Children's Home, Carson City, Nevada.*

DEAR MR. VAN DER SMISSEN: We have your letter of April 25, 1956 and the benefit of your conversation in regard to the question hereafter stated, requiring an opinion of this department.

FACTS

In paragraph numbered 5, page 8 of a will dated March 15, 1934, Mrs. Luella Rhodes Garvey, then a resident of Reno, Nevada, made provision for a bequest of ten thousand dollars to the State Orphans' Home, now the Nevada State Children's Home, and designated trustees by their official offices, with this language:

The sum of ten thousand (\$10,000.00) dollars to Trustees consisting of incumbents in the offices of Chief Justice of the Supreme Court of the State of Nevada, the Governor, our Chief Executive of the State of Nevada, the Superintendent of the State Orphans' Home at Carson City, Nevada, and their successors in office, the principal and interest thereof to be by said Trustees in their judgment used and expended for the comfort and happiness of the children in said ORPHANS' HOME in supplying them with adequate playgrounds, Christmas gifts and forms of entertainment.

That said will was duly admitted to probate and distribution was made to the above legatee on October 21, 1947.

That the said trustees named therein and in charge of the administration of said charitable trust fund have agreed to expend a portion of said fund in providing certain playground improvements at the said Children's Home consisting of a concrete rectangular slab of dimensions 88 by 75 feet, and a concrete walk to surround a lawn playground, the ground to be of dimensions 63 by 106 feet, the walk to be

The test that you would apply in any case in which one is operating for hire in this type of business is this: The operation which he proposes to carry on either falls within the exception as we have restated it or it does not. The burden is upon him who claims the exception to prove to your satisfaction that it is such. If the proposed operation falls within the exception, the operator goes his way without being required to comply with the provisions of the Act. If the proposed operation does not fall within the enumerated provisions of exception, the operator then must comply with the provisions of the Act.

Respectfully submitted,

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13 feet in width at one end and 6 feet in width on two sides and one end, all concrete work to be 4 inches in thickness, or a total of 9,287 square feet of concrete work. It has been estimated that the total cost will be from three to four thousand dollars.

The total of said fund so received, namely, \$10,000, is on deposit with the State Treasurer of the State of Nevada.

QUESTION

In disbursing funds for this proposed project so received and held, will it be necessary for the trustees to advertise for lowest and best bidder and if so what are the requirements as to time?

OPINION

The answer to the question is in the negative.

The present statute providing for the government and maintenance of the Nevada State Children's Home is Chapter 254, Statutes of 1951, page 370. Earlier statutes providing other boards of control do not cast light upon this question. The Statute of 1951 provides that the State Welfare Board shall be the governing board of said home.

Ordinarily a gift by will to a state institution would not set up a trust arrangement of control of persons other than those in control of the state institution. The within trust has done just so. A dual control on any matter involving the institution could easily lead to confusion. The question is not presented here but we are struck with the singularity of the situation. We will give it no further attention.

Certain statutes appear to still be applicable to the management of the State Orphans' Home (Nevada State Children's Home) as regards the expenditure of public funds, and this despite the fact that the management has been changed from that existing at the earlier date. The statute vesting the governing power in the Nevada State Welfare Department (Chapter 254, Stats. of 1951, p. 370) appears to have no provisions at variance and in conflict with the earlier statute requiring the superintendent and matron to semi-annually estimate supplies needed (Section 7594 N.C.L. 1929), and likewise no provision in conflict with the section requiring the directors to advertise for supplies (Section 7595 N.C.L. 1929), and likewise no provision to conflict with the section requiring bids to be opened and contracts to be awarded (Section 7596 N.C.L. 1929). Whether or not these provisions are in full force and effect, we are not called upon to determine, for in any event the application, if it does exist, is to the duly authorized governing board of the institution, and the application of the referred to sections would be limited to the expenditure of public funds, and not funds obtained as in this manner, by bequest.

Apart from statutory provisions and in the absence thereof, the test of control of and the manner of disposition of such funds obtained as in this case, would be the will and intent of the testator. (See Charitable Trusts—Restatement of the Law—Trusts. Section 261 to end, page 1089 et seq.)

But we do have specific provisions in anticipation of gifts and making provision therefor. Section 5, Chapter 254, Statutes of 1951, p. 370 reads as follows:

The superintendent of the Nevada state children's home shall receive any gifts made to the said children's home and shall be accountable to and report said gifts to the state welfare board.

As to the manner of control of gifts made to the State Orphans' Home (Nevada State Children's Home) Section 7597 N.C.L. 1929 appears to be controlling as regards the recognition to be given to the wishes of the donor. The section reads as follows:

The board of directors of the state orphans' home is hereby authorized to receive and have full control of any and all gifts, bequests or donations now made, or that may be made hereafter, to the state orphans' home, and the said board is also hereby empowered to invest or expend the principal and interest of any and all such moneys coming thus into their possession as they may deem best for the interest of said orphans' home; provided, that nothing in this act shall be so construed as to prevent any person or persons, company or society, from making any gift of money or property, and directing how such money or property shall be disposed of, and when; such direction shall accompany such gift. The directors of the orphans' home shall make such disposition of such gift, or money, or property, as the donor or donors may direct.

We seriously doubt that the statute requiring the board of control to advertise for bids on supplies, to be purchased with public funds, is intended to include work and materials for permanent improvement to property and grounds. But assuming that it would include such items, it would in any event have application only to the expenditure of public funds, and not funds obtained by gift as here. And, as we have found, the wishes of the donor as to the disposition of funds or property shall prevail. This provision removes all doubt as to the intent of the Legislature in cases such as this.

We therefore arrive at the conclusion that no advertising is necessary in awarding bids for the completion of the proposed work. We also conclude that within the wording and spirit of the gift the control of the trustees named is absolute.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

166. **Public Schools**—State Board of Education does not have power under the apportionment provisions of the 1956 School Code, and regulations adopted relative thereto, to review and/or override the action of a County School Board in closing a public school under the provisions of Sections 239 and 240 of the School Code.

CARSON CITY, May 2, 1956.

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

MY DEAR MR. DUNCAN: You have requested of this office an opinion as to whether the State Board of Education under its apportionment regulations would have the right to review the action of a County School Board in closing a school in accordance with powers given them under Sections 239 and 240 of the 1956 School Code.

OPINION

The relevant portions of Sections 239 and 240 of the 1956 School Code which apply are as follows:

SEC. 239. * * * In any school district having and maintaining more than one school offering instruction in the same grade or grades, the board of trustees shall have the power to zone the school district and to determine which pupils shall attend each school.

SEC. 240. * * * 4. A school attendance area shall be abolished when the board of trustees act according to the powers granted them in section 239.

The apportionment provisions of the School Code, or regulations adopted by the State Board of Education relating to the same, are entirely separate and distinct from the powers delegated to the County School Boards under Sections 239 and 240 of the Code.

It is, therefore, the opinion of this office that the State Board of Education has no power, under the apportionment provisions of the School Code of 1956, or regulations adopted relative thereto, to review and/or override the action of a County School Board in closing a school under Sections 239 and 240 of the Code.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

167. **Nevada Real Estate Commission.** 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.

CARSON CITY, May 7, 1956.

MR. GERALD J. MCBRIDE, *Executive Secretary, Nevada Real Estate Commission, 309 West Telegraph Street, Carson City, Nevada.*

DEAR MR. MCBRIDE: This is in response to your call of April 30, 1956 asking this department to render an opinion upon the inquiry submitted to us by letter on March 19, 1956. In the interval at your request the matter had been held in abeyance.

166. Public Schools—State Board of Education does not have power under the apportionment provisions of the 1956 School Code, and regulations adopted relative thereto, to review and/or override the action of a County School Board in closing a public school under the provisions of Sections 239 and 240 of the School Code.

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OPINION

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SEC. 240. * * * 4. A school attendance area shall be abolished when the board of trustees act according to the powers granted them in section 239.

The apportionment provisions of the School Code, or regulations adopted by the State Board of Education relating to the same, are entirely separate and distinct from the powers delegated to the County School Boards under Sections 239 and 240 of the Code.

It is, therefore, the opinion of this office that the State Board of Education has no power, under the apportionment provisions of the School Code of 1956, or regulations adopted relative thereto, to review and/or override the action of a County School Board in closing a school under Sections 239 and 240 of the Code.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

167. Nevada Real Estate Commission. 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.

CARSON CITY, May 7, 1956.

MR. GERALD J. McBRIDE, *Executive Secretary, Nevada Real Estate Commission, 309 West Telegraph Street, Carson City, Nevada.*

DEAR MR. McBRIDE: This is in response to your call of April 30, 1956 asking this department to render an opinion upon the inquiry submitted to us by letter on March 19, 1956. In the interval at your request the matter had been held in abeyance.

QUESTION

Is it necessary for an individual or company engaged in business within the State of Nevada as a mortgage broker to be also duly licensed as a Real Estate Broker?

You have explained further with the following specification: "We are assuming, of course, that as a mortgage broker, they are buying and selling only first and second Trust Deeds or Mortgages."

OPINION

The Nevada Real Estate Act was passed, and became effective in 1947 (Statutes of Nevada 1947, Chapter 150, p. 484), first amended in 1949 (Statutes of Nevada 1949, Chapter 204, p. 433), and amended again in 1955 (Statutes of Nevada 1955, Chapter 279, p. 457) and was otherwise amended in 1955, but not pertinent here.

Section 1 of said Act, in part, reads as follows:

It shall be unlawful on and after June 1, 1947 for any person, copartnership, association, or corporation, to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or real estate salesman within the State of Nevada, without first obtaining a license as a real estate broker or real estate salesman from the Nevada state real estate board, as provided for in this act.

Section 2 of said Act, in part, reads as follows:

A real estate broker within the meaning of this act, is any person, copartnership, association, or corporation who for another and for a compensation, or who with intention or expectation of receiving a compensation sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or solicits prospective purchasers of any real estate or the improvements thereon; or who buys or offers to buy, sells, or offers to sell, or otherwise deals in options on real estate or the improvements thereon; or who collects or offers or attempts or agrees to collect rental for the use of real estate or the use of real estate or the improvements thereon; or who collects or offers or attempts or agrees to collect rental for the use of real estate or the improvements thereon; or who negotiates or offers or attempts or agrees to negotiate a loan upon real estate.

Section 5 of the Act provides the exceptions to the persons or entities that would otherwise be included within the definition of "real estate broker" as set out in Section 2 of the Act, above quoted. It is not necessary however to quote or discuss the provisions of Section 5, for the reason that we do not find your specifications of "mortgage broker" to bring such operators within the provisions of Section 2.

You have stated as above quoted: "We are assuming, of course, that as a mortgage broker, they are buying and selling only first and second Trust Deeds or Mortgages." If this is the "mortgage brokers" sole operation, namely, "buying and selling" first and second Trust Deeds or Mortgages, then it cannot with accuracy or truth be said

that he is one "who negotiates or offers or attempts or agrees to negotiate a loan upon real estate." He is not one who negotiates, etc. a loan upon real estate, for by your specification he merely buys or sells rights under a loan already existing prior to any act on his part. Our opinion hinges upon this distinction of time and of act. If he for the first time touches a deal and a transaction involving a present existing encumbrance upon real estate, then it cannot be said that he helped to create that encumbrance or in the words of the statute that he "negotiated" a loan upon real estate.

We have carefully balanced every word and clause of Section 2, defining "real estate broker" with reference to your specification of what the operation of a mortgage broker is and do not find any part of this section such as to bring a "mortgage broker" as defined by you within the meaning of the term "real estate broker" as defined by the section.

The answer to the question propounded, under your definition or specification of the functions of a "mortgage broker" is therefore, for the reasons given, in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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168. **Purchasing Department—Surplus Property Division.** Only certain officers of either public or private health institutions in this State, or their properly authenticated agents, are authorized to represent such institutions in obtaining Federal donable property through the State Purchasing Department.

CARSON CITY, May 10, 1956.

