SYLLABUS

**OPINION NO. 1932-68. State Engineer—Distribution of Waters of the Humboldt River Under Decree Filed October 20, 1930.**

1. The decree directs that the waters of the Humboldt River shall be distributed in accordance with the date of priority, except as to the discretion given the State Engineer in the first paragraph beginning on page 244 of the Findings of Fact and Decree.

2. The State Engineer is the sole judge as to the date of beginning the irrigation season on the Humboldt River stream system so long as his discretion in this regard is reasonable and not arbitrary.

INQUIRY

CARSON CITY, January 26, 1932.

In your letter to this office of January 16, 1932, you quote from paragraph numbered 47, pages 29 and 30, of the Findings of Fact and from pages 243 and 244 of the Decree filed and dated October 20, 1930, in the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, in a matter entitled "In the Matter of the Determination of the Relative Rights of the Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries," No. 2804, this being the "Findings of Fact, Conclusions of Law and Decree" now on file in said matter and court, and then ask for the opinion of this office on the following questions concerning those Findings of Fact, Conclusions of Law and Decree, in relation to the alleged districting of said stream system and its effect upon priorities:

Query No. 1. Does the Decree as filed with the Clerk of Humboldt County direct that the waters of the Humboldt River shall be distributed in accordance with the date of priority, wherever located upon the Humboldt stream system?

Query No. 2. Is the State Engineer the sole judge as to the date of beginning of the irrigation season on the Humboldt River stream system?

OPINION

It is the opinion of this office that said Findings of Fact, Conclusions of Law, and Decree do not disregard or abrogate, or even attempt to disregard or abrogate, the law of priority as it relates to the rights of the water-users along said stream system. It simply provides a method of administration in the distribution of the waters, through the State Engineer's office, to the various water-users. The utmost it does, or attempts to do, is to provide a method of rotation in the use of the waters of the stream system as between the water-users situated in District No. 1, otherwise known as the lower or Lovelock district, and those situated in District No. 2, otherwise known as the upper district or Elko district. These districts are divided at Palisade, Nevada, on the Humboldt River, that portion below Palisade being known as District No. 1 or the lower or Lovelock district, and that portion above Palisade being known as District No. 2 or the upper or Elko district. The Findings of Fact, Conclusions of Law and Decree proceed upon the theory that, in the practical application of the waters of this stream system to beneficial use, from the earliest initiation of water rights on the stream system up to the present time, the users of these waters in the lower or Lovelock district actually applied the waters available to them to a beneficial use and actually irrigated their lands much earlier in the spring of each year than did the water-users of the upper or Elko district, and that, although the water rights of a user in the lower district and a user in the upper district might have been initiated in the same year, the user

in the lower district actually applied his water to a beneficial use and irrigated his lands earlier in the season than did the water-user of the same priority in the upper district. Upon this theory, the court finds that the water-users in the upper or Elko district did not apply the water of the early run-off, to wit, the run-off before about May 15 of each year, to beneficial use, except as to flash streams within the upper district, while the water-use in the lower or Lovelock district took the waters from this early run-off, to wit, the run-off earlier than about May 15 of each year, and he irrigated his lands from that water. The court then finds that, from the standpoint of practice, the water-users in the lower or Lovelock district applied the waters of this early run-off to beneficial use, while the water-users of the upper district did not irrigate their lands from this early run-off. There is then a finding that this Humboldt River stream system lends itself to rotation in the use of the waters thereof as between these two districts and that this method of rotation is the "most economical method of irrigating from waters of said stream" and the most economical method to serve the priorities as they exist, except as to flash streams and floodwaters. There is also a finding of fact to the effect that the water-users in the lower or Lovelock district applied all of the waters coming down to them earlier than and up to about May 15 of each year to a beneficial use; that the water-users in the upper or Elko district applied the waters in that district to beneficial use only after about May 15 of each year and continued to use the waters until priorities in the upper district were served to an equal date as the priorities had been therefore served in the lower or Lovelock district; that, when priorities had been served in the upper or Elko district to as late a priority as those already served in the lower or Lovelock district, the water was permitted to flow down the stream to the lower district and thereafter the priorities in the two districts were served equally throughout the remainder of the irrigation season; and that this method of rotation or practical administration of the water rights and distribution of the waters had existed continuously from the earliest initiation of water rights up to the time of this adjudication.

Apparently, this theory and the findings supporting it amount to nothing more than a finding that the irrigation season and the right to apply the water to a beneficial use in the upper district do not begin until approximately May 15 of each year, while the right to apply the water to a beneficial use or the irrigation season in the lower district begins at an earlier date each spring, to wit, as soon as the run-off begins.

Upon the findings of fact hereinbefore set forth and as set forth in your letter and said Findings of Fact, Conclusions of Law and Decree, it was ordered, adjudged, and decreed, among other things, that the stream system, "for the *purpose of distributing* the waters of the Humboldt River stream system and its tributaries," be and was divided into two districts to be known as "District No. 1 and District No. 2," District No. 1 being all that portion of the Humboldt River stream system and its tributaries and all the lands irrigated therefrom situated below Palisade, Nevada, and District No. 2 being all that portion thereof situated above Palisade, Nevada; and that the State Engineer or Water Commissioner "in the *distribution* of water shall distribute *all* water flowing in said stream system, except flash streams, prior to approximately May 15" of each year "to the claimants and appropriators situated in District No. 1," and, after approximately May 15 of each year, to the waters-users in the upper district until they shall have been served to a priority as late as the priorities served in the lower district, making provision for flood waters in the lower district, and that thereafter each year priorities of equal dates shall be served in each district, provided that "sufficient water is flowing in the river to reach claimants in the lower district, without waste, keeping in mind the location of the various places of use, the condition of the stream flow, season of the year, and the matter of transmission loss, evaporation, and seepage."

From the foregoing and from the language actually used in the Decree, it is evident that this districting of the stream system was for the purpose of the rotation of the water in the manner in which the water-users had rotated it in the practical application of the water to beneficial use from the earliest initiation of water rights, as found in these findings of fact, and for the purposes of administration only, and as a guide to the State Engineer and Water Commissioners in the actual distribution of the water of the stream system; and it is also evident from the language used that it was not the purpose of the Findings of Fact, Conclusions of Law and Decree to

ignore or abrogate the law of priority of application of the waters to beneficial use. The instrument says that it provides "the order of the rights of the respective appropriators of the waters of said stream and its tributaries." It provides the order or turn or sequence as to the period or time of the year that the water is to be used. The Decree says that the first in order of time is to be first in right up to the very latest priority; that those having prior rights are not to be hindered at all by those having later priorities, except that the earlier priorities shall not divert water except when and as needed; that the water-users are to divert the waters "to the extent of their rights of appropriation, *according to the order of their priority rights*." Throughout the entire Decree there is nothing to indicate an intention to ignore, abandon, or abrogate the law of priority as it relates to the use of the waters of this stream system; but the intention is manifest throughout the Findings of Fact, Conclusions of Law and Decree that it was the intention to provide, and that there was thereby provided, a method of rotation, as already put into operation by water-users themselves from the earliest initiation of their rights, as found therein, and that this districting of the stream system was for administrative purposes only and the guidance of the State Engineer and Water Commissioners in the actual distribution of the waters of the stream system.

It is, therefore, the opinion of this office that the Decree directs that the waters of the Humboldt River stream system shall be distributed in accordance with the date of priority, except as to the discretion given the State Engineer in the first paragraph beginning on page 244 of said Findings of Fact, Conclusions of Law and Decree, wherein the court says that "after the serving of equal priorities in the upper district, if sufficient water is flowing in the river to reach claimants in the lower district, without waste, keeping in mind the location of the various places of use, the condition of the stream flow, the season of the year, and the matter of transmission loss, evaporation, and seepage, an equal distribution of the water between District No. 1 and District No. 2 shall be made to serve equal priorities."