MRS. AVIS M. HICKS, *Acting Director, State Purchasing Department, Carson City, Nevada.*

DEAR MRS. HICKS: You have requested an opinion from this office on the following inquiries:

1. What person or officer is eligible to bind a nonprofit health institution in this State participating in the surplus property distribution program administered through your office?
2. What person or officer of any such institution so participating is responsible for the custody of surplus property received for its use?

Under the provisions of Section 43, Chapter 333, Statutes of Nevada 1951, as amended by Chapter 338, Statutes of 1953, the director of the Nevada state purchasing department, as head of the Nevada state agency for surplus property, is specifically authorized and directed, "to do all things necessary to secure and distribute federal donable surplus property to nonprofit * * * health institutions throughout the state * * *," Section 14.1(f) of Minimum Standards of Operation for State Agencies for Surplus Property and Appropriate

that he is one "who negotiates or offers or attempts or agrees to negotiate a loan upon real estate." He is not one who negotiates, etc. a loan upon real estate, for by your specification he merely buys or sells rights under a loan already existing prior to any act on his part. Our opinion hinges upon this distinction of time and of act. If he for the first time touches a deal and a transaction involving a present existing encumbrance upon real estate, then it cannot be said that he helped to create that encumbrance or in the words of the statute that he "negotiated" a loan upon real estate.

We have carefully balanced every word and clause of Section 2, defining "real estate broker" with reference to your specification of what the operation of a mortgage broker is and do not find any part of this section such as to bring a "mortgage broker" as defined by you within the meaning of the term "real estate broker" as defined by the section.

The answer to the question propounded, under your definition or specification of the functions of a "mortgage broker" is therefore, for the reasons given, in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

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DEAR MRS. HICKS: You have requested an opinion from this office on the following inquiries:

1. What person or officer is eligible to bind a nonprofit health institution in this State participating in the surplus property distribution program administered through your office?
2. What person or officer of any such institution so participating is responsible for the custody of surplus property received for its use?

Under the provisions of Section 43, Chapter 333, Statutes of Nevada 1951, as amended by Chapter 338, Statutes of 1953, the director of the Nevada state purchasing department, as head of the Nevada state agency for surplus property, is specifically authorized and directed, "to do all things necessary to secure and distribute federal donable surplus property to nonprofit * * * health institutions throughout the state * * *," Section 14.1(f) of Minimum Standards of Operation for State Agencies for Surplus Property and Appropriate

State Officials, promulgated by the Federal Department of Health, Education and Welfare, defines nonprofit institution as "one which is operated by one or more nonprofit corporations or associations, no part of the net earnings of which inure or may lawfully inure to the benefit of any private shareholder or individual, and which has been held by the Internal Revenue Service to be tax exempt under either the provisions of Section 101(6) of the 1939 Internal Revenue Code or Section 501(c)(3) of the 1954 Internal Revenue Code." Section 14.1(i) of said Minimum Standards defines tax supported institution used in connection with a medical center, hospital, clinic or health center * * * as one which receives a major portion of its financial support from moneys derived from state or local government revenues."

These definitions afford no clear distinction between these two types of institutions with reference to their operation on either a profit or nonprofit basis. As a matter of fact, both are nonprofit institutions insofar as their financial operations are concerned. A clearer and more correct distinction would be to classify the first type as private institutions, and the latter as public institutions, and for purposes of clarification they will hereinafter be referred to as such.

Health institutions in Nevada participating in the surplus property program will for the most part be tax supported or public. All public institutions are created pursuant to constitutional or legislative authority. We find no provisions in the Constitution of Nevada for the establishment of any type of health institution, but we do find that the Legislature through numerous acts has provided for several different types of such institutions throughout the State. Principally among these, together with a discussion of the governing authority under which each functions, are the following:

1. Nevada State Hospital.

This institution was established pursuant to Legislative Act in 1913, being Sections 3505-3525, N.C.L. 1929, as amended. The governing authority, then called the Hospital Board, and consisting of the Governor, State Controller and State Treasurer, is provided for in Section 3509 thereof wherein there is delegated to said board the full power and exclusive control of certain hospital property, the duty to furnish supplies, and have charge of all other matters connected with the institution. Also to establish rules, regulations and by-laws for the government of said hospital as they deem proper. The Act as it originally stood authorized the appointment of a superintendent and delegated to him the duty of managing all business affairs, subject to the approval of the hospital board. This board later gave way to an appointive board called "Board of Hospital Commissioners" and under the provisions of Chapter 154, Statutes of Nevada 1945, page 242, the appointment of an assistant superintendent was authorized, with additional duties as purchasing agent and such duties in that connection and others as are delegated by the superintendent of said hospital.

Chapter 277, Statutes of Nevada 1947, page 852, provides for a business manager to conduct all business pertaining to the hospital under rules and regulations adopted by the Board of Hospital Commissioners. Without specifically repealing the Act providing for a

business manager at said hospital, Chapter 365, Statutes of Nevada 1953, page 694, defines duties of the superintendent thereof, "Further * * * to be responsible for and to supervise the fiscal affairs and responsibilities of the hospital."

By act of the Legislature in 1951, Chapter 331, Statutes of Nevada 1951, a hospital advisory board, to be appointed by the Governor was created with only such powers and duties as may be authorized by law, including that of being an advisory board to the superintendent, but with the condition that, "The superintendent shall be the final authority for the conduct and policies of the hospital and its administrative functions, unless otherwise provided by law." Section 9(2) of this Act includes, among other powers and duties of the superintendent, the following: "To be responsible for and to supervise the fiscal affairs and responsibilities of the hospital."

In view of the above and as the law now stands, it seems clear that the Superintendent of the Nevada State Hospital has proper authority to bind said hospital on a contract for the purchase of surplus donable property.

2. County Hospitals.

By Legislative Act in 1929, Sections 2225-2242 N.C.L. 1929 as amended, establishment of county-owned and operated hospitals was authorized in those counties of the State complying with the provisions of the Act. Section 2225, as amended by Chapter 141, Statutes of Nevada 1955, page 194, empowers the Board of Hospital Trustees "to make and adopt such by-laws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economical and equitable conduct thereof not inconsistent with this act or the ordinances of the city or town wherein such hospital is located. They shall have the exclusive control of the expenditures of all money collected to the credit of the hospital fund * * * and to appoint a suitable superintendent or matron, or both, and the necessary assistants * * * and shall in general carry out the spirit and intent of this act in establishing and maintaining a county public hospital." From a close scrutiny of the Act authorizing county hospitals as amended, we feel that the Legislature meant to center the authority for operating, maintaining and managing such institutions in the hands of the Board of Hospital Trustees, elected by and accountable to the voters. Some of the authority given these boards may be delegated to appointed officers and employees of the hospital, but these seem to be only minor functions. Of especial importance is the provision that such boards shall have the exclusive control of the expenditure of all moneys of the hospital funds. No doubt the superintendent appointed by a board may make recommendations and suggestions, but is without power to bind the institution in any agreement or order for any purchases. Only the Board of Hospital Trustees has that power, and that only to the extent expressly conferred upon them by statute or which may be reasonably implied therefrom.

3. State Board of Health.

The State Board of Health of the State of Nevada was created by Legislative Act in 1911, Section 5235, N.C.L. 1929, 1931-1941 Supp., consisting of the Governor and four appointed members. It directs

most of its functions through a State Health Officer appointed by the members of the board and responsible to them for his acts. Final authority continues to rest with the board and is not delegated to the State Health Officer or others. Again, only the board is authorized to bind the State Health Department on agreements for purchases.

4. County and City Boards of Health.

These are authorized under the provisions of Section 5261 and Section 5263, N.C.L. 1929, respectively. Since the county board of health is established by the Board of County Commissioners, who automatically become members thereof, control vests in said County Commissioners and it follows that they have final authority to bind the county on agreements. Likewise, since city councils have authority to create city boards of health, the power to control such health department remains with the members of the council, who alone may authorize an agreement binding upon them.

5. City Hospitals.

It is not known that any such hospitals presently exist within the State of Nevada, but if they should, they operate or will operate by virtue of the power, contained in the charter of the particular city where such hospital is located, to establish and maintain them as a function of the said city. As in other types of tax supported hospitals, the governing body, namely, the city council, has the authority to enter into and bind such hospital under lawful agreements.

6. Federal Hospitals.

Although not in any sense a creature of state law, these hospitals, consisting of the Veterans Administration Hospital and the several hospitals located on Indian Reservations of the State, were established pursuant to federal laws. Each of said hospitals is managed by a general superintendent who has authority to bind the hospitals on contracts for supplies.

7. Other Health Institutions.

It is always possible that clinics, health centers, or similar types of medical institutions will operate within the State during periods of emergency or for other reasons. However, such operations for the most part are for temporary periods only, and usually come under supervision of the Red Cross, or state, county or city authority.

Coming now to nonprofit private health institutions, these usually exist in the form of private corporations created under and by virtue of the corporation laws of the State. All such institutions are governed by the laws of private corporations with a board of directors, in which is vested the management and control of the business affairs of the institution. The powers which such board is authorized to carry out pursuant to general laws or its charter provisions, may be delegated to an officer of such corporation. Usually the officer is the president or general manager, and is ordinarily empowered to carry on such business transactions as are specifically authorized by the board of directors. It is only in the usual course of his duties and the corporation's business that he may bind the corporation under a contract without express authority from the board to do so. Positive evidence that a particular officer of a corporation is empowered to

bind his principal on a lawful contract should be required in the form of a copy of the resolution of the board of directors delegating such authority.

OPINION

By reason of the foregoing we are of the opinion that the questions hereinabove propounded should be answered as follows:

No. 1. In participating in the surplus property distribution program of this State, a public health institution of the types above mentioned may legally be bound on agreements entered into by its board of commissioners, trustees, or council, or such person in whom or in which is vested the power and authority to control its business and other affairs, while a private health institution of the type mentioned above may legally be bound on agreements entered into by an officer thereof who has been vested with proper authority by the board of directors of such institution to act for and on its behalf.

No. 2. Any of the bodies or persons mentioned in No. 1 above who are found to be authorized to enter into agreements on behalf of their principals for participation in the surplus goods distribution program of this State, or the agents of such bodies or persons, are eligible to receive and exercise control over any goods so received. However, responsibility for the care, protection, loss, damage, etc. of such goods cannot be delegated to an agent but must rest with the principal.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

-
169. Soil Conservation Districts Law. "Land Occupier" as defined in the Act means any person, firm or corporation in possession of lands in a district, as owner, lessee, renter, tenant or such other person or persons with a right affecting title thereto. Only such "Land Occupiers" as herein defined may vote on questions concerning Soil Conservation Districts or hold office therein.

CARSON CITY, May 16, 1956.

MR. ANGUS MAXWELL, *Acting Chairman, Austin Soil Conservation District, Smith Creek Ranch, Fallon, Nevada*.

DEAR SIR: Receipt is acknowledged of your recent letter wherein you request the opinion of this office on the following questions:

1. Would one living on a ranch as manager thereof and receiving a set salary as such, be considered a "Land Occupier" as that term is defined in Section 3(10) of the Soil Conservation Districts Law?

2. Is such person eligible to vote on district affairs and to hold office as a supervisor of the District in which he resides?

Chapter 212, Statutes of Nevada 1937, Section 3(10), as amended, being Section 6870.01(10) N.C.L. (1931-1941 Supp.) defines "Land Occupier" as follows:

bind his principal on a lawful contract should be required in the form of a copy of the resolution of the board of directors delegating such authority.

OPINION

By reason of the foregoing we are of the opinion that the questions hereinabove propounded should be answered as follows:

No. 1. In participating in the surplus property distribution program of this State, a public health institution of the types above mentioned may legally be bound on agreements entered into by its board of commissioners, trustees, or council, or such person in whom or in which is vested the power and authority to control its business and other affairs, while a private health institution of the type mentioned above may legally be bound on agreements entered into by an officer thereof who has been vested with proper authority by the board of directors of such institution to act for and on its behalf.

No. 2. Any of the bodies or persons mentioned in No. 1 above who are found to be authorized to enter into agreements on behalf of their principals for participation in the surplus goods distribution program of this State, or the agents of such bodies or persons, are eligible to receive and exercise control over any goods so received. However, responsibility for the care, protection, loss, damage, etc. of such goods cannot be delegated to an agent but must rest with the principal.

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2. Is such person eligible to vote on district affairs and to hold office as a supervisor of the District in which he resides?

Chapter 212, Statutes of Nevada 1937, Section 3(10), as amended, being Section 6870.01(10) N.C.L. (1931-1941 Supp.) defines "Land Occupier" as follows:

"Land Occupier" or "Occupier of Land" includes any person, firm, or corporation who shall hold title to, or shall be in possession of, any lands lying within a district organized under the provisions of this act, whether as owner, lessee, renter, tenant, or otherwise."

Both of these terms are used interchangeably in the Act, which fact, together with the above definition, leaves no doubt but that they are synonymous. In this opinion, we therefore include either or both although only specifically mentioning the first.

Following the modern trend in statutory enactment, the Legislature at the outset of this Act, defined several of the more important terms used therein. And the above definition given was apparently intended to be exclusive for nothing appears in the following sections thereof which adds to or detracts from it. Therefore, we are confined to the definition furnished us for a determination of who is a "Land Occupier."

The problem of definition is not an easy one—for it never stops. Inevitably, the definition itself must be defined, and the definition of the definition, will itself, need interpretation. Where a definition is clear it should control the meaning of words used in the remainder of the Act, but where it is not clear then both intrinsic and extrinsic aids must be resorted to in arriving at a fair interpretation of the legislative intent. (Sutherland—Statutory Construction, Sec. 3002.)

Looking to the definition itself for guidance, we note first of all that the term "Land Occupier" includes any person, firm, or corporation who shall hold title to, or shall be in possession of, etc. Holding title to lands is self-explanatory and requires no discussion here, but what is meant by being in possession of lands is not so readily ascertainable. Some extrinsic aid is necessary. Possession of land has been defined as "The exercise of acts of dominion over it in making the ordinary use of it and taking the ordinary profits it is capable of yielding." (33 Words & Phrases, p. 75, quoting from *Collier v. Bartlett*, 71 Okla. 133, 175 P. 247.)

It is obvious that a manager of lands, employed at a set salary, even though residing thereon, does not exercise the acts of dominion over such lands to the extent necessary to place him in possession as that term is here defined. He is an employee or agent of another person who does have such possession, and as such employee or agent, his rights rest upon his contract of employment with his principal as distinguished from the rights of an owner, lessee, tenant or renter whose rights rest upon an interest in the land being occupied by them.

We note further from the Legislature's definition here under discussion that any person, firm, or corporation is a "Land Occupier" when in possession of any lands involved, whether as owner, lessee, renter, tenant, or otherwise. No difficulty is encountered in ascertaining the meaning of the words owner, lessee, renter and tenant as therein used. They are specific words and convey a definite meaning. Not so, however, with the term "or otherwise," which is a general term. Its meaning is not apparent per se but, (under the rule of *Ejusdem Generis*) it can be determined only by its reference to or connection with the specific words preceding it. Where a general

word or words follow the enumeration of a particular class of persons or things, the general word or words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless a contrary interest is shown. (82 C.J.S. 658, Sec. 332(b).)

The rule, or doctrine of *Ejusdem Generis*, is well explained in *City of Phoenix v. Yates*, 69 Ariz. 68 208 P(2) 1149, where the court said:

The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The words "other" or "any other" following an enumeration of particular classes are therefore to read as "other such like" and to include only others of like kind or character.

The decisions following this rule of construction are so numerous as to make its use as a guide undisputed. We feel that it applies with great certainty in determining the meaning of "or otherwise" as hereinabove used. The term must be regarded as restricted to the same or similar meaning as the words preceding it rather than accorded one which is broader than or is foreign or repugnant to them. Each of the persons covered in the particular words of the definition has a right affecting title to land they occupy. Persons included in the words "or otherwise" could well be persons either with or without a right affecting title. Therefore, under the rule, it follows that the words do not include one without a right affecting title.

OPINION

On the basis of the law above discussed, it is the opinion of this office that the questions contained in your inquiry should both be answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

170—Nevada Industrial Commission. The term "theatrical or stage performer" as persons excluded from the compulsory provisions of insurance (Ch. 439, 1955 Stats.) construed.

CARSON CITY, May 23, 1956.

MR. GUY A. PERKINS, *Chairman, Nevada Industrial Commission, Carson City, Nevada*.

DEAR MR. PERKINS: We are in receipt of your inquiry of May 9, 1956, requesting an opinion of this department construing Section 11 (b) of the Nevada Industrial Insurance Act, upon specific questions hereinafter stated.

You have called our attention to Section 30 of the Act which requires all employers, unless specifically excluded by other provisions of the Act, having two or more employees, to come under the Act and make contributions to the State Insurance Fund.

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OPINION

On the basis of the law above discussed, it is the opinion of this office that the questions contained in your inquiry should both be answered in the negative.

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DEAR MR. PERKINS: We are in receipt of your inquiry of May 9, 1956, requesting an opinion of this department construing Section 11 (b) of the Nevada Industrial Insurance Act, upon specific questions hereinafter stated.

You have called our attention to Section 30 of the Act which requires all employers, unless specifically excluded by other provisions of the Act, having two or more employees, to come under the Act and make contributions to the State Insurance Fund.

You have also called attention to Section 82 of the Act which authorizes and empowers the Commission to prosecute, defend and maintain actions to compel compliance with the provisions of the Act.

We have reworded your questions, to make clear the distinctions affecting the rulings as to each class of employees, and as reworded, state the questions as follows:

QUESTIONS

1. Are named entertainers, as for example Jimmie Durante, Eddie Cantor, Betty Hutton, etc., and their supporting casts of theatrical and stage performers, included within the group of "employees" that are excluded from the compulsory provisions of the Act?

2. Are dance bands whose chief business is playing for dances, though they might participate in stage performances as musical supporting casts, included within the group of "employees" that are excluded from the compulsory provisions of the Act?

3. Are chorus girls regularly employed by the hotel or club, etc., as for example the Riverside Starlets or Mapes Skylets, included within the group of "employees" that are excluded from the compulsory provisions of the Act?

4. Are regularly employed stage hands in whatever category they may fall, as for example electricians, property men, scene shifters, etc., whose work is in the nature of trade work or labor for the show, included within the group of "employees" that are excluded from the compulsory provisions of the Act?

OPINION

The Nevada Industrial Insurance Act, as reenacted in Chapter 168, Statutes of 1947, page 569. Section 11 of the Act was amended in 1953 by Chapter 102, page 99; and this section was again amended by Chapter 439, Statutes of 1955, page 915.

The pertinent section, being Section 11(b), Statutes of 1947, reads as follows:

The term "employee" excludes:

(b) Any person engaged in household domestic service, farm, dairy, agricultural, or horticultural labor, or in stock or poultry raising, except as otherwise provided herein.

In 1953 the Legislature left Section 11(b) unchanged but added Subsection (c), of content which appears to have no bearing upon this problem.

In 1955 the Legislature amended Section 11 subsection (b) to read as follows:

The term "employee" excludes:

(b) Any person engaged in household domestic service, *as a theatrical or stage performer but not including employees of bona fide producers of motion pictures*, farm, dairy, agricultural, or horticultural labor, or in stock or poultry raising, except as otherwise provided herein. (Italics supplied.)

The portion that we have italicized is the new material of 1955.

Our problem therefore is to construe the new material with reference to the entire section as formerly existing and constructions placed thereon, and as requested in the questions that you have posed.

Before striking at the heart of the problem we wish to comment briefly and critically upon the language used in the amendment of the year 1955. It is unfortunate and does not express what the Legislature obviously intended. In effect it states this, that certain persons are not "employees" within the meaning of the Act, including persons engaged in household domestic service as (or if their work is) theatrical or stage performers. In effect it states that certain of the household domestic servants are theatrical or stage performers, and infers that certain of the domestic servants are not theatrical or stage performers. We shall construe the statute under the meaning that it was intended to embody and as if it read as follows:

The term "employee" excludes:

(b) Any person engaged in household domestic service; any person engaged as a theatrical or stage performer but not including employees of bona fide producers of motion pictures; also persons employed at farm, dairy, agricultural, or horticultural labor, and in stock or poultry raising except as otherwise provided herein.

In *Ex Parte Siebenhauer*, 14 Nev. 365, at 368, the court said:

In order to reach the intention of the legislature, courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to an absurdity or manifest injustice, but may in such cases modify, restrict or extend the meaning of the words so as to meet the plain, evident policy and purview of the act and bring it within the intention which the legislature had in view at the time it was enacted.

The definitions of "employee" contained in the compensation acts, or statements as to who shall be deemed employees, are to be broadly or liberally construed, in order to effectuate the purpose of the legislation, * * * 71 C.J. Art. 160, p. 417—Workmen's Compensation Acts.

See also: *Costley v. Nevada Industrial Insurance Commission*, 53 Nev. 219, at 225.

Conversely in a section—Section 11(b)—that enumerates the employees that are to be excluded from the benefits of the Act, a strict construction must be followed, extending the exclusion no further than strict construction requires.

The Workmen's Compensation Acts of the several states differ greatly as to the elective features, the maximum number of employees with an employer that are permitted before the compulsory provisions attach, and the fields of employment that are not mandatorily covered by the Act.

In this respect the Nevada statute will bear close inspection. It appears to be a correct statement of the Nevada law to observe, that unless the employees are excluded under the provisions of Section 11, or unless excluded under the provisions of Section 23, upon the theory of interstate commerce, or unless excluded under the provisions of

Section 30, (one employee only with the employer), it is the mandatory duty of all employers to comply with the provisions of the Act and pay to the Nevada Industrial Commission, the insurance premiums required under the law by the commission. Also, we observe that under Section 37 of the Act that even though the employer is not required to cover under the Act, those employees enumerated in Section 11(b), he is privileged to do so. Also, we observe that under Section 33 of the Act, an employer who employs less than two employees, and is for that reason not required to cover the employee with the insurance afforded by the Act, may nevertheless elect to do so.

We now consider the phrase that was added by the Legislature of 1955, namely, "as a theatrical or stage performer but not including employees of bona fide producers of motion pictures." The word "theater" means "to see." *Bell v. Mahn*, 15 A. 523, 1 L.R.A. 364. "Among the ancients it (theater) signified an edifice in which spectacles or shows were exhibited for the amusement of spectators, as its derivation from the Greek verb 'to see' plainly shows." "Performer" is defined by Webster as "one who performs; especially one who executes an undertaking, fulfills a promise, or acts a part in some performance; a worker; doer."

It follows then that a "stage performer" is one who performs upon the stage. Under the wording of the statute of "theatrical or stage performer" it is clear that the words "theatrical" and "stage" are intended to be used synonymously.

For the reasons hereinbefore given it is therefore our opinion that Question Number 1 (big name entertainers) clearly must be answered in the affirmative.

We are further of the opinion that Question Number 2, (dance bands) must be answered in the negative. Such persons are not always, although sometimes, upon the stage. In a strict sense we doubt that they can be characterized as "theatrical or stage performers." We doubt that the rendition of their music can properly be called a "performance." We apply strict construction rules and arrive at the conclusion that they are not within the group of employees that are excluded from the compulsory provisions of the Act. We conclude that insurance must be carried upon such employees.