The last above-quoted language limits and changes to some extent the other provision of the Decree as to the equal division of the water between the water-users of the two districts after equal priorities have been served in each district each year. In other words, that language provides that, after priorities in the upper district are served to a time equal to the time the priorities were theretofore served in the lower district, you are to determine whether there is sufficient water flowing in the river to reach the claimants in the lower district, without waste, keeping in mind the location of the various places the water is to be used in the lower district, the condition of the stream flow, the season of the year, and the matter of transmission loss, evaporation, and seepage; and that the water is not to be distributed in the lower district equal to that in the upper district after such earlier equal distribution in the two districts, unless there is sufficient water flowing in the river to reach the claimants in the lower district, without waste, after taking into consideration the location of the various places where the water is to be used, the condition of the stream flow, the season of the year, and the matter of transmission loss, evaporation and seepage. Someone must determine whether the water, after such earlier equal distribution, can be made to reach the claimants in the lower district at the places where they are to use the water, so that it may be economically used in such places, and used without waste, after taking into consideration the conditions named in the language quoted. It is the opinion of this office that, in the first instance, this discretion of determining this condition is vested in the State Engineer, subject, however, to review and modification by the court.

2. As to your second query, it is the opinion of this office that the State Engineer is the sole judge as to the date of the beginning of the irrigation season on the Humboldt River stream system so long as his discretion in this regard is reasonable and not arbitrary. This does not mean, however, that a water-user may not question the discretion used by the State Engineer in fixing the date of the beginning of the irrigation season. The action of the State Engineer in this regard, as in all other particulars provided for in the Decree, is under the supervision of the court. The State Engineer cannot, therefore, arbitrarily and without investigation and examination, set the beginning of the irrigation season at an unreasonable time; but the discretion given him in this regard is only a reasonable discretion.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-69. State Engineer—Right to Hear and Adjudicate Water Rights Previously Determined by the Courts.**

The State Engineer has no right to hear and determine a dispute over water rights which has been previously adjudicated by the court, even though the description of the source of the water right was erroneously set forth in the judgment.

STATEMENT

CARSON CITY, February 2, 1932.

An application to appropriate water from a spring for irrigation purposes was filed with the State Engineer and notice of filing thereof published according to law. Thereafter, a formal protest against the granting of a permit under the application was filed, alleging that the respective rights of applicants and protestants in the waters of the spring had been adjudicated by the District Court in favor of protestants, and that proof of such adjudication had been submitted to the State Engineer by means of certified copy of the judgment and decree of said court wherein the applicants (then defendants) were permanently enjoined from asserting any right, title, or interest in and to the waters of said spring. Applicants concede that waters of said spring are the same as the waters in the application applied for, but allege their application that the location of the spring as set forth in the judgment and decree was erroneous, and offered evidence to show that the spring was situated on lands other than the lands described in said judgment.

INQUIRY

Regardless of the location of the spring with respect to a legal subdivision, is it within the jurisdiction of the State Engineer to hear and determine the matter in any manner that would be adverse to the judgment and decree of the court?

OPINION

Your inquiry is answered in the negative. The mere fact that the location of the spring in question may have been given erroneously in the Judgment and Decree of the District Court will not, and cannot, serve to give the State Engineer jurisdiction to hear and determine a matter that has been adjudicated by such court. The error in the description of the location of the spring, if any such error exist, is an error for the court to correct upon its own motion or upon application of the parties.

The State Engineer is bound by the judgment and decree of the court. He is without power or jurisdiction to modify or change in any way such judgment and decree. The State Engineer is without authority to determine or adjudge conflicting land titles, or to quiet them. His duty and authority, with respect to an application for permit to appropriate water, are limited to granting a permit to use unappropriated water. In the matter in question, undoubtedly the water has been appropriated; and a judgment and decree of a court of competent jurisdiction has adjudicated the right thereto.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General,*

By W. T. MATHEWS, *Deputy Attorney-General.*

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-70. Corporations—Bonding and Indemnity Companies—Insurance Companies—Licenses to do Business.**

1. If a bonding and indemnity company is an insurance company purporting to do an insurance business within the common acceptance of the term and within the meaning of sections 3540-3558, Nevada Compiled Laws 1929, such bonding and indemnity company before doing business in the State of Nevada must comply with the provisions of said sections, even though it is organized under the General Corporation Act of 1925.

2. It is not mandatory that "the principal place of business" be within the State of Nevada.

3. The provisions of section 3541, Nevada Compiled Laws 1929, relative to the paid-up cash capital investment of insurance incorporations are complied with upon the showing that the statutory amount has been invested in the State of Nevada in accordance with the provisions of the statute.

4. Sections 7627-7633, Nevada Compiled Laws 1929, do not repeal nor modify section 3541, Nevada Compiled Laws 1929.

STATEMENT

CARSON CITY, February 2, 1932.

A bond and indemnity corporation filed its articles of incorporation in the office of the Secretary of State of Nevada, under the General Corporation Law of Nevada of 1925, seeking thereby to become a Nevada corporation with its principal office in Nevada. Later, it filed amended articles of incorporation but did not materially change or modify the original articles. The articles of incorporation show that the corporation purports mainly to do a bonding and indemnity business in Nevada and elsewhere and to become surety on official, penal, and other bonds and undertakings. After filing its articles of incorporation as aforesaid, it made application to the State Controller, as ex officio Insurance Commissioner of Nevada, for a license to transact a bond and indemnity business in Nevada; and stated, among other things, in its application that it proposed to carry on a general bond and indemnity business and become surety on public and private bonds as principal and jointly with others, and that its principal place of business is in the City of Los Angeles, State of California. None of the incorporators are citizens or residents of Nevada, nor does it appear that any of the officers, directors, or stockholders are such citizens or residents. The application for the license to do such bonding and indemnity business was made to the ex officio Insurance Commissioner pursuant to "An Act to facilitate the giving of bonds and undertakings in certain cases and prescribing conditions upon which surety companies may become liable thereon in this state; fixing penalties for the violation thereof, repealing conflicting acts and other matters relating thereto," the said Act being sections 7627-7633, Nevada Compiled Laws 1929.

INQUIRY

The Insurance Commissioner requests an opinion on the following queries:

1. Does a bonding and indemnity company, incorporated under the General Corporation Act of 1925 of Nevada, have to qualify under section 3541, N.C.L. 1929 (being section 2 of an Act to license and regulate insurance business in this State), which provides that at least five directors of an insurance company incorporated under the general laws of the State shall be residents and property owners in the State and stockholders in the corporation before assuming risk as an

insurer, and also providing that such insurance company shall have paid-up, unimpaired cash capital equal to one hundred thousand dollars invested in this State in State or United States bonds, or other bonds and mortgages, bonds of school districts, or other municipal bonds, etc., before assuming risk as an insurer, before engaging in business in this State.

2. Should not the principal place of business be located in this State?

3. Should not the cash capital or securities in the amount stated in section 3541, N.C.L. 1929, be deposited or held in the principal office in Nevada?

4. Is there any statute that repeals or modifies section 3541, N.C.L. 1929, with respect to the qualifying of the bonding and indemnity company mentioned hereinbefore, it being understood that it is an insurance company?

OPINION

Answering query No. 1, it is the opinion of this office that, if the bonding and indemnity company mentioned in said query is an insurance company purporting to do an insurance business within the common acceptance of the term and within the meaning of "An Act to license and regulate insurance business in this State," approved February 23, 1881, and as thereafter amended, and which is now found at sections 3540-3558, N.C.L. 1929, such bonding and indemnity company, before engaging in business in the State of Nevada, must comply with the provisions of this Act, even though it is incorporated under the General Corporation Law of 1925, and qualify in accordance with section 2 of the Act, *i.e.*, section 3541, N.C.L. 1929. Such company before assuming any risk as an insurer must have at least five directors who are residents and property owners in this State and stockholders in the corporation, and it also must have a paid-up, unimpaired cash capital equal to one hundred thousand dollars invested in this State in accordance with the said section 3541, except, however, it may do business for one year with a cash capital of twenty-five thousand dollars in cash and seventy-five thousand dollars in negotiable promissory notes payable to it, approved by the State Bank Examiner and State Controller, bearing interest at six per cent per annum and payable within one year after the granting of the license (section 3541, supra).

We are impelled to the foregoing view by reason of section 2 of "An Act providing a general corporation law," approved March 21, 1925, the same being section 1603, N.C.L. 1929, providing that:

> Insurance, * * * surety companies * * * may be formed under this act; *provided, however, that no corporation formed for the purpose of conducting such business shall transact any business within the State of Nevada until such corporation has first complied with all laws now in effect or hereafter enacted concerning or affecting the right to engage in such business.*

See Opinion, Atty.-Gen. Nev., No. 107, Report of Attorney-General 1923-1924.