We are of the opinion that Question Number 3 (chorus girls, e.g., *Riverside Starlets* and *Mapes Skylets*) must be answered in the affirmative. Such persons perform upon the stage. They are theatrical. Except for practice and work in perfecting their acts, we believe that their work is entirely that of a "theatrical and stage" performer. We arrive at this conclusion reluctantly for we see no good reason why the Legislature has seen fit to deprive such employees of the benefits of compulsory insurance. However, the language of the Act is clear and it is equally clear that the work of such employees is entirely theatrical, i.e., it is addressed to the sense of sight and hearing, but always sight. The language of the legislative provision permits no other construction. However, as we have formerly shown, the door has been left open by which the employers of such employees may (although not required to do so) provide for such employees the benefits of the insurance afforded by the Nevada Industrial Insurance Act.

We are further of the opinion that Question Number 4 (stage hands,

mechanics, etc.) must be answered in the negative. Such persons are not theater or stage performers within the meaning of the legislative intent of exclusion. Such persons are not excluded from the benefits of the Act. Insurance upon such employees must be carried with the Nevada Industrial Commission, unless excluded under one of the other provisions heretofore mentioned.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

171—Nevada State Department of Health. Statute providing sanitation and health regulations (Secs. 2816–2823 N.C.L.) may be applied to highway construction camps, only.

CARSON CITY, May 25, 1956.

MR. W. W. WHITE, *Director, Division of Public Health Engineering, Nevada State Department of Health, 755 Ryland Street, Reno, Nevada.*

DEAR MR. WHITE: We have your inquiry of May 18, 1956, requiring an opinion of this department, which we quote in part as follows:

The purpose of this letter is to obtain opinion in application of the Act, "Sanitation of Camps," N.C.L., Secs. 2816–2823, inclusive. Can the application of this Act be generally applied to any construction camp of five or more persons, as in the title of the Act; or, is the application specifically limited to a "highway construction camp" as described in Sec. 2816?

You have explained that the practice has been to limit the application of the Act to highway construction camps.

QUESTION

Can an Act entitled "An Act regulating the sanitation and ventilation in and at camps where five or more persons are employed; and providing a penalty for the violation thereof," be applied generally to all construction camps employing five or more persons?

OPINION

The answer to the question is in the negative.

The statute is Chapter 47, Statutes of Nevada 1923, page 57 (Secs. 2816–2823, N.C.L. 1929).

We find no amendments to the statute as originally enacted.

In your communication it is suggested that the title to the Act is broad and could include highway construction camps and all other construction camps employing the requisite number of persons. The Act, however, limits proceedings taken thereunder in Section 1 to "highway construction" camps. In Section 4 in part it is provided: "For every *such camp* there shall be provided * * *." In Section 5 in part it is provided: "All garbage, kitchen wastes and other rubbish in *such camp* shall be deposited * * *." In Section 6 in part

mechanics, etc.) must be answered in the negative. Such persons are not theater or stage performers within the meaning of the legislative intent of exclusion. Such persons are not excluded from the benefits of the Act. Insurance upon such employees must be carried with the Nevada Industrial Commission, unless excluded under one of the other provisions heretofore mentioned.

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it is provided: "It shall be the duty of any person, firm, corporation, agent or officer of a firm or corporation employing persons to work in or at camps to which the provisions of *this act apply* * * *." In Section 7 in part it is provided: "*any camp to which the provisions of this act may apply*; * * *" and "*Any camp coming under the provisions of this act* * * *." Also in Section 8 it is provided: "*any camp coming under the provisions of this act* * * *." (Italics supplied.)

It is therefore very clear that the Legislature intended to limit the application of the Act, and inferred in each of the sections from which we have quoted that not all construction camps employing five or more persons were to come under the provisions, but only "highway construction" camps.

One point remains to be considered, namely, does the fact that the title is sufficiently broad to include other camps change the result?

We quote from Sutherland Statutory Construction, Third Edition, Vol. 1, Sec. 1720, as follows:

That a title is broader than the act it captions is not ground for invalidating the act, so long as the title is not actually misleading. The body of an act need not contain all the provisions which are possible under its title. If, therefore, the title of a statute is duplicitous, but the body is devoted to a single legislative object which has been expressed in the title, the extra subject mentioned in the title will be disregarded and the act sustained.

It therefore follows that the body of the Act, which is clearly expressed applying only to highway construction camps, will control, despite the fact that the title might have been suitable to sustain an Act which might have been applicable to all construction camps of requisite size.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

172—Purchasing Department. State Purchasing Director authorized to purchase material in excess of that requested by using agency.

CARSON CITY, May 29, 1956.

MRS. AVIS M. HICKS, *Acting Director, State Purchasing Department, Carson City, Nevada*.

DEAR MRS. HICKS: Your letter dated May 21, 1956 requests the opinion of this office upon the following facts and question:

FACTS

Certain automobiles were acquired by our department as a quantity in excess of a quantity requisitioned by a using agency. These vehicles were held in our stock for future sale to other using agencies. The excess number of vehicles had

it is provided: "It shall be the duty of any person, firm, corporation, agent or officer of a firm or corporation employing persons to work in or at camps to which the provisions of *this act apply* * * *." In Section 7 in part it is provided: "*any camp to which the provisions of this act may apply; * * **" and "*Any camp coming under the provisions of this act * * **" Also in Section 8 it is provided: "*any camp coming under the provisions of this act * * **" (Italics supplied.)

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DEAR MRS. HICKS: Your letter dated May 21, 1956 requests the opinion of this office upon the following facts and question:

FACTS

Certain automobiles were acquired by our department as a quantity in excess of a quantity requisitioned by a using agency. These vehicles were held in our stock for future sale to other using agencies. The excess number of vehicles had

been acquired for the reason that it was, under the particular circumstances, economically advantageous to the State to purchase a quantity larger than the amount requisitioned by the using agency. Under certain conditions, purchasing in excess of immediate needs has been considered by our office to be good purchasing practice; especially when there is no question of the need for the material by other using agencies within the near future.

QUESTION

Is the State Department of Purchasing authorized to make such purchases in excess of a requisition and hold the excess for future sale?

OPINION

The answer is in the affirmative, and is found in the fundamental policy of the Act itself as expressed in its several sections. (Chap. 333, 1951 Stats., as amended.)

The object of the Act is to provide a method of controlled buying whereby the greatest amounts both in quantity and quality may be obtained for the least amount of expenditure from public funds.

To this end the Director of Purchasing is authorized to classify materials and to set up schedules for purchasing in large quantities upon estimates of requirements from the various using agencies. This direction is found in Sections 14, 15 and 16 of the Act.

While it is obvious that the Director, in order to effect a controlled program, must stay reasonably close to the amounts required by the using agencies, it is still to be remembered that he is authorized to purchase upon estimates made by the using agencies for future needs. This of course anticipates that there may, at times, be an excess in stock.

This policy of scheduled purchasing in bulk upon estimated future need is, of course, designed for that type of commodity lending itself to scheduled purchasing. Whether automobiles are of this type, this office is unable to say. However, even if the director is making a non-scheduled purchase for a using agency there is no requirement, under the Act, which limits such purchases only to purchases requested by a using agency. In this regard Section 27 of the Act leaves it up to the Director to formulate the rules for this purpose. Thus, if the Director, in light of his experience, determines that it will be advisable, because of marketing conditions or other factors, to purchase more of the particular nonscheduled commodity than is requested, he may do so. In which event he would be in compliance with Section 10 of the Act which provides as follows:

The director, in all his purchasing and property control activities, shall pursue a policy of securing the greatest possible economy consistent with grades or qualities of supplies and services that are adapted to the purposes to be served.

We are aware of the provisions of Section 20 which provides that in advertising for bids or offers to sell from the suppliers, the advertisement must contain the names and locations of the agencies for which the purchase is being made. Whatever the purpose of this provision we do not understand it to mean that, if there is a demand for

some nonscheduled item, the Director cannot take advantage of a good market and purchase more than is required by the particular request, if in his judgment he feels it will be economically advantageous to the State.

This is further supported by the fact that the Department of Purchasing pays for its purchases from a Revolving Fund. Thus, the Director has a fund from which he can make his purchases of material which may go directly to the using agency or may be held in stock for future use. So long as the material is ultimately purchased by the using agency and the department's Revolving Fund reimbursed, the requirements of the law have been complied with. It might well have been otherwise if, upon each purchase made by the Director, the fund of the particular using agency was used to pay the supplier directly.

We conclude, therefore, that the Director may stock new material which is acquired in excess of the amount of material requested by a using agency.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

173—Nevada Liquefied Petroleum Gas Board—Board exists and also derives and exercises its authority under the Act creating it. All rules and regulations promulgated by said board must be pursuant to, and not in excess of, the authority expressly or impliedly delegated it under said Act. Regulations adopted by said board authorizing an unlicensed person to operate under the authority of a license issued to another, and granting licenses under conditions at variance with minimum standard requirements, are both beyond the authority of the board.

CARSON CITY, June 1, 1956.

MRS. FLORENCE M. KREBS, *Secretary, Nevada Liquefied Petroleum Gas Board, Carson City, Nevada*.

DEAR MRS. KREBS: Reference is made to your letter of May 23, 1956, wherein you request the opinion of this office on the following inquiries:

1. Is it illegal for one to engage in the business of selling, delivering, and in general dealing in liquefied petroleum gas in the State of Nevada while operating under the authority of a license issued another?
2. Is the Nevada Liquefied Petroleum Gas Board authorized to grant a license permitting an applicant to engage in the usual activities of a liquefied petroleum gas dealer under conditions at variance with minimum standard requirements?

OPINION

Chapter 93, Statutes of Nevada 1953, created the Nevada Liquefied Petroleum Gas Board, and defined said board's powers and duties. Section 2 thereof authorizes the board to make, promulgate and enforce

some nonscheduled item, the Director cannot take advantage of a good market and purchase more than is required by the particular request, if in his judgment he feels it will be economically advantageous to the State.

This is further supported by the fact that the Department of Purchasing pays for its purchases from a Revolving Fund. Thus, the Director has a fund from which he can make his purchases of material which may go directly to the using agency or may be held in stock for future use. So long as the material is ultimately purchased by the using agency and the department's Revolving Fund reimbursed, the requirements of the law have been complied with. It might well have been otherwise if, upon each purchase made by the Director, the fund of the particular using agency was used to pay the supplier directly.

We conclude, therefore, that the Director may stock new material which is acquired in excess of the amount of material requested by a using agency.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

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OPINION

Chapter 93, Statutes of Nevada 1953, created the Nevada Liquefied Petroleum Gas Board, and defined said board's powers and duties. Section 2 thereof authorizes the board to make, promulgate and enforce

certain regulations for the locating, handling, storing, transporting, etc., of liquefied gas as are reasonably necessary for the protection of public health, welfare and safety, and to be in substantial conformity with the published standards of the National Board of Fire Underwriters as recommended by the National Fire Protective Association. Pursuant to the authority vested in it, the board adopted a code of Rules and Regulations dated April 1, 1954, under which it now operates.

The rules and regulations adopted set up the minimum requirements and conditions which all applicants for a license must meet or can furnish in the handling of liquefied petroleum gas before a license may issue. Provision for board meetings, examinations for licenses, variances, and certain other general functions of the board are also made in said rules and regulations.

It is an elementary principle of law that an administrative board or commission of the type under discussion exists only by virtue of the Act creating it, and that all rules and regulations promulgated by such board or commission must be within the scope of the authority granted it under the Act or which may be reasonably implied therefrom. It appears that the board here concerned has properly set up requirements and standards of the type directed in the Act to enable it to judge and pass upon the qualifications of applicants wishing to install, construct and operate equipment for the handling, transportation, storage, etc., of liquefied petroleum gas and engage in the business of selling such gas. Health, safety and public welfare are to be protected and the Legislature wisely prescribed a standard to be followed by the board and to be established as a prerequisite to the handling and selling of liquefied petroleum gas or operating equipment used in connection therewith.