The corporation in question here, while it may be, and probably is, a domestic corporation and has filed its articles of incorporation under the general law aforesaid, in our opinion must still comply with the other statutes pertaining to its purported business and the right to engage therein and qualify in accordance with such statutes before transacting such business within this State.

Answering query No. 2, it is the opinion of this office that it is not a mandatory requirement of the Nevada Corporation Law that "the principal place of business" be within the State. We think there is a distinction between the term "principal place of business" and the term "principal office in the State," which is used in the General Corporation Act; and that, so long as the corporation in question maintains its "principal office in the State" and there keeps its books, records, and other documents and papers so that the State Controller may make the examinations required by law to be by him made relative to insurance companies doing business in this State and incorporated under the laws thereof, *i.e.*, sections 3544 and 3547, N.C.L. 1929, a sufficient compliance with the legal requirements as to the principal place of business will be had.

Answering query No. 3, it is the opinion of this office that the provisions of section 3541, supra, relative to the paid-up cash capital investment of insurance corporations, are complied with upon a showing that the statutory amount has been invested in the State of Nevada in accordance with the provisions of the statute, and that it is only necessary to keep in the principal office of such corporations in Nevada the evidences of such investment and a record of where the securities are kept and can be found within the State.

Answering query No. 4, from the letters and papers submitted with the request for an opinion herein, we understand that it is thought that sections 7627-7633, N.C.L. 1929, are inconsistent with or repeal section 3541, N.C.L. 1929, with respect to the corporation in question here and its right to qualify to do business in this State as a bonding and indemnity company or as an insurance company. First, we might point out that section 3541 was amended at a later date than any of the sections 7627-7633, inclusive, and, no doubt, under the rules of statutory construction where statutes are construed in pari materia (which obtain in this State), that the provisions of section 3541 would control; but we do not deem this controlling in the instant matter. The corporation here is a domestic corporation and, from an examination of the articles of incorporation filed by it and of the application for license to do business in this State made to the Insurance Commissioner, we cannot escape the conclusion that the business of the corporation to be transacted in Nevada is that of a bonding and surety business. This conclusion is strengthened by the application aforesaid of the corporation being made and filed pursuant to said sections 7627-7633. This office has heretofore held that sections 695-701, Revised Laws of 1912 (now said sections 7627-7633, N.C.L. 1929), have no application to domestic surety companies but constitute an act to regulate foreign surety companies doing business in Nevada. Opinion Atty.-Gen., Nev., No. 250, Report of Attorney-General 1925-1926.

It is, therefore, our opinion that sections 7627-7633, N.C.L. 1929, do not repeal or modify section 3541, N.C.L. 1929. Whether sections 7627-7633 would repeal or modify section 3541 if applied to matters concerning foreign insurance companies, we do not now decide, as such is not material here. We find no other statute of Nevada repealing or modifying said section 3541.

As stated above, we cannot escape the conclusion that the corporation in question here purports to transact a bonding and surety business in this State and, while it has the legal right to incorporate under the General Corporation Law, still before it can transact such bonding and surety business within the State it must further comply with the Nevada statutes pertaining to such business. We are of the opinion, and here suggest, that the application for license to transact its business in this State, made to the Insurance Commissioner under the provisions of sections 7627-7633, N.C.L. 1929, was erroneous. The attempt to proceed under these sections indicates most clearly that a bonding and surety business in the State was contemplated, especially in view of the paramount purposes of the corporation set forth in its articles of incorporation. This being the apparent purpose, we think the corporation should qualify under the provisions of "An Act to authorize the formation of corporations for the purpose of transacting business as sureties on all bonds and undertakings required by law, and to prescribe the powers and duties of such incorporations," approved March 8, 1897, the same being section 7620-7626, N.C.L. 1929.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. ED. C. PETERSON, *as ex officio Insurance Commissioner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-71. Schools—Apportionment of State and County Funds—Basis of Apportionment.**

1. The basis of apportionment of State and county moneys for school purposes is the average daily attendance as shown by the last preceding annual school report.

2. Paragraph 2(c) of section 5798, N.C.L. 1929, does not authorize the substitution or acceptance of any other report other than the annual school report.

3. Section 5780, Nevada Compiled Laws 1929, is inoperative by reason of the later enactment of sections 5798 and 5799, Nevada Compiled Laws 1929.

INQUIRY

CARSON CITY, February 4, 1932.

The Superintendent of Public Instruction requests an opinion upon the following queries:

1. Must the apportionment of state and county moneys be based on the average daily attendance of pupils as shown by the last preceding annual school report?

2. Does paragraph 2c of section 5798, N.C.L., give the State Superintendent of Public Instruction authority to call for or to accept any other than the preceding annual school report as the basis for the apportionment of State or county school funds?

3. In view of the amendments passed by the Legislature in 1925 (Statutes of 1925, Chapter 117, page 159) what is the present status of section 5780 of the N.C.L.?

4. If the apportionments of State and county school moneys are made on the basis of the preceding annual school report, is this section (5780 N.C.L.) superseded by sections 5798 and 5799?

5. If the apportionments are not to be made on the basis of the preceding annual school report, what are the rights of a Board of School Trustees under section 5780 of the N.C.L.?

OPINION

Answering query number one, it is the opinion of this office that the apportionment of State and county moneys for school purposes is to be apportioned by the Superintendent of Public Instruction in the manner provided in sections 151 and 152 of the School Code, *i.e.*, sections 5798 and 5799, N.C.L. 1929, and that the basis of such apportionment is the average daily attendance as shown by the last preceding annual school report.

Answering query number two, it is the opinion of this office that paragraph 2c of section 5798, N.C.L. 1929, does not authorize the Superintendent of Public Instruction to substitute any rule, or to accept any other report, other than the preceding annual report of the average daily attendance of pupils in a school district, as a basis of apportionment of school moneys. The paragraph in question only authorizes the Superintendent of Public Instruction to promulgate rules to be used by teachers, sections 5655, 5687, N.C.L. 1929, in the compiling of such reports.

Answering query number three, the amendments mentioned in this query, so far as pertinent to this opinion, are limited to the amendment to section 122 of the School Code, which said section, as amended in 1925, is now section 5770, N.C.L. 1929. The effect of the 1925 amendment was to make it discretionary on the part of the State Board of Education to order or provide that a school census of any or all school districts in the State be taken. Prior to 1925 it was necessary that a school census be taken each year for the purpose of determining the number of children of school age within the State in order to apportion the school funds in accordance with the law as it then existed. But in 1925 the Legislature provided a different mode of apportioning the State and county school moneys, *i.e.*, the basis upon which the apportionment was thereafter to be made, and provided that the basis should be the number of pupils in average daily attendance in school as shown by the annual report thereof of the preceding school year in lieu of the school census report theretofore the lawful basis of such apportionment. See Stats. Nevada 1925, page 280. This change in the basis of apportionment was undoubtedly made by the Legislature to conform to the amendments to sections 122 and 124 of the School Code, now sections 5770 and 5772, N.C.L. 1929, whereby the necessity of taking the school census was dispensed with, save as it might be deemed necessary by the State Board of Education. Thus a different method of ascertaining the basis upon which to compute and apportion the state and county school moneys was provided by the Legislature and the necessity of a school census dispensed with. Under the law as it now stands a census report is not to be taken as the basis of

apportionment. The record of average daily attendance in school of the preceding school year is the only report upon which the Superintendent of Public Instruction is to rely in obtaining the data from which to apportion the moneys in question.

The annual school census no longer being necessary, and the report of any school census that might be authorized to be taken by the State Board of Education no longer being the legal basis of apportionment of school moneys, it is the opinion of this office that in so far as section 131a of the School Code, *i.e.*, section 5780, N.C.L. 1929, may or can be applied to the apportionment of State and county school moneys, that it is now of no force or effect. As pointed out hereinbefore the Legislature has provided an entirely different method of ascertaining the basis of apportionment and any school census report now could not be used as a basis upon which to make the legal apportionments, and section 5780 is so inconsistent with the sections providing such different method of apportionment, *i.e.*, sections 5798 and 5799, N.C.L. 1929, and which said sections are the later expression of the legislative will, that we are constrained to hold that said section 5780 is inoperative when sought to be invoked for the purpose of basing an apportionment of school moneys in accordance with its provisions.

Holding the views expressed in answer to query number three, query number four is answered in the affirmative. For the reasons set forth hereinbefore we feel it is not necessary to answer query number five.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. WALTER W. ANDERSON, *Superintendent of Public Instruction, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-72. Licenses—Motor Vehicles.**

The owners of motor vehicles who rent the same to other persons, said motor vehicle being driven, controlled and operated by the renter, are not required to secure a license under the provisions of secs. 4404-4413, Nevada Compiled Laws 1929.

INQUIRY

CARSON CITY, February 8, 1932.

A company or individual owns one or more automobiles which it rents to another person or persons for use upon the highways of the State, collecting certain rental therefor under a contract of leasing or rent. The person renting such automobile drives it himself, no driver being furnished by the owner of the automobile, neither does the owner thereof drive it for the person renting the automobile. The automobile is in and under the care and control of the renter during all the time leased or rented by him.

Is the owner of such automobiles required to secure and pay for the license provided for in "An Act requiring a license for the operation of motor cars and vehicles for hire on the public highways of the State, and other matters relating thereto," approved March 29, 1929, the same being sections 4404-4413, N.C.L. 1929?

OPINION

Section 1 of the Act cited above provides:

> Every corporation, company, individual or association operating motor vehicles for hire over any public highway in the State of Nevada shall annually secure from

> the public service commission of Nevada a license therefor and make payments as hereinafter provided.

Section 2 of said Act provides the license fees to be collected by the Public Service Commission of Nevada for each vehicle coming within the provisions of the statute.

Section 5 of the Act provides:

> Any corporation, company, individual or association who shall engage in the business of transporting property or passengers in motor cars or vehicles on any of the public highways of the state for hire, wholly or partly within the State of Nevada, without complying fully with the provisions of this act, or who shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars; *provided*, that each day's operation shall be considered a separate offense.

The inquiry is whether an owner of an automobile which the owner rents to another person for the use of such other person upon the public highways of the State during all the time for which it has been rented is required to secure the license above mentioned as a prerequisite to operating or maintaining the business of renting such automobile. The renter operating such automobile on the highways of the State drives it himself and has control of said automobile during the time it is in his possession.

It is clear that the statute above cited pertains to carriers for hire and that such carriers do not need to be common carriers in order to be brought within the purview of the statute. But is the owner of an automobile who rents it to another person who drives it upon the highways of the State himself, a carrier of passengers for hire within the meaning of the statute? The statue is not clear upon this point, and the statute providing a penalty of a fine for failure to secure the license provided in the statute thereby becomes a penal statute and subject to the rule that penal statutes are to be construed strictly, and doubts resolved in favor of the person charged with its violation. Ex Parte Todd, 46 Nev. 214.

Section 1 of the Act provides that "every corporation, etc., *operating* motor vehicles for hire over any public highway in the State of Nevada" shall secure the required license. Section 5 provides that "any corporation, etc., who shall *engage in the business of transporting property or passengers* in motor vehicles on any of the public highways of the state for hire," without complying with the provisions of the statute, *i.e.*, securing the license in question, shall be deemed guilty of a misdemeanor.

We think that the proposition of an owner renting an automobile to another person, who then drives it himself, has absolute control over it for the time being, and chooses when and where he will drive such automobile, being engaged in the operating of a motor vehicle for hire within the meaning of the statute, where the penal provision is directed to those who engage in the business of transporting property or passengers in motor vehicles for hire, is so involved in doubt as to require the application of the rule of strict construction of penal statutes.

From an examination of such cases as we have been able to find upon this question, it is apparent that the courts hold that owners of automobiles whose business is that of renting such automobiles to others who drive them themselves do not fall within the licensing provisions of statutes and ordinances containing provisions for the licensing of carriers for hire. State v. Bee Hive Auto Service Co., 242 Pac. 384; State v. Hertz Driv-Ur-Self Stations, 271 Pac. 331; Armstrong v. Denver Saunders System Co., 268 Pac. 976; State v. Dabney, 5 S.W. (2d) 304; Campbell v. Groh, 8 S.W. (2d) 712.

In State v. Bee Hive Auto Service Co., supra, the court said:

> The question for determination therefore is: Does the cited statute prohibit the letting of an automobile by its owner to another for that other's use in a city of the first class? That it contains no direct prohibition to that effect must be conceded. If it prohibits the act at all, it does so by reason of the fact that it prohibits the carrying

of passengers for hire in a city of the first class without complying with certain conditions, and by reason of the further fact that the letting for hire of an automobile to the use of another is to carry that other as a passenger for hire. But we cannot think the act of leasing has this result. It is true, of course, that the lessor, by the act of leasing, enters into certain obligations, so well understood as not to require enumeration here; but we think it manifest that he does not by the act undertake to carry any one, and much less does he become by the act either a public or a private common carrier of passengers for hire. His situation is not different in legal effect from that of the old-time occupation of livery stable keeper, who keeps teams and carriages to let for hire. No court, in so far as we are aware, has ever held such a keeper to be a common carrier of passengers, and we think a like rule must apply to the defendants in this instance.

In view of the holdings in the cases cited above, and in view of the necessity for a strict construction of the statute by reason of its carrying a penal provision, and the resolving of the doubt as to its meaning when applied to the matter in question here in favor of the nonapplicability of the statute, we are constrained to answer the query in the negative.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. J. F. SHAUGHNESSY, *Chairman Public Service Commission of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-73. Taxation—Power of Board of County Commissioners to Extend the Time of Payment of Tax Penalties and Interest—Duties of Tax Collecting Officers in Relation Thereto.**

1. The Board of County Commissioners do not have the power to waive or extend the time of payment of penalties or interest on delinquent taxes.
2. There is no legal justification of such action.
3. Tax collecting officers cannot legally accept delinquent taxes without receiving the penalties and interest.
4. The irrigation districts are governed by the same law as the county.

INQUIRY

CARSON CITY, February 24, 1932.

The Board of County Commissioners passed the following resolution:

WHEREAS, Many taxpayers in Lyon County were unable to pay their taxes as they appear on the 1931 tax roll of said county, the first installment of which was due on the first Monday in December, 1931, on account of the existing depression and failure of crops; now, therefore, be it

*Resolved by the Board of County Commissioners of Lyon County*, That the penalties and interest on said delinquent taxes be waived until the first Monday in June, 1932.

Query No. 1. May Boards of County Commissioners, under the existing law, waive the collection of penalties and interest on delinquent taxes?

Query No. 2. Do you know of any legal justification for such action on the part of Boards of County Commissioners?

Query No. 3. What is the position of county officers, upon whom the law imposes the duty to collect delinquencies, penalties, and interest, in accepting (under such a resolution) delinquent taxes without the penalties provided by law?

Query No. 4. In the event of an action being filed against the Commissioners or other county officers for malfeasance, would there be a proper defense?

Query No. 5. The Walker River Irrigation District has passed, or is contemplating passing, a similar resolution. The same reasoning would apply there, would it not?

OPINION

From the foregoing resolution, adopted by the Board of County Commissioners, it is apparent that the economic situation, due to the depression and the inability of taxpayers to obtain sufficient money to promptly pay their taxes when due, prompted the adoption of such resolution for the purpose of relieving a tense situation. In the rendering of the following opinion, this office does so reluctantly, knowing full well that the economic conditions work hardships on many worthy citizens; but we must interpret the law as we find it, notwithstanding its effect.

Answering query No. 1, the taxing power of the State is exercised by the Legislature. Its will is supreme and is not delegated to any other officer or tribunal, save as may be delegated to incorporated cities and towns in their respective charters. The officers of the counties designated by the Legislature to levy and collect taxes are administrative agents of the State, and must perform their duties in accordance with the statutes providing for the collection of revenue for the government of the State, and must find their powers in such statutes or other statutes that pertain to the subject.

Boards of County Commissioners are inferior tribunals of special and limited jurisdiction, having no powers beyond those expressly granted by the Legislature; and their action must affirmatively appear to be in conformity with some provision of law giving them power, or it will be without authority. State v. C.P.R. Co., 9 Nev. 79; Lyon County v. Ross, 24 Nev. 102.