Only those persons licensed by the board may engage in the business of handling, storing, transporting or selling liquefied petroleum gas or installing, constructing or operating equipment used in connection therewith. And they are accorded this privilege because they are qualified to do so. A license, being a personal privilege, cannot, as a general rule, be assigned to another. 33 Am.Jur. 333, Sec. 6. It is noted that the board has included in its rules a provision against the transfer of all licenses issued by it. Undoubtedly this was with the thought in mind of preventing persons otherwise unqualified from performing any acts or carrying on a business which only licensed persons are qualified to do. We believe, however, that it was the intent of the Legislature that agents or employees of a properly qualified licensee, and working under his supervision, instructions and control, may perform any of the acts such licensee himself is authorized to perform by reason of his license. Such intent is apparently expressed in Section 6 of the Act, where, included among the persons permitted to perform certain acts pertaining to the handling, sale, etc., of liquefied petroleum gas are "those authorized by the owner so to do."

An agent has been defined as "* * * a person authorized by another to act on his account and under his control." 2A, Words and Phrases, 474. And this definition includes "employee" which is practically synonymous. It is obvious, however, that one operating a separate and independent business and in nowise connected with a licensee

as herein described, and not acting under his control, does not become either an agent or employee of such licensee by handling, operating, installing or selling any of the equipment or products which the said licensee alone has been authorized to handle or sell. No one is entitled to the privileges conferred by a license without himself first qualifying and obtaining such license. To permit a licensee engaged in the liquefied petroleum gas business to arrange for the handling and sale of his products through others who are neither his agents nor employees, nor act under his control, would tend to place the operation of the business beyond the board's control and thereby defeat the purpose for which the Act was designed. If such other persons are properly qualified to handle and sell liquefied petroleum gas products, they have only to comply with the necessary procedure for obtaining a license for that purpose. Had the Legislature intended otherwise, it would have so provided in the Act. Neither are we able to read into the Act, by implication, anything different than as here stated.

The Legislature not only prescribed a standard to be followed by the board in determining the eligibility of persons seeking to engage in the liquefied petroleum gas business, but it also undertook to establish the assurance that such standard would not be diminished, impeded or destroyed. Section 9 of the Act provides "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 (by the board)." This brings us to an inquiry into the validity of the provision for granting variances contained in the board's Rules and Regulations.

In order that a rule or regulation of a public administrative body or officer may be valid it must be authorized, and it should also be uniform in operation, fair, nondiscriminatory, reasonable, appropriate, necessary, consistent with law and constitutional. 73 C.J.S. 420, Sec. 103. And, ordinarily, an administrative agency may not waive, suspend or modify the operation of its own rules and regulations in individual cases or ignore or violate them. 73 C.J.S. 433, Sec. 111.

Application of these rules was appropriately made in *Railroad Commission v. Shell Oil Company*, 139 Tex. 66, 161 S.W.(2d) 1022. There the Railroad Commission was created pursuant to statute for the purpose of preventing waste in the oil fields of Texas, being specifically authorized to promulgate its own rules and regulations. One rule adopted by the commission was to the effect that no gas or oil well in certain districts could be drilled within 660 feet of an existing well, provided, however, that the commission might, under conditions therein mentioned, grant an exception to permit drilling within a shorter space than that provided. An application for a permit to drill within a shorter space than required was granted by the commission under the authority reserved by it in the rule to make exceptions.

In ruling on the question as to whether the commission acted with authority in granting the permit the Supreme Court of Texas, speaking through Chief Justice Alexander, said:

The contention of the Railroad Commission that in the exercise of its authority to regulate the oil industry it has the power to grant or refuse a special permit in its discretion, is unsound * * * The exercise of such discretion

would grant to the commission arbitrary power to discriminate between individuals without any standard or guide to govern it in the exercise of its discretion * * * It is a well established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of a license or permit as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.

In the facts at hand, in each instance where the Nevada Liquefied Petroleum Gas Board grants or refuses a permit under its rule authorizing a variance, we have a situation analogous to that stated in the above case. The granting or refusing of a permit under such provision places the board in the position of acting on applications without regard to a rule or guide. This is contrary not only to the legislative intent, but also to what it specifically prescribed. The rule providing for variances is unauthorized by the Act and is, therefore, null and void.

From the foregoing discussion and authorities cited, it is the opinion of this office that the first question should be answered in the affirmative and the second question should be answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

174—Governor—State of Nevada. Governor has authority to appoint the National Association for the Blind to make survey and report as a basis for legislative recommendations, despite nondisclosure provisions of statute.

CARSON CITY, June 7, 1956.

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

DEAR GOVERNOR RUSSELL: We have your inquiry of June 5, 1956 requiring a construction by this department of the statute providing for aid to the blind and the statute creating the Public Welfare Department.

You have inquired if an independent group acting and serving in your behalf, designated National Association for the Blind, to obtain confidential data regarding aid to the blind, obtaining information from the Nevada State Department of Welfare and otherwise, reporting the information to you to be used by you in the making of recommendations of amendments to the Legislature, but otherwise kept as confidential material, may be so commissioned.

Mr. Suverkrup, Executive Assistant, specifically calls attention to Section 9 of the Act, hereinafter quoted, and asks that we advise whether a survey designated to ascertain conditions existing among

would grant to the commission arbitrary power to discriminate between individuals without any standard or guide to govern it in the exercise of its discretion * * * It is a well established principle of constitutional law that any statute or ordinance regulating the conduct of a lawful business or industry and authorizing the granting or withholding of a license or permit as the designated officials arbitrarily choose, without setting forth any guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled, is unconstitutional and void.

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From the foregoing discussion and authorities cited, it is the opinion of this office that the first question should be answered in the affirmative and the second question should be answered in the negative.

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Mr. Suverkrup, Executive Assistant, specifically calls attention to Section 9 of the Act, hereinafter quoted, and asks that we advise whether a survey designated to ascertain conditions existing among

the blind of the State with a view to inaugurating corrective legislation if required, is not an administrative function "relating directly to the provisions of" the Act in question.

QUESTION

Would the authorization of the gathering of such information in this manner, for such purposes, be in violation of law?

OPINION

We are of the opinion that the answer is in the negative, and also of the opinion that the law authorizes such a survey of conditions to be made.

The Act providing aid for blind persons is Chapter 369, Statutes of 1953, p. 703. Sections 12, 35 and 42 are amended 1955 Statutes, p. 456. Also Section 48.1 is added in 1955, p. 456. Section 10 of the Act places the administration in the hands of the Nevada State Welfare Department.

Section 9 of the Act provides as follows:

Information with respect to any individual claiming aid to the blind shall not be disclosed by the Nevada state welfare department or any of its employees to any person, association or body *unless such disclosure is related directly to carrying out the provisions of this act.* (Italics supplied.)

The Legislature of 1949 created the State Welfare Department by Chapter 327, p. 673. Such Act has been amended in a number of particulars.

Section 4 provides that three members of the department (State Welfare Board) are to be appointed by the Governor.

Section 8 of the Act is amended by Chapter 249, Statutes of 1953, p. 333, and provides inter alia that the State Welfare Board shall have rule making power and shall appoint with the approval of the Governor, a State Welfare Director and that among other duties it shall be the duty of the Director "(2) To advise and make recommendations to the governor or legislature relative to the public welfare policy of the state."

Section 9 is also amended by Chapter 249, Statutes of 1953, and provides among other things that it shall be the duty of the State Welfare Director:

(7) To make reports to the state welfare board, to supply the legislature with material on which to base legislation, and to present the biennial budget of the department to the legislature in conjunction with the state budget officer.

(8) To make a biennial report to the governor of the condition, operation and functioning of the department.

It is therefore clear that the information sought to be obtained might properly be obtained by the Welfare Department and might properly be demanded by the Governor from the Welfare Department, and communicated to the Legislature by way of recommended amendments to the existing law; also that this department is of the executive branch of the government, appointed by and working for the chief executive officer, the Governor.

For the information to be obtained and evaluated by the National Association for the Blind, from the Welfare Department and other sources, to be used by the Governor in recommending legislation, is to the same end, and should meet with the same ruling, that is, it is a disclosure "related directly to carrying out the provisions of the act."

This ruling is also in harmony with the spirit of the Act providing aid for the blind, and since it is a remedial statute it should be liberally construed to effectuate its purposes.

We see also considerable advantage in the selection of this survey and fact finding agency being one of national scope, being specialists within the field and having findings as to other states to which to make comparisons.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

By D. W. PRIEST, *Deputy Attorney General*.

175—Nevada Real Estate Commission. 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 service they expect and receive compensation, are "real estate brokers" as defined in the statute.

CARSON CITY, June 8, 1956.

MR. GERALD J. MCBRIDE, *Executive Secretary, Nevada Real Estate Commission, 309 West Telegraph Street, Carson City, Nevada.*

DEAR MR. MCBRIDE: Receipt is acknowledged of your letter of the 4th requesting the opinion of this office on the following question:

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?

OPINION

Opinion No. 167, released from this office on May 7, 1956, ruled that a mortgage broker operating in *buying and selling first and second Trust Deeds and Mortgages*, is not a real estate broker as defined by statute. (Italics supplied.) This was for the reason that under the facts there stated, the broker merely buys or sells rights under a loan already existing prior to any act on his part.

An entirely different set of facts are given in the question above propounded. It involves mortgage brokers whose operations are *negotiating and processing original or purchase money trust deeds and mortgages*. (Italics supplied.) For a determination as to whether these acts come within the statute defining real estate brokers, we look to Section 2, Chapter 150, Statutes of Nevada 1947, as amended, which reads as follows:

A real estate broker within the meaning of this act, is any person, copartnership, association, or corporation who for

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The wording of the above section setting out who is a real estate broker is unequivocal and admits of no other meaning than that stated. Also, it is axiomatic that persons who act in negotiating and processing original or purchase money trust deeds and mortgages, do so in connection with negotiating a loan upon the real estate involved. In so acting, they come within the definition of real estate brokers and are therefore subject to the provisions of the Act.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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

176—Public Schools. Public school buses cannot be used to transport school children other than to school or to one of the activities set forth in Sec. 395, subparagraph 1 of the 1956 School Code.

CARSON CITY, June 12, 1956.

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

MY DEAR MR. DUNCAN: You have requested an opinion of this office as to whether school buses may be used to transport children of school age to activities other than those specifically set forth in Section 395 of the 1956 School Code.

You point out that transportation of children of school age to activities other than those set forth in Section 395 has been furnished during the summer vacation.

Section 395, subparagraph 1, reads as follows:

A board of trustees of a school district shall have the power to permit school buses or vehicles belonging to the school district to be used for the transportation of public school pupils to and from:

- (a) Interscholastic contests; or
- (b) School festivals; or
- (c) Other activities properly part of a school program.

another and for a compensation, or who with intention or expectation of receiving a compensation sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of, or offers or attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of, or lists or solicits prospective purchasers of any real estate or the improvements thereon; or who buys or offers to buy, sells, or offers to sell, or otherwise deals in options on real estate or the improvements thereon; or who collects or offers or attempts or agrees to collect rental for the use of real estate or the use of real estate or the improvements thereon; or who collects or offers or attempts or agrees to collect rental for the use of real estate or the improvements thereon; *or who negotiates or offers or attempts or agrees to negotiate a loan upon real estate.* (Italics supplied.)

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OPINION

It is the opinion of this office that the use of state-owned school buses for the transportation of school children to activities other than those set forth in Section 395 of the 1956 School Code, or to schools, is contrary to law, whether such transportation be during the school term or during vacation.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

177—Motor Vehicles—Registration of motor vehicles is accomplished by a procedure requiring the taking and processing of an application by the County Assessors of the State and subsequent approval thereof by the Motor Vehicle Registration Division of the Public Service Commission which alone has authority to issue certificate of registration. Duplicate processing or handling of any application does not entitle a county to receive more than a single payment of 75 cents as provided for by statute.

CARSON CITY, June 15, 1956.

MR. RICHARD HERZ, *Director, Motor Vehicle Registration Division, Public Service Commission, Carson City, Nevada.*

DEAR MR. HERZ: Reference is here made to your letter of May 21, 1956, requesting the opinion of this office on the question hereinafter propounded and arising out of those certain facts as below stated.