There is no provision in the statutes providing the powers of the Boards of County Commissioners which could be construed as empowering such board to abrogate an enactment of the Legislature. We fail to find in the Act of the Legislature providing revenue for the support of the government of the State of Nevada, *i.e.*, sections 6415-6528, N.C.L. 1929, or any other Act, any provision empowering such boards to adopt any resolution or procedure that would tend to authorize officers of the county whose duty it is to collect the taxes to proceed other than in strict accord with the law. If such power is not provided for by statute, it does not exist.

It was long ago settled by our Supreme Court that Boards of County Commissioners have no power to compromise and settle suits instituted by the State for the collection of delinquent taxes, and that the only power such boards have to reduce or in any manner change taxes as assessed is vested in them as boards of equalization, and, when acting in that capacity, they must comply literally with the provisions of the statute. They can neither release the property from the lien of the tax nor discharge the property owner from his obligation. State v. Cent. Pac. R. Co., 9 Nev. 79.

In State v. Cal. M. Co., 15 Nev. 308, it was held that the District Attorney, whose duty it was and is to bring suit for delinquent taxes, could not enter into a stipulation with delinquent taxpayers to forego the collection of the penalties provided by law, the court saying:

> The law has, in terms, limited the time for payment without penalty, and the time for putting in operation the coercive machinery of the state, in case of refusal to pay according to law; and the district attorney can find no warrant in the statute for an agreement on his part, to delay the payment of a portion due to the state, upon payment of the balance. Such an agreement is opposed by the words and the policy of the law.
>
> If he can agree to postpone payment of the penalty, upon the receipt of the tax, he may delay payment of both tax and penalty, upon an agreement to pay the whole at some time in the future without a contest in the courts. If he has power to

postpone payment for a year, he may extend the time to five years or more, thus practically defeating the object of the law, and giving privileges to one delinquent that are not granted to others.

So, if the District Attorney in a suit for the recovery of delinquent taxes could not forego the collection of the penalties, then, most assuredly, Boards of County Commissioners have no power to waive the statutory penalties and interest. The query is answered in the negative.

For the reasons given in the foregoing, query No. 2 is answered in the negative.

In answer to query No. 3, it is the opinion of this office that, in the absence of statutory authority therefor, county officers upon whom the law imposes the duty of collecting the taxes, delinquencies, penalties, and interest may not legally accept delinquent taxes without the penalties and interest being tendered also. In this connection, we desire to point out that the Legislature in 1931 did provide for a suspension of penalties and interest on delinquent taxes for the year 1930, but that such statute expired by its own limitations on June 1, 1931 (1931 Stats., p. 142).

With respect to query No. 4, this office does not desire to anticipate any defense an officer might interpose to a charge of malfeasance, as such is not necessary for the purposes of this opinion. Suffice is [it] to say that, no doubt, such officers would be required to justify under the statutes.

In answer to query No. 5, it is our opinion that irrigation districts, with respect to the levying of assessments according to law, the delinquency and the collection thereof are governed by the same statutes as are counties with respect to taxation, as it is so provided by law. Sec. 8041, N.C.L. 1929.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. JOHN R. ROSS, *District Attorney, Yerington, Nevada.*

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SYLLABUS

**OPINION NO. 1932-74. Time—Publication of Notice in Water Hearing.**

1. Requirement that notice be published for five weeks is met by publishing on September 16 and each week thereafter, the last publication being on October 14.
2. A thirty-day period to file papers would begin to run from and after October 14.

INQUIRY

CARSON CITY, April 1, 1932.

There exists a rule of the State Engineer, upon application to appropriate water being filed, that notice thereof be given by publication in some newspaper in the district, once a week for five consecutive weeks. Thereafter, by statute, a protestant has thirty days from the date of final publication in which to file a formal protest against the granting of such application.

1. Does the publication of the above notice for five consecutive weeks, in a weekly newspaper, beginning September 16, end on October 14 or October 21?
2. From what date, *i.e.*, October 14 or October 21, does the thirty-day period in which protestant may file formal protest against the application to appropriate water commence to run?

OPINION

Answering query No. 1, it is the opinion of this office that the final publication of the notice falls on October 14.

Statute requiring publication of notice once a week for a given number of weeks is complied with when the required number of publications have been made. State v. Yellow Jacket Silver Mining Co., 5 Nev. 415; In Re Hegarty, 45 Nev. 145.

Computing the publications in your query, we find as follows: September 16, September 23, September 30, October 7, and October 14, five publications, one week apart. Applying the rule above stated, the time for publication is complete for purposes of notification on October 14.

Answering query No. 2, it is the opinion of this office, from the views expressed in answer to query No. 1, that the thirty-day period, within which such protestant may file a formal protest against the application to appropriate water, begins to run from and after October 14, the date of final publication.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

GEO. W. MALONE, *State Engineer, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-75. Corporations—Construction of Section 31 of the Domestic Corporation Act as Amended in 1931.**

The directors under 1925 Corporation Act may make and adopt the by-laws for the corporation in the event the stockholders do not do so, or the stockholders may confer the right upon the directors to adopt by-laws.

INQUIRY

CARSON CITY, April 8, 1932.

The question has arisen as to the construction of the following language, which will be found in section 31 of the Domestic Corporation Act as amended in 1931:

"Subject to the by-laws, if any, adopted by the stockholders, the directors may make the by-laws of the corporation."

We would appreciate it very much to have your opinion as to whether or not, under the language in question, the directors may adopt the original by-laws of the corporation. In other words, does the above language empower the directors to make the by-laws of the corporation, or does the statute not confer this power and must the by-laws be adopted by the stockholders?

OPINION

In the absence of a statute to the contrary, the power to make the by-laws of a corporation resides in the stockholders or most numerous body of the corporation's constituents. 7 R.C.L. 144; 14 C.J. 352. In the absence of charter or statutory restrictions, the stockholders or members of the corporation may confer the power to adopt by-laws, either generally or for a particular purpose, on the directors or trustees of the corporation. R.C.L. and C.J., supra.

Section 8 of the Corporation Act of 1925 provides that the corporation, by virtue of its existence, shall have the power to make and adopt by-laws for the management, regulation, and government of its affairs and property, etc. This section standing alone, without qualification elsewhere in the Act, would undoubtedly confer the power to make and adopt by-laws upon the stockholders or members only. However, section 31 of the Act contains the provision quoted in the inquiry, *i.e.*, "Subject to the by-laws, if any, adopted by the stockholders, the directors may make the by-laws of the corporation." This provision, construed in the light of the rule of law above cited, undoubtedly grants the power to the directors of a corporation to make and adopt the by-laws of the corporation, subject only to the right of the stockholders to adopt by-laws, which by-laws, if adopted by the stockholders, would qualify and restrict by-laws adopted by the

directors. If the stockholders do not, or fail to, adopt by-laws, unquestionably the directors have full power to adopt by-laws for the corporation.

In our opinion, the directors, under the 1925 Corporation Act, may make and adopt the by-laws for the corporation in the event the stockholders do not do so, or the stockholders may confer the right on the directors to adopt the by-laws. We are further of the opinion that, under this Act, the stockholders may adopt by-laws superseding the by-laws adopted by the directors, if they so desire.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. W. G. GREATHOUSE, *Secretary of State, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-76. Motor Vehicles—Collection of License Fees from Nonresidents who Operate Motor Vehicles for Hire. (See Opinion No. 81.)**

1. Paragraph (b), section 17, of the 1931 Act, page 322, modifies sections 4404 to 4413, Nevada Compiled Laws 1929.

2. Fees provided for in sections 4404 to 4413, Nevada Compiled Laws 1929, cannot be legally enforced until expiration of the five-day period provided for in paragraph (b) of sec. 17 of the 1931 Act, where the nonresident is not using the motor vehicle for hire when he enters this State.

INQUIRY

CARSON CITY, May 3, 1932.

Is a nonresident owner or operator of a motor vehicle for hire liable for the payment of the license fees provided in "An Act requiring a license for the operation of motor cars and vehicles for hire on the public highways of the State, and other matters relating thereto" (1929 Stats. Nev. 360; secs. 4404- 4413, N.C.L. 1929) immediately on entering the State and engaging in carriage-for-hire, or is such owner or operator entitled to a period of five days after entering the State and engaging in the carriage-for-hire business before payment of the aforesaid license fee can be enforced?