STATEMENT OF FACTS

We understand that frequently applicants for motor vehicle registration are unable to present satisfactory certificate of prior registration to the vehicle they are seeking to register or license so as to entitle them to a permanent license. This may result from the fact that the vehicle involved belongs to an estate which has not been probated; that transfer from a former owner has not been completed; that a previously issued registration certificate has been lost or for some one of several other reasons an applicant has not satisfied the prerequisites for issuance of the license sought. In such situations, it is the practice of the County Assessors to issue a temporary license in the form of a windshield sticker, effective for a prescribed period to enable the applicant to obtain and submit proper evidence of ownership. This necessarily requires extra or duplicate processing of the application with no additional fees to the Assessor's office rendering the additional service.

It appears that during the years 1952, 1953, 1954, and 1955, the Washoe County Assessor's Office issued 1,304 temporary licenses or permits out of which number 1,128 were later "redeemed" or converted into permanent licenses, necessitating the applications therefor being "handled twice." For that reason the County Assessor of Washoe County contends that in addition to the seventy-five (75¢) cents for each of these transactions which the said county has already received, it is still entitled to receive the further sum of seventy-five (75¢) cents

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for each one because of the duplicate processing of the license application. The claim is based upon existing laws governing refunds or distributions to counties from the moneys received from sale of licenses and constituting the Motor Vehicle Fund.

QUESTION

From the facts stated the following question is submitted:
Of the moneys received by the Motor Vehicle Registration Division of the Public Service Commission from the registration of motor vehicles and credited by the State Treasurer to the account of the Motor Vehicle Fund, what portion thereof is required by law to be distributed or paid to the various counties of the State issuing the licenses?

OPINION

Since 1919 a myriad of laws pertaining to motor vehicles have appeared in our statutes, being supplemented and amended by practically every session of the Legislature to the present time. After a careful study to determine which of these are applicable, we feel that only those herein mentioned govern or are pertinent to the question and facts with which we are here concerned.

Each County Assessor of the State of Nevada is made an ex officio officer of the Motor Vehicle Division of the Public Service Commission, commonly referred to as the "Department," and each is charged with the performance of certain acts and duties in connection with the registration of motor vehicles. Chapter 202, Statutes of Nevada 1931, Sections 2(b), 29(a), being Sections 4435.01(b) and 4435.28 (a) N.C.L., 1931-1941 Supp. Such acts and duties include the taking, handling and processing of applications for such registration from residents of his county in accordance with certain prescribed procedure as provided for in Section 4435.05(a) (b) N.C.L., 1943-1949 Supp., as amended by Chapter 57, Statutes of Nevada 1953, Section 1.

In order to reimburse the counties of the State for expenses incurred in the processing of applications for registration, the Legislature created the Motor Vehicle Fund and provided for annual payments therefrom to the counties, i.e., a certain sum for each registration issued therein. Section 4435.29(a) (c) N.C.L., 1943-1949 Supp., as amended by Chapter 216, Statutes of Nevada 1953, Section 7, said paragraphs (a) and (c) now read as follows:

(a) There is hereby created in the state treasury a fund which shall be known as the "Motor Vehicle Fund." The state treasurer shall deposit all money received by him from the department or otherwise under the provisions of this act in such motor vehicle fund.

(c) * * * the department will, at the end of the year, certify claims to the board of examiners in favor of each and every county of the state to the amount of *seventy-five cents for each and every registration issued in that county* * * *. (Italics supplied.)

We believe that any determination made as to the amount that can

be paid from this fund to a county of the State for its assistance or functioning in the registration of motor vehicles must rest upon the meaning of the word "registration" as used in Section (c) of the statute last above cited. Under Section 4439.01i N.C.L., 1943-1949 Supp., registration, as it applies to motor vehicles, is defined as the:

Registration certificate or certificates and registration plates issued under the laws of this state pertaining to the registration of motor vehicles.

It is apparent from a study of this definition that registration of a motor vehicle in the State is not completed in the office of the County Assessor where an application is submitted. Acting in his capacity as an ex officio officer of the department, he merely processes or handles it by obtaining the necessary information, collecting the proper fee, and assigning and issuing the license plates. These are all incident to or steps leading to final issuance of a registration certificate. Issuance of temporary permits or licenses to some applicants until they can secure additional evidence of their right to register a particular motor vehicle, and which evidence they afterwards furnish, is still only a part of the procedure, necessary for them, in obtaining a registration certificate. It is not until all prerequisite procedure has been complied with in the Assessor's office, whether it be by one or more handlings of the application, that it is forwarded to the Motor Vehicle Registration Division in Carson City for final approval and issuance of a certificate of registration. Then and only then is registration completed. What transpires in accomplishing registration brings the completed Act clearly within the statutory definition of that term as above quoted. And statutory definitions or interpretive statutes existing in the law should be relied upon in determining the meaning of particular words for they express the intent of the Legislature. Sutherland Statutory Construction, Vol. 2, Sec. 3003.

Applying this meaning to the word "registration" as it appears in paragraph (c), Section 4435.29 N.C.L., 1943-1949 Supp., quoted above, we are able to reach a final determination of the question herein presented. It is the opinion of this office, then, that for each certificate of registration issued by it, the department is required to pay the sum of seventy-five (75¢) cents from the Motor Vehicle Fund to the county processing the application for such certificate. Since this payment is based upon each "registration issued," nothing is due the county for processing or handling an application, whether once or several times, until and unless the final act is completed, viz., the issuance of a registration certificate by the department. We must conclude that in no case would a county be entitled to receive more than seventy-five (75¢) cents for processing or handling an application upon which the department issues a certificate of registration.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

178—Interpretation of Chapter 122, Statutes of 1955, page 165, relating to the election of public hospital trustees and their terms of office.

CARSON CITY, June 18, 1956.

HONORABLE A. D. JENSEN, *District Attorney, Washoe County, Reno, Nevada.*

DEAR MR. JENSEN: This concerns your letter of June 12, 1956, relating to the election of hospital trustees.

You state that of the five trustees of the Washoe Medical Center, the terms of office of three expire in January, 1957. Thus, there would ordinarily be three elected this year with two holdovers; that it appears, however, that Chapter 122, 1955 Statutes, page 165, requires that in the general election of 1956 all five positions on the board are to be filled by election, and that you have so advised the County Clerk. You ask that this office also study the matter and state in writing either our agreement or disagreement with your interpretation of the 1955 amendment of this law.

OPINION

The pertinent portion of the above-cited statute provides as follows:

Should a majority of all the votes cast upon the question in each county concerned be in favor of establishing such county public hospital, the board or boards of county commissioners shall immediately proceed to appoint five (5) trustees chosen from the citizens at large, with reference to their fitness for such office, all residents of the county or counties concerned, not more than three (3) to be residents of the city, town, or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital. The said trustees shall hold their offices until the next following general election when five (5) hospital trustees shall be elected and hold their offices, three (3) for two (2) years and two (2) for four (4) years, and at subsequent general elections the offices of the trustees whose terms of office are about to expire shall be filled by the nomination and election of hospital trustees *for a term of four (4) years* in the same manner as other county officers are elected. *All such trustees of county public hospitals now in office shall, after the next general election at which a complete, new board of five (5) trustees be elected, three (3) for two (2) years and two (2) for four (4) years, subsequently be elected for terms of four (4) years in the same manner as other county officers are elected.* * * *. (The italicised wording constitutes the new material added in 1955.)

This office agrees with your interpretation of the section. While we are aware of the difficulty involved, inasmuch as Washoe would have two holdover trustees, nevertheless, the provision calls for the election in 1956 of five trustees.

It may be of some help if we express our thoughts as to why we think this last complete sentence, as above quoted, was added in 1955.

One of the objectives of this type of law is to provide terms of office

in which there will be no possibility of complete turnover of personnel at any one time. In other words, staggered terms of office. Thus, if such objective is properly effected there would always be certain officials having had experience in the office who will hold over while new members are oriented.

It appears to have been thought by the Legislature in 1955 that such an objective was not properly effected by this law prior to 1955. It is true that the law as it then existed made no mention of a four year term of office. Now, if you reason that, inasmuch as a four year term was not set by the statute, the trustees were to be elected in succeeding elections on the basis of three members for two years and two members for four years, it necessarily follows that at every other general election five trustees would have to be elected. Under such an arrangement it would be quite possible that there would be, following an election, a board of trustees composed of completely new members. It appears to have been this objectionable quality of the statute that prompted the addition, in 1955, of the wording, "for a term of four (4) years." In light of the wording of the statute referring to the election of trustees "in the same manner as other county officers are elected," and in light of Section 4781, N.C.L. 1929, wherein it is provided that the county officers are to be elected for terms of four years, it could have been concluded that the law prior to 1955 called for four-year terms following the second general election after the establishment of a hospital. Under such an interpretation the statute would not have been objectionable and there would have been no necessity for the 1955 amendment. Nevertheless, the Legislature, in 1955, did provide the amendment, obviously for the purpose of attempting to effect terms of office which would be staggered.

Now, having the foregoing statement in mind and placing the interpretation on the former statute as was placed by the 1955 Legislature, we arrive at what was added to the law in 1955. It will be observed that preceding the last complete sentence of the provision, as above quoted, the Legislature added the wording "for a term of four (4) years." What would be the effect of this addition if the last sentence, as above quoted, had not also been added? The effect would have been that at the 1956 election in some counties (although not in Washoe County), by reason of the date of the establishment of the hospital, there would have been five trustees elected, all of whom would have been elected for a term of four years. Thus, in 1960 there would again be an election of five trustees, and so on every four years. Under such an arrangement the objective of staggered terms would be completely defeated. The Legislators, apparently being aware of this, added the last sentence as above quoted. The addition, then, of this last sentence has the effect of starting every county on a basis which would provide for an election in 1956 of three members for two years and two members for four years and thereafter for a term of four years each, as their terms expire. This, of course, would provide for the staggered terms of office as was originally intended.

We are aware that this amendment has a somewhat adverse effect on those counties having holdover trustees in 1956, such as Washoe County. While we think that the amendment might have been drawn

to eliminate this embarrassment, this office is concerned only with the interpretation of the law as it stands.

In this connection it should also be stated that the question may arise as to why it should be necessary for those counties in the position of Washoe to do an act which on the face of it appears to be required because the Legislature failed to take into account the varying positions of the counties, and thus requiring an act which for some counties would appear not only to be useless but expensive. The answer to that is, of course, that aside from the fact that this office is not at liberty to say that the Legislature was not fully aware of all the factors involved, it may well be, and the wording of the amendment indicates, that the Legislature intended that uniformity in all the counties, insofar as the terms of office of hospital trustees are concerned, is to be attained by the expedient of starting from scratch in all counties beginning with the election of 1956.

It should be added, also, that this office is not, by this opinion, expressing itself concerning the subject of the rights of elected officials whose terms of office are altered by the Legislature prior to the expiration date of office set by the law under which they were elected.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

179—Elections—Candidates for nomination for elective office shall file declaration not less than fifty days prior to the primary.

CARSON CITY, June 20, 1956.

HONORABLE A. D. JENSEN, *District Attorney, Washoe County, Reno, Nevada*.

Attention: William J. Raggio, Assistant District Attorney.

DEAR MR. RAGGIO: In your letter of June 11, 1956, you request the opinion of this office as to the correct date to be considered as the last day on which a declaration or acceptance of candidacy for office can be filed under Section 5 of the Primary Election Law, as last amended by Statutes of 1955, page 497.

It is the opinion of this office that the correct method of computing such date is to apply that date which is the 50th day preceding the day of the primary election without counting the day of election. This, exclusive of the exceptions found in subparagraphs 5(c) and 5(d) of Section 5. Thus, for the year 1956 the last day for filing would be July 16.

In support of this conclusion we refer you to the following Nevada Supreme Court decisions:

State v. Brodigan, 37 Nev. 458, 142 P. 520.