OPINION

We have heretofore held that the statute cited in the above query is a revenue measure for the purpose of maintenance of the public highways of this State (Opinions Attorney-General 1931, No. 51). The moneys derived from the license fees provided by this statute are placed in the State Highway Fund for maintenance purposes (sec. 4 of the Act). This statute, standing alone, would unquestionably authorize the collection of the license fees provided for from any and all nonresident owners or operators of motor vehicles for hire immediately upon their entering the State and then and there being engaged in, or engaging in, the business of carriage-for-hire, as there is no period of exemption provided in the statute.

However, the Legislature in 1931 enacted a motor vehicle licensing and registration law, 1931 Stats. Nev. 322, one of the purposes of which was to provide revenue for the construction and maintenance of the public highways of this State; and, in so far as this later statute relates to the disposition of the fees derived from the registration of motor vehicles, it is, in effect, a revenue measure for the preservation of the public highways; and such fees, after payment of certain expenses and bonds, are placed in the State Highway Fund (sec. 30 of Act, as amended 1931 Stats. Nev. 340).

Section 17 of the Act of 1931, above cited, provides exemptions for nonresident motor vehicle owners. Paragraph (b) of said section reads as follows:

> A nonresident owner of a foreign vehicle operated or designed to be operated within this state for the transportation of persons or property for compensation or for the transportation of merchandise shall within twenty-four hours after entering the state register such vehicle with the department or an officer thereof, making application for permission to operate such foreign vehicle within the state for a period of not more than five consecutive days, which permission shall be granted by the department or an officer thereof for such limited period of not to exceed five consecutive days in one calendar year without the payment of any fees to the state.

It has long been the rule of statutory construction in this State that statutes relating to the same subject are to be construed in pari materia and effect given to both or all such statutes, but that, in event of a conflict between such statutes the latest expression of the legislative will will govern. Applying this rule to the construction of the statutes above mentioned, we are of the opinion that paragraph (b) of section 17 of the 1931 Motor Vehicle Act qualifies and controls the provisions of the 1929 Act cited in the query with respect to nonresident owners or operators of motor vehicles for hire, and that the collection of the fees provided in the 1929 Act cannot be legally enforced until the expiration of the five-day period of exemption provided in said paragraph (b) of section 17, supra.

Entertaining the views set forth above, we suggest that the "Notice to Operators of Motor Vehicles for Hire," contained on page 3 of your instructions to carriers for hire, be changed to conform to this opinion.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. J. H. SHAUGHNESSY, *Chairman, Public Service Commission of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-77. Banks—Trust Funds—Preferred Deposits.**

> Moneys deposited by an irrigation district for the specific purpose of paying interest and principal of bonds of the district, the bank accepting the deposit upon the specific terms upon which it was deposited, would be a trust fund and preferred claim and subject to redelivery to the depositor upon the close of the bank.

INQUIRY

CARSON CITY, May 24, 1932.

Moneys were deposited in a bank by the treasurer of an irrigation district of Nevada, such deposit being duly approved by the board of directors of the irrigation district, for the specific purpose of paying the principal and interest of the irrigation district bonds. A written statement, signed by the treasurer, setting forth the specific purpose of the deposit, accompanied the deposit. Said statement contained a provision that the deposit be deemed and considered as a special trust fund for the purpose of paying the principal and interest on the irrigation district bonds and not a deposit in which the relation of debtor and creditor exists between the bank and the depositor. The bank accepted the deposit so made in trust and for the specific purpose so designated. Thereafter, and before the principal and interest on said irrigation bonds had been paid from the deposit so made, the bank became insolvent, closed its doors, and was taken over by the State Bank Examiner.

The irrigation district in question was duly organized and existing under the "Nevada Irrigation District Act of 1919," the same being sections 8008-8097, N.C.L. 1929.

Query. Is a claim for return of the moneys, deposited as stated above, filed with the State Bank Examiner a preferred claim and the moneys subject to redelivery to the depositor?

OPINION

It does not appear from the statement or query whether such deposit was secured by the bank, and, in view of section 8021, N.C.L. 1929, no security was required by the statute for moneys deposited for the purpose of paying the principal or interest on bonds of irrigation districts. We make this observation for the reason that secured deposits are subject to a different rule in many instances.

Section 8021, supra, provides inter alia as follows:

> The provisions of this section, however, shall not apply to deposits made for the purpose of paying the principal or interest due on any bonds of such district, and the treasurer or other custodian of such funds of such district may, with the approval of the board of directors of such district, deposit money in any bank or banks within or without this state in such amount as shall be necessary for the payment of the principal and interest of such bonds at the place or places at which the same are payable and under such conditions as the board of directors shall determine.

The treasurer of the irrigation district, therefore, could legally deposit in any bank moneys when such deposit had been approved by the board of directors of the irrigation district, for the specific purpose of paying the principal and interest on the irrigation district bonds; and we think that, if the bank acquiesced in and agreed to the deposits being made in this manner and for the specific purpose stated, a trust fund, in effect, was created with the bank as trustee of the fund.

> It is a well established rule that moneys received by a bank to be applied to a particular purpose, or to be remitted to some creditor of the person paying such sums, are regarded as trust funds, and a claim therefor is ordinarily entitled to preference over the claims of general creditors in the distribution of the assets of the insolvent bank. Thus, money intrusted to a bank for investment is a trust fund. And where money is deposited with a bank, to be applied in the payment of a note or other obligation on which the depositor is liable, the bank holds it as a trust fund and not as the assets of the bank and it may be followed and reclaimed from the assignee or receiver. The reason of the rule is that the relation between the depositor and the bank as to such deposits is that of principal and agent, or trustee and cestui que trust, and not simply that of depositor and depositary. Nor will the mere fact that the bank credits to the depositor the amount received, or issues him a certificate of deposit, change this relationship and create simply that of debtor and creditor. 3 Michie, Banks and Banking, sec. 186 (1931 Edition).

In Northwest Lumber Co. v. Scandinavian American Bank of Seattle et al., 39 A.L.R 922, it was held, in a well-considered case, that a depositor who sends to his bank a check with directions to apply the proceeds to the payment of interest on bonds, which are shortly to mature and are payable at the bank, thereby creates a special deposit of the amount of the check which entitled him to preference in case the bank becomes insolvent before the interest is paid.

It is our opinion that the moneys deposited by the treasurer of the irrigation district, deposited in the manner and for the specific purpose stated above, became a trust fund for a designated purpose and that the deposit falls within the rule of law stated herein. Entertaining these views, we answer your inquiry in the affirmative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General,*

By W. T. MATHEWS, *Deputy Attorney-General.*

HON. E. J. SEABORN, *State Bank Examiner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-78. State Board of Medical Examiners—Power to Revoke Licenses to Practice.**

The Nevada State Board of Medical Examiners cannot revoke a license granted in 1920 without examination, on reciprocity with Texas, upon the ground that the applicant was not properly examined in Texas.

INQUIRY

CARSON CITY, May 27, 1932.

Your inquiry seems to present the following question: Whether the Nevada State Board of Medical Examiners can now, on the ground of fraud and gross misrepresentation allegedly occurring in 1920, revoke the certificate of a physician licensed to practice in this State by the board in 1920, under the following set of facts:

A, a graduate osteopath, was granted a certificate to practice medicine in the State of Texas, according to its laws in 1915 or thereabouts. Thereafter, in 1917, A enlisted in the United States Army and there served as a surgeon. In 1920 A applied to the Nevada State Board of Medical Examiners for a certificate to practice medicine in this State, presenting his Texas certificate and a diploma issued him from the Pacific Medical College, presumably a regular medical college, the diploma being issued in 1916. It appears that A, in the taking of his examination in Texas, was not examined in materia medica, therapeutics, and the theory of medicine. A was admitted to practice by the Nevada Board without examination, upon the ground of reciprocity with Texas, and a certificate was issued to him upon the payment of the fee therefor required by law.

OPINION

Section 6 of the Act regulating the practice of medicine, surgery, and obstetrics in the State of Nevada, the same now being section 4905, N.C.L. 1929, and in effect in 1920, provides that the State Board of Medical Examiners may, in its discretion, accept and register, upon payment of the registration fee and without examination of the applicant, any certificate which shall have been issued to the applicant by the medical examining board of the District of Columbia, or of any State or Territory of the United States, provided that the legal requirements of the medical examining board of the examining State, at the time of the issuing of the certificate, shall have been in no degree or particular less than those of Nevada at the time of the presentation of the certificate for registration in Nevada. In 1920, therefore, the State Board of Medical Examiners was authorized and empowered to exercise their discretion in the granting of a certificate to practice medicine without an examination first being had, and, in this case, undoubtedly exercised such discretion and issued a certificate to A without an examination.

Section 7 of the same Act (sec. 4096, N.C.L. 1929) in 1920, as it does now, provided that the Board might require additional evidence relating to the qualifications and character of the applicant, if it so desired. Section 8 (sec. 4097, N.C.L. 1929) provided for an examination of all applicants for certificates, qualified, of course, by section 6 as to reciprocity, which was in the discretion of the board as to whether or not it would be granted. In 1920, therefore, A could have been examined as to his qualifications, irrespective of any credentials he may have presented. Apparently, no fraud or misrepresentation on the part of A was in evidence at the time he presented his credentials. The board then had before it the evidence of his qualifications and, being satisfied therewith, accepted his license fee and granted a certificate.

We think it is now too late to question the act of the board in 1920 or to now raise the question of fraud and misrepresentation and cause it to relate back to the time of the granting of the certificate.

Statutes providing for the revocation of physician's licenses are highly penal and must be strictly construed in favor of the physician. 54 A.L.R. 1504, note.

Municipalities, license boards, etc., which have received and retained a license fee cannot object that the license granted was invalid by a reason of some informality, where, without objection, it has permitted licensee to carry on the business. 37 C.J. 243, sec. 99.

The statute in question here being penal, all doubts as to any improper action of the board in granting a certificate to A must be resolved in his favor; and the board, having accepted his license fee and granted him a certificate to practice medicine in Nevada and permitted him to so practice for ten years and more, cannot now object that the certificate was improperly granted and revoke the same. Such action would be highly inequitable.

Further, it must be noted that no statutory grounds for revoking a physician's certificate for fraud and gross misrepresentation existed in 1920. This ground was added to the section 12 of the Act in 1929 (see sec. 4101, N.C.L. and Stats. Nev. 1929, 40); so that, in 1920 and for several years thereafter, the board had no statutory power to revoke such certificates upon these grounds.

Where the licensing statutes enumerated the causes or grounds for revoking licenses, licenses cannot be revoked for causes or grounds not enumerated. 37 C.J. 1247, sec. 110; 17 R.C.L. 555, sec. 68.

Entertaining the views herein expressed and based upon the principles of law stated, we are constrained to answer your inquiry in the negative.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

EDWARD E. HAMER, M.D., *Secretary-Treasurer of Nevada State Board of Medical Examiners, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-79. Nepotism Act.**

That degree of relationship which exists between the wife of A and the husband of A's aunt does not come within the provision of a Nepotism Act.

INQUIRY

CARSON CITY, June 13, 1932.

What is the degree of relationship between the wife of A and the husband of A's aunt, there being no blood relationship between any of the parties other than A and his aunt? The question arises under the Nevada Nepotism Act and pertains to the prohibition of employment of relatives within the third degree of consanguinity and affinity as provided in that Act.

OPINION

Degrees of kindred or relationship are computed according to the rules of civil law (sec. 9862, Nevada Compiled Laws 1929). Under the rules of the civil law, nephews and nieces are in the third degree of relationship. In Re McKay Estate, 43 Nev. 114.

Under the Nevada Nepotism Act, it is unlawful for any School Trustee, State, township, municipal, or county official, elected or appointed, to employ on behalf of the State of Nevada or any county thereof, in any capacity, any relative of such employer within the third degree of consanguinity or affinity, with certain exceptions, not pertinent here (see 4851, supra.) Undoubtedly, the policy of this State is to guard against undue influence on the part of relatives

and relationship in public and quasi public functions, as such policy is evidenced, for example, by the disqualification of a judge by reason of his relationship to either party to an action in his court within the third degree of consanguinity or affinity (sec. 8407, Nevada Compiled Laws 1929) and the disqualification of jurors for the same reason (secs. 8762 and 10496, supra). So, in employing persons on behalf of the State and counties and their institutions, the Legislature has further evidenced the policy of the State and prohibited employment of those within the third degree of relationship to the employer. We think that nephews and nieces come within the prohibition of the statute, but this is not the question here.

The question presented here is, is the wife of a nephew of the wife of a man related to such man within the meaning of the law, there being no blood relation or consanguinity between the parties save and except between the nephew and aunt.

The rule of law relating to relationship by blood and by marriage and according to which the relationship is computed is well stated in 14 Ruling Case Law, 32, section 3. It reads as follows:

> Consanguinity is relationship by blood, and affinity that by marriage; a husband is related by affinity to all the consanguinei of his wife and vice versa. The consanguinei of the wife are the affines of the husband, and the consanguinei of the husband are the affines of the wife; but the affines of the wife are not those of the husband nor are the affines of the husband those of the wife. Affinity is defined to be "that tie which arises, in consequence of marriage, betwixt one of the married pair and the blood relatives of the other;" and the rule of computing its degrees is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; which rule holds also in the case of the wife's relations. Thus where one is brother by blood to the wife, he is brother-in-law, or brother by affinity to the husband. But there is no affinity between the husband's brother and the wife's sister, which is called affinitas affinitatis. A husband is related by affinity to his wife's brother, but not to that brother's wife.

This rule, when analyzed, simply means this: That a wife by marriage is related by affinity in the same degree of relationship to the husband's blood relatives as he himself is related to them by blood, but that the relatives of such husband by marriage and not by blood bear to him relationship by marriage only and bear no relationship to his wife nor she to them by affinity or otherwise. The same is true when the rule is applied to the husband and the relatives of his wife.

Applying the rule to the relationship disclosed in the query, A is related to his aunt by consanguinity (by blood) in the third degree and in the same degree by affinity to his aunt's husband. A's wife is related to A's aunt in the third degree by affinity only and, under the rule that the affinities (relationship by marriage only) of the husband are not those of the wife, then A's wife bears no relationship to the husband of A's aunt by affinity or otherwise.

We conclude that the wife of A does not fall within the prohibition of the Nepotism Act under the query as propounded.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. WALTER W. ANDERSON, *Superintendent of Public Instruction, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-80. Woman Officer Marrying During Term—Signature—Identification.**

Signature of a woman officer who was unmarried at the time she was elected to office and qualified as such officer should be such as to identify her as the same person who was so elected and who so qualified.

INQUIRY

CARSON CITY, June 15, 1932.

In what form or name should a woman who was unmarried at the time of her election to office and of her qualification as such officer but who thereafter married during her term of office and is continuing in office sign or issue, after marriage, such legal filings, documents, instruments, and papers as she is required by law to sign and issue, or which she does sign or issue, as such officer?

OPINION

This is a case in which an unmarried woman ran for and was elected to office and was still unmarried at the time of the issuance to her of her certificate of election and at the time she took her official oath and executed her official bond, but who thereafter married during her term of office and is continuing to perform the duties of her office. She is named in the certificate of election and in her oath of office and in her official bond by her name at the time of her election.

It is the opinion of this office that the name used by such officer should be such as to identify her as the same person who was so elected and who so qualified by taking her oath of office and executing her official bond. Cooper v. State, 20 A.L.R. (Tex.) 411.

The name used should be such as to identify her as the same person who was elected and who qualified, without any extrinsic evidence.

The married woman's name consists, in law, of her own christian name and her husband's surname. There is no dispute, of course, as to the correct form of the surname of a married woman, because on her marriage the law confers on the wife the surname of her husband. Brown v. Reinke, 35 A.L.R. (Minn.) 415; Harper v. Hudgins, 211 S.W. (Mo.) 63; Chapman v. Phoenix National Bank, 85 N.Y. 437; Rich v. Mayer, 7 N.Y.S. 69; Freeman v. Hawkins, 19 Am. St. Rep. 769; Emory v. Kipp, 19 L.R.A. (N.M.) 983, 29 Am. St. Rep. (Cal.) 144, 16 Am. Cas. (Cal.) 792.