McCulloch v. Bianchini, 53 Nev. 101, 292 P. 617; same case on petition for rehearing, 53 Nev. 110, 297 P. 503.

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You may see also Opinions of the Attorney General of Nevada, numbers:

136, August 25, 1914,
84, July 25, 1916,
224, August 29, 1918,
130, April 5, 1934.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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

180—Public Schools—Not necessary for County School Boards to hold separate bond elections because more than one building is to be constructed or repaired. Notice to the public of the purposes for incurring such bonded indebtedness an essential element of procedure.

CARSON CITY, June 20, 1956.

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

MY DEAR MR. DUNCAN: This office is in receipt of an inquiry from you as to whether it is necessary for the county school boards of education to submit to the voters separate bond issues for each school to be built or repaired.

OPINION

Section 155 of the 1956 School Code provides the answer. Paragraph 1 thereof states:

1. The board of trustees of a county school district may, when in its judgment it is advisable, call an election and submit to the electors of the county school district the question whether the negotiable coupon bonds of the county school district shall be issued and sold for the purpose of raising money for the following purposes, and no others:

(a) Construction or purchase of new school buildings, including but not limited to teacherages, dormitories, dining halls, gymnasiums and stadiums.

(b) Enlarging or repairing existing school buildings, including but not limited to teacherages, dormitories, dining halls, gymnasiums and stadiums.

(c) Acquiring school building sites or additional real property for necessary school purposes, including but not limited to playgrounds, athletic fields and sites for stadiums.

(d) Purchasing necessary school equipment.

(e) Refunding of any outstanding valid indebtedness of the county school district, evidenced by bonds, when the interest rate or rates on the indebtedness are to be increased or any bond maturity is to be extended.

Paragraph 2 states:

Any one or more of the purposes enumerated in subsection 1, except that of refunding any outstanding valid indebtedness of the county school district evidenced by bonds, may,

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136, August 25, 1914,
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(b) Enlarging or repairing existing school buildings, including but not limited to teacherages, dormitories, dining halls, gymnasiums and stadiums.

(c) Acquiring school building sites or additional real property for necessary school purposes, including but not limited to playgrounds, athletic fields and sites for stadiums.

(d) Purchasing necessary school equipment.

(e) Refunding of any outstanding valid indebtedness of the county school district, evidenced by bonds, when the interest rate or rates on the indebtedness are to be increased or any bond maturity is to be extended.

Paragraph 2 states:

Any one or more of the purposes enumerated in subsection 1, except that of refunding any outstanding valid indebtedness of the county school district evidenced by bonds, may,

by order of the board of trustees entered in its minutes, be united and voted upon as one single proposition.

It is clear, therefore, that Paragraph 2 refers to subparagraphs (a) (b) (c) and (d) of Paragraph 1.

It becomes apparent that the construction, or repair, of school buildings may be voted upon at a bond election as a single proposition, provided, however, that in compliance with Sections 156, 157 and 158 of the School Code, the resolution of the board initiating the bond election and the notice of election must state the purpose or purposes for incurring the bonded indebtedness, and this in turn calls for setting forth the building or buildings to be constructed or repaired with the money secured from the sale of the bonds.

This office can find no ambiguity in the sections of the law which have been cited and the answer to the inquiry is in the negative, i.e., there is no necessity for holding separate bond elections because more than one school building is to be constructed or repaired. Notice to the public is the essential element in order to so proceed.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

181—Public Service Commission—Nevada Tax Commission—Time and duty of registration of motor vehicle brought to this State for use in business, remains unchanged, irrespective of whether ownership is that of a natural person or artificial person. Opinion No. 115 of October 4, 1955.

CARSON CITY, June 21, 1956.

MR. RICHARD A. HERZ, *Director, Motor Vehicle Registration Division, Public Service Commission, Carson City, Nevada.*

DEAR MR. HERZ: We have your letter of April 30, 1956, requesting an opinion of this department upon the question stated, which we quote as follows:

QUESTION

Is a foreign corporation doing business in the State of Nevada, maintaining an office in this state subject to the licensing of a vehicle in this state, if the vehicle is used partly in this state? Also is the vehicle in question subject to the use tax of this state?

Subsequent correspondence between your office and this office concluded on June 4, 1956, has developed a statement of facts, making more clear the question to be passed upon as follows:

STATEMENT OF PERTINENT FACTS

A corporation domiciled in another state qualifies to do business in Nevada. It sets up an office in Nevada. It brings a car duly registered and licensed for the year 1956 in the state of domicile to Nevada, and uses the same in its business part time in Nevada. The car also is working part time in the service of the corporation in the state in which the corporation has its domicile. Question: Does the nonresident corporation have a duty under these circumstances to register, pay

by order of the board of trustees entered in its minutes, be united and voted upon as one single proposition.

It is clear, therefore, that Paragraph 2 refers to subparagraphs (a) (b) (c) and (d) of Paragraph 1.

It becomes apparent that the construction, or repair, of school buildings may be voted upon at a bond election as a single proposition, provided, however, that in compliance with Sections 156, 157 and 158 of the School Code, the resolution of the board initiating the bond election and the notice of election must state the purpose or purposes for incurring the bonded indebtedness, and this in turn calls for setting forth the building or buildings to be constructed or repaired with the money secured from the sale of the bonds.

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personal property tax upon, and license the car for the year 1956 in Nevada (that is the remainder of the fiscal year) despite the fact that the car is registered and duly licensed in the state of domicile, in which state the personal property tax has been paid for the full fiscal year?

OPINION

We first observe that the answer to this problem is of very limited application, for we believe a corporation so situate will seldom have but one car in its service. Usually it will have cars assigned entirely to one office or geographic area (the area of domicile) and other cars assigned entirely to another office or geographic area (the area of the state in which it has qualified). Secondly, we have not overlooked the fact that states do not all follow the same fiscal year, also the fact that the fiscal year in Nevada is at this time in the process of change-over. Nevertheless, the problem is with us and these side glances can have no substantial bearing upon the answer to the problem posed.

The question posed is dual and we shall distinguish by referring to this dual question as "Question Number 1" and "Question Number 2."

With reference to Question Number 1, an opinion of this office of October 4, 1955, numbered 115, is very helpful. Later herein we will refer to the conclusions reached in that opinion and the effect of those conclusions with reference to this question.

Section 17 of the Act of 1931, as amended (Sec. 4435.16 N.C.L., 1943-1949 Supp.) was amended by Chapter 120, Statutes of 1951, page 156, which Section 17(a) reads as follows:

Except as otherwise provided in this section, a nonresident owner of a vehicle of a type subject to registration under this act, owning any vehicle which has been duly registered for the current year in the state, country, or other place of which the owner is a resident and which at all times when operated in this state has displayed upon it the registration number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without any registration thereof in this state under the provisions of this act and without the payment of any registration fees to the state; provided, nothing in this section shall be construed to permit the use of manufacturers' or dealers' license plates issued by any state or country by any such nonresident in the operation of any vehicle on the public highways of this state; provided further, *a nonresident owner of a vehicle of a type subject to registration in this state who, while residing in this state, accepts gainful employment within this state or who comes into the state for the purpose of being gainfully employed therein shall, for the purposes of and subject to the provisions of this act, be considered a resident of this state and pay such registration fees as provided for in this act*; provided further, nothing in this subparagraph shall be construed to require registration of vehicles of a type subject to registration under this act operated by nonresident common

motor carriers of persons and/or property, contract motor carriers of persons and/or property, or private motor carriers of property as stated in subparagraph (b) of this section. (Italics supplied.)

In the 1951 Act the paragraph entitled (b), which we have not quoted, sets out and makes clear the legislative intent that motor carriers conveying persons or property shall be regulated by the provisions of the law regulating their particular operation, even though the provisions of paragraph (a), hereinabove quoted, may be to the contrary. We mention this only to show the possibility of an exception to the application of the ruling of this opinion. That is to say, your statement does not show that you have in mind a corporation engaged in carrying persons or property for hire, and in the conclusion reached we do not include such an operation, and do not pass thereon.

The Legislature of 1955, Chapter 221, page 350, again amended Section 17(a), to read as follows:

Except as otherwise provided in this section, a nonresident owner of a vehicle of a type subject to registration under this act, owning any vehicle which has been duly registered for the current year in the state, country, or other place of which the owner is a resident and which at all times when operated in this state has displayed upon it the registration number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without any registration thereof in this state under the provisions of this act and without payment of any registration fees to the state; however, nothing in this section shall be construed to permit the use of manufacturers' or dealers' license plates issued by any state or country or by any such nonresident in the operation of any vehicle on the public highways of this state. Nothing in this subparagraph shall be construed to require registration of vehicles of a type subject to registration under this act operated by nonresident common motor carriers of persons or property, contract motor carriers of persons or property, or private motor carriers of property as stated in subparagraph (b) of this section.

Upon expiration of such nonresident registration or upon any transfer of the vehicle within the State of Nevada the owner shall immediately apply to register the vehicle in this state and shall pay registration and other fees as herein provided.

The Attorney General's Opinion No. 115 of October 4, 1955, formerly referred to, construed Section 17(a) as amended by the Statute of 1955, distinguishing it from the Act of 1951, with this language:

It can readily be perceived that the legislature intended by the 1955 bill to amend Section 17(a) of the Motor Vehicle Registration Act, and the line of their intention is indicated by the deletions and additions to the 1951 act.

From the 1955 act was stricken the proviso, "provided further, a nonresident owner of a vehicle of a type subject to registration in this state who, while residing in this state, accepts gainful employment within this state, or who comes into the state for the purpose of being gainfully employed therein, shall, for the purpose of, and subject to the provisions of this act, be considered a resident of this state and pay such registration fees as provided for in this act * * *," and to the same act was added, "Upon expiration of such nonresident registration or upon any transfer of the vehicle within the State of Nevada the owner shall immediately apply to register the vehicle in this state and shall pay registration and other fees as herein provided."

In that opinion the Attorney General concluded as to his construction of the amendment of 1955 with this language:

The 1955 legislature by the enactment of Chapter 221 of the 1955 Statutes, afford to persons who purchase their cars in foreign jurisdictions and who register and secure license plates for the same elsewhere than Nevada, the benefit of not having to register the car in Nevada and secure license plates therefor, regardless of whether they become gainfully employed in Nevada, and regardless of whether they come to Nevada for the purpose of becoming gainfully employed, until such time as the period of foreign registration has expired. Any other construction or interpretation would have to be reached at points outside the four corners of the act.

Question Number 1 has reference to "doing business in Nevada." From the conclusions reached in Opinion No. 115, construing the Statute of 1955, it is clear that working in Nevada or intending to be gainfully employed in Nevada can have no effect upon the question of duty to license, in those cases in which the automobile has been duly licensed elsewhere, before the owner came to Nevada. Similarly, "doing business in Nevada," and the use of the car by the owner in "doing business," can have no bearing upon the question of duty to license such a car, unless that "doing business" consists in conveying persons or property for hire. A further part of the question has to do with the maintaining of an office in Nevada. This fact cannot change the conclusion reached in the former opinion, there applied to natural person owners, and here applied to artificial persons as owners, for if the corporation qualifies to enter the state to do business, by full compliance with the corporation laws of Nevada, a necessary incident is the right to set up an office. The question also includes the statement that the motor vehicle is "used partly in this state." This fact was considered in Opinion No. 115. There it was determined that if properly registered and licensed in the state of owner's domicile and perhaps used in this state for profit, at least the owner being here for profit (employment), these facts could not render the motor vehicle taxable and subject to the license laws of Nevada, until expiration of the foreign license, or transfer of title in Nevada before such expiration date. It follows that if the car is used here under these circumstances in business of its corporate owner, it would not be under a

different test, as to duty to license by such owner, than if used here by its natural person owner in holding and carrying on his private employment or business. Finally, does the fact that the entity (person owning) is corporate in form modify the conclusions reached in Opinion No. 115? The answer is that the statute does not distinguish between natural persons and artificial persons as to the "nonresident owner."

For the reasons heretofore given, it follows that Question No. 1 must be answered in the negative. The conclusions reached in Opinion No. 115 are equally applicable to a corporate owner as to a natural person owner of a motor vehicle, under the given facts. The negative answer to question No. 1 is qualified in three respects, viz:

1. The business in Nevada and use of the vehicle here must not consist of the conveyance of persons or property for hire.
2. The vehicle must be properly registered and licensed in the state in which the corporate owner has its domicile.
3. The registration and licensing elsewhere (state of corporate domicile) will be good in Nevada only to the expiration of such non-resident registration or upon any transfer of title of the vehicle within the State of Nevada, whichever first occurs.

Your Question No. 2 has to do with whether or not such a vehicle so situate is subject to the use tax of Nevada. We do not know that the Director of the Sales and Use Tax Division of the Nevada Tax Commission desires to have this question researched. If he does, he should ask for an opinion thereon.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

By D. W. PRIEST, *Deputy Attorney General.*

182—Hospital Trustees—Surplus funds in hospital fund cannot be used to construct building which exceeds the cost of such surplus, until necessary additional funds are secured by taxation or bond issue.

CARSON CITY, June 22, 1956.

HONORABLE GRANT SAWYER, *District Attorney, Elko County, Elko, Nevada.*

MY DEAR MR. SAWYER: You have made the following inquiry of this office:

Can surplus sums collected through taxation based upon a proposed budgetary need of the hospital be expended for construction of a nurses residence which will cost between \$75,000 and \$100,000, or will the expenditure of such funds require submission of a bond issue for this purpose to the electors?

You advise that there is at present a surplus of \$38,000 in the hospital fund.

different test, as to duty to license by such owner, than if used here by its natural person owner in holding and carrying on his private employment or business. Finally, does the fact that the entity (person owning) is corporate in form modify the conclusions reached in Opinion No. 115? The answer is that the statute does not distinguish between natural persons and artificial persons as to the "nonresident owner."

For the reasons heretofore given, it follows that Question No. 1 must be answered in the negative. The conclusions reached in Opinion No. 115 are equally applicable to a corporate owner as to a natural person owner of a motor vehicle, under the given facts. The negative answer to question No. 1 is qualified in three respects, viz:

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By D. W. PRIEST, *Deputy Attorney General.*

182—Hospital Trustees—Surplus funds in hospital fund cannot be used to construct building which exceeds the cost of such surplus, until necessary additional funds are secured by taxation or bond issue.

CARSON CITY, June 22, 1956.

HONORABLE GRANT SAWYER, *District Attorney, Elko County, Elko, Nevada.*

MY DEAR MR. SAWYER: You have made the following inquiry of this office:

Can surplus sums collected through taxation based upon a proposed budgetary need of the hospital be expended for construction of a nurses residence which will cost between \$75,000 and \$100,000, or will the expenditure of such funds require submission of a bond issue for this purpose to the electors?

You advise that there is at present a surplus of \$38,000 in the hospital fund.

OPINION

Section 1 of Chapter 141 of the 1955 Statutes of Nevada, which amends Section 4 of an Act to enable counties to establish and maintain public hospitals, etc., reads in part as follows: "The board of hospital trustees * * * shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of the site or sites, the purchase or construction of any hospital building or buildings, and of the supervision, care, and custody of the grounds, rooms, or buildings purchased, constructed, leased, or set apart for that purpose * * *."

Further on in the same section we find the following: "* * * the board shall, during the first week in February of each year, * * * file with the board of county commissioners of said county a budget as required of all governmental agencies of this state by an act entitled 'An Act regulating the fiscal management of counties, cities, towns, etc., approved March 28, 1953,' and in the fiscal management of the affairs of said public hospital and all other institutions under the supervision, government, and control of the board of hospital trustees shall be governed by the provisions of said act as amended."

Turning now to the Act referred to in the preceding paragraph, and particularly Section 5 thereof (Chapter 335 of the 1953 Statutes), we find the following admonition, "It shall be unlawful for any governing board or any member thereof or any officer of any city, town, municipality, school district, etc., to authorize, allow, or contract for any expenditure, unless the money for the payment thereof has been specially set aside for such payment by the budget. Any member of any governing board or any officer violating the provisions of this section shall be removed from office, etc."

Now from a study of these sections two things become apparent: (1) That as to money on hand in the hospital fund, the trustees have the power to use it for the purchase of sites or buildings or for the construction of the later, whether budgeted for that purpose or not. (2) That as to the use of any moneys above and beyond those in the surplus fund, which would have to be secured by taxation based on budgetary requirements, such moneys could not be anticipated and a building costing, as you point out, \$75,000 or \$100,000 started with the surplus on hand.

It would be necessary, it would seem to me, to float a bond issue for the difference between the surplus funds and those needed to complete the building, if the money could not be raised by taxation based on a stated budgetary requirement.

I also call your attention to the provisions of Section 9 of the fiscal management Act providing for emergency loans, which is available to hospital boards.

Your inquiry must be answered in the negative.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

183—University of Nevada—Use of Agricultural Extension and Hatch Buildings construction fund created under Chapter 404, 1955 Statutes—Removal of furniture and equipment before demolition.

CARSON CITY, June 25, 1956.

MR. M. GEORGE BISSELL, *Manager, State Planning Board, Carson City, Nevada.*

DEAR SIR: By your letter of June 25, 1956, you request the advice of this office upon the following question:

QUESTION

Can a portion of the Agricultural Extension and Hatch Buildings construction fund, created under Chapter 404, 1955 Statutes of Nevada, be used for the purpose of transferring the furnishings and equipment located in the Agricultural Extension Building to some other location on the University of Nevada Campus at Reno in order that such building can be demolished and a new building constructed?

OPINION

This office is of the opinion that the fund can be so used.

Under Opinion No. 132 released by this office on December 5, 1955, it was concluded that Chapter 404, 1955 Statutes, authorized the demolition of the Agricultural Extension Building and the construction of a new building in its place. If the building is to be demolished, it necessarily follows that valuable furnishings and equipment will first be removed therefrom. It is inconceivable that the Legislature intended otherwise. This would follow whether remodeling of the old or the construction of a new building is to be effected when it appears that good and valuable property can be saved.

Since, therefore, one of the necessary steps in carrying into effect the objects of the statute is the removal of valuable equipment from the building, and since the fund was created to accomplish the objective of the Act, it follows that the Legislature authorized the use of some portion of the fund for removal of such equipment.

The place on the Campus to which the furniture and equipment is to be moved is, we think, not significant so long as the distance or location does not entail an unreasonable expense out of keeping with the object and scope of the statute.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General.*

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

184—Taxation—Opinion No. 156 modified—Service in Korean action for tax credit—Period begins June 1, 1950 and ends February 1, 1955.

CARSON CITY, June 29, 1956.

HONORABLE HOMER D. BOWERS, *Director, Division of Assessment Standards, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. BOWERS: On March 29, 1956, in official Opinion No. 156, this office ruled that for purposes of allowance or disallowance of claims of servicemen or women for tax exemption or credit (Chapter 217, Statutes of 1955, p. 340, "Seventh"), based upon service in the Korean conflict, the dates were fixed as follows: (a) Date of beginning—June 1, 1950; (b) Date of termination of hostilities—July 27, 1953. We cited the proclamation of the President of January 7, 1955. (U.S. Code, Congressional and Administrative News, Vol. 1, 84th Congress. First Session, page 985.

The date of termination given has been questioned.

In this proclamation the President fixed or determined dates for benefits accruing to veterans under various federal statutes, designating such statutes, and in this respect fixed the dates for these purposes, and under federal statutes as January 31, 1955, and February 1, 1955. The President did not nor could he fix the date of termination of the Korean conflict for purposes of benefits to veterans under State laws. A problem of construction therefore arose, namely the date as stated by the President of the actual termination of hostilities or the date as fixed by the President for certain benefits under federal statutes.

We have been persuaded that the construction of the State statute for the purpose of tax exemption or credit, as the case may be, should be not less generous than that allowed the veteran by the President in the application of federal statutes.

Opinion No. 156, of March 29, 1956, is, therefore, amended in such a manner as to substitute the date of February 1, 1955, for the date July 27, 1953, as the date of termination of hostilities in the Korean conflict, for State tax exemption or credit of veterans under the Nevada statute.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General,*

By D. W. PRIEST, *Deputy Attorney General.*

185—Elections—State Officers—Constitutional Law—Vacancy in State office of Superintendent of Public Instruction to be filled by vote at earliest possible biennial general election.

CARSON CITY, June 29, 1956.

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

DEAR MR. KOONTZ: In your letter dated June 28, 1956, you request the opinion of this office upon the following facts and question.

FACTS

The position of Superintendent of Public Instruction is now vacant by reason of the recent death of Mr. Glenn A. Duncan. But for our

184—Taxation—Opinion No. 156 modified—Service in Korean action for tax credit—Period begins June 1, 1950 and ends February 1, 1955.

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Opinion No. 156, of March 29, 1956, is, therefore, amended in such a manner as to substitute the date of February 1, 1955, for the date July 27, 1953, as the date of termination of hostilities in the Korean conflict, for State tax exemption or credit of veterans under the Nevada statute.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General,*

By D. W. PRIEST, *Deputy Attorney General.*

185—Elections—State Officers—Constitutional Law—Vacancy in State office of Superintendent of Public Instruction to be filled by vote at earliest possible biennial general election.

CARSON CITY, June 29, 1956.

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

DEAR MR. KOONTZ: In your letter dated June 28, 1956, you request the opinion of this office upon the following facts and question.

FACTS

The position of Superintendent of Public Instruction is now vacant by reason of the recent death of Mr. Glenn A. Duncan. But for our

loss of Mr. Duncan that position would not ordinarily be placed upon the ballot until the general election of 1958. Because the closing date for the filing of candidacy for the general election to be held this year falls on July 16, 1956, immediate determination of the following question becomes imperative:

QUESTION

Is the position of the Superintendent of Public Instruction to be designated by the Secretary of State as one of the offices for which candidates are to be nominated at primary election to be held on September 4, 1956?

OPINION

The answer is in the affirmative.

The other horn of this question is, of course: Is the appointment to fill the office to be for the unexpired term of Mr. Duncan which would be until the first Monday in January, 1959?

The position of Superintendent of Public Instruction being created by the State Constitution (Article XI, Section 1), and the powers and duties thereof being prescribed by statute (Chapter 32, Article 3, 1956 Statutes) wherein it is clear that some portion of the sovereign power of the State has been delegated thereunder to be exercised on a state-wide basis, we are of the opinion that there is no dispute concerning the fact that this position is a State office. *State Ex Rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982; 42 Am.Jur. "Public Officers," Section 20, p. 895.

Article XVII, Section 22 of the Nevada Constitution provides as follows:

In case the office of any justice of the supreme court, district judge, or other state officer shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the governor, until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

Section 4812 N.C.L. 1929 provides as follows:

Whenever any vacancy shall occur in the office of justice of the supreme court or district judge, or any state officer, the governor shall fill the same by granting a commission, which shall expire at the next general election by the people and upon the qualification of his successor, at which election such officers shall be chosen for the balance of the unexpired term.

Article XVII, Section 22 of the Constitution, and Section 4812 N.C.L. 1929, as above quoted, have been construed by our Supreme Court to the effect that, with regard to the offices therein referred to, it is the legislative policy of this State to fill those offices by election as soon as practicable after the vacancy occurs. *Ex Rel. Penrose v. Greathouse*, 48 Nev. 219, 233 P. 527; *Brown v. Georgetta*, 70 Nev. 500, 275, P.2d 376.

In the present situation, we conclude that the organic, statutory

and case law in this State require that the people of the State be afforded the opportunity to vote on the office of Superintendent of Public Instruction in the forthcoming general election and that the office be designated by the Secretary of State as one for which candidates are to be nominated at the primary election on September 4, 1956.

Respectfully submitted,

HARVEY DICKERSON, *Attorney General*.

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