Since the surname of the married woman is the surname of her husband, and since the name of the officer must be such as to identify her as the same person who was elected and who qualified and who is named in the certificate of election and her oath of office and official bond, it is the opinion of this office that the name of this woman officer, after her marriage in office, should be signed to such legal filings, documents, instruments, and papers as she is required by law to sign and issue, or which she does actually sign or issue, as such officer, in the same form as she was named in her certificate of election, oath of office, and official bond, with the addition of a hyphen and her husband's surname at the end of her name at the time of election and as specified in her certificate of election, oath of office, and official bond.

Applying this opinion to the office of the Clerk of the Supreme Court of the State of Nevada, it is the opinion of this office that the Clerk of that Court, who was elected to that office under the name of "Eva Hatton" and who is so named in her oath of office and official bond, should use the name "Eva Hatton-Guthrie" in signing and issuing all legal filings, documents, instruments, and papers which she is required by law to sign and issue, or which she does actually sign or issue, as such officer.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

MRS. EVA HATTON-GUTHRIE, *Clerk of the Supreme Court, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-81. Motor Vehicles—Nonresidents Defined—Collection of License Fee from Nonresidents Operating for Hire (see Opinion No. 76).**

The "nonresident" mentioned in paragraph (b), sec. 17, of the 1931 Act, page 322, is not a resident of another State who enters this State with a motor vehicle which is at the time of entrance being used for hire, hence, where the motor vehicle is in use for hire at the time of entrance, the operator or owner does not have five days to acquire the license provided for by the 1929 Act (sections 4404 to 4413, N.C.L. 1929).

INQUIRY

CARSON CITY, June 17, 1932.

What is the effect of the term "nonresident" and the definition thereof in section 1 of the Motor Vehicle Licensing and Registration Law of 1931, *i.e.*, Chapter 202, Statutes of Nevada 1931, upon the application of "An Act requiring a license for the operation of motor vehicles for hire on the public highways of the State, and other matters relating thereto" (1929 Statutes of Nevada, 360; secs. 4404-4413, N.C.L. 1929), to nonresident carriers for hire by motor vehicles operating within the State?

INQUIRY

In a former opinion of this office, Opinion No. 76, we dealt with the question of whether a nonresident owner or operator of a motor vehicle for hire was liable for the payment of the license fees provided in "An Act requiring a license for the operation of motor vehicles for hire on the public highways of the State" immediately on entering the State and engaging in carriage-for-hire, or whether such owner or operator was entitled to a period of five days after entering the State and engaging in such carriage before payment of the license fee could be enforced. It was there our opinion that paragraph (b) of section 17 of the Motor Vehicle Act of 1931 qualified and controlled the provisions of the 1929 Carrier License Act to the extent that the enforcement of payment of the license fee thereunder could not be legally enforced as to nonresident owners or operators of motor vehicles for hire until the expiration of the five-day period provided for in said paragraph (b) of said section 17 of the 1931 Act. The opinion was premised upon paragraph (b), section 17, supra, and referred to the nonresident mentioned in said paragraph and section, with the thought in mind that the nonresident mentioned in the opinion was the nonresident as ordinarily defined.

The question presented here is, in brief, what is the effect of the legislative definition of the term "nonresident" in section 1 of Motor Vehicle Act of 1931 upon the administration of the Carrier Licensing Act of 1929 (secs. 4404-4413, N.C.L. 1929) as applied to nonresident owners and operators of motor vehicles for hire operating within this State, in view of the holding in the former opinion that paragraph (b) of section 17 of the Motor Vehicle Act of 1931 qualifies and controls the provisions of the 1929 Carrier Licensing Act.

The term "nonresident" is defined in section 1 of the Motor Vehicle Act of 1931 as follows:

> "Nonresident." Every person who is not a resident of this state, and *who does not use his motor vehicle for a gainful purpose*. (Italics ours).

After a careful examination of the statutes in question here, we think the above definition serves to clarify our opinion No. 76 and, also, to correct any erroneous opinions concerning the matters contained in that opinion which may have been entertained, as well as to clarify the administration of the two statutes involved in this opinion.

Applying the statutory definition of nonresident to paragraph (b) of section 17 of the 1931 Motor Vehicle Act, it becomes apparent that the Legislature intended that the nonresident owner or operator of motor vehicles operated or designed to be operated in this State for hire should not at the time of entering the State be then and there engaged in carriage-for-hire, *i.e.*, *using his*

*motor vehicles for a gainful purpose*; but must enter the State without being so engaged before such nonresident owner or operator could be said to be a nonresident within the meaning of the term "nonresident owner" as used in said paragraph (b) of section 17.

An examination of the Motor Vehicle Act of 1931, we think, discloses the intent of the Legislature to limit the use of the highways of the State, for a short period of time, without a reasonable contribution toward the maintenance and construction thereof by nonresident users in the carrying of passengers or property for hire in motor vehicles to a nonresident who, possessing or operating a motor vehicle designed to be operated in the transporting of persons or property for hire, comes into the State without such motor vehicle being then and there used in such transportation for hire, but who, after entering the State, desires to engage in the transportation business for hire and may obtain a permit so to do for a period of five consecutive days without payment of any license fees to the State, provided application for such permit first be made within twenty-four hours after entering the State.

We think that a nonresident owner or operator of a motor vehicle for hire who does not meet the foregoing conditions is not the nonresident meant by the statute and is not, therefore, entitled to the exemption period provided in the statute before payment of the license fees to the State, under either of the statutes in question, can be legally enforced. Further, it is pertinent here to point out that only one five-day period can be granted in any one calendar year to any one owner or operator; and it is our opinion that, as applied to the Carrier License Act of 1929, the exemption under the permit to operate can only be claimed once in the calendar year by the nonresident, and, further, we think that the five-day period of exemption, being consecutive in nature, par. (b), sec. 17, 1931 Act, requires that the person obtaining the permit to operate for said five-day period, without the payment of license fees, must utilize the five days consecutively in the State at one time and not by operating for a portion thereof and then leaving the State and later returning to engage in the transportation business for hire for the remaining portion of the five-day period. We think that the nonresident, having obtained five days' grace without contributing toward the upkeep of the highways of the State used by him in his business, must literally comply with this provision of the statute and that any deviation therefrom by leaving the State during the period forfeits his right to the remainder of the time, and that any further operations within the State by the owner and/or operator of the motor vehicle or vehicles can only be had after the securing of the licenses required by law.

Pertinent, also, to this opinion is the transferring or attempted transferring of the right to operate motor vehicles for hire under the permit. The license provided by the Carrier License Act of 1929 goes to the owner or operator of the motor vehicle and not to the vehicle, and the nonresident securing the permit to operate for the five-day period must operate or cause to be operated the motor vehicle permitted to be operated by the permit issued in accordance therewith, and any transfer of such permit or any attempted operation of some other vehicle or by some other person would be a manifest evasion of the law.

Entertaining the views above set forth and in view of the rule of construction of statutes in pari materia, as set forth in our former opinion No. 76 wherein we held the statutes in question here to be in pari materia, we are constrained to hold that, unless the nonresident owner and/or operator of a motor vehicle for hire intending to operate such motor vehicle for hire within this State falls within the definition of a nonresident as defined in section 1 of the Motor Vehicle Act of 1931 and meets the conditions and qualifications of such definition, such nonresident owner and/or operator is not a nonresident within the meaning of the statute and that the provisions of the Carrier-for-Hire Act of 1929 can be enforced as to the nonresident not meeting the conditions and qualifications of the definition before the expiration of the five-day period of exemption provided in paragraph (b) of section 17 of the 1931 Motor Vehicle Act.

Opinion No. 76 may be deemed supplemented and modified by this opinion.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General,*
By W. T. MATHEWS, *Deputy Attorney-General.*

HON. J. F. SHAUGHNESSY, *Chairman Public Service Commission of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-82. Corporations—Mutual Fire Insurance Companies—Necessity and Sufficiency of Compliance with Sections 3547 and 3579 Nevada Compiled Laws 1929—Concerning Refund of Portion of Premiums as Dividend to Insurer.**

1. Certificates of the Commissioner of Insurance of the State where mutual fire insurance companies have their home office, stating that said companies are "possessed of unimpaired net cash assets equivalent to at least $200,000 of paid-up unimpaired cash capital," satisfy requirements of section 3547, Nevada Compiled Laws 1929.

2. Special, specific and tariff rates adopted and filed by mutual fire insurance companies meet the requirements of section 3579, Nevada Compiled Laws 1929, even though they have been taken from rates compiled and adopted by the nonmutual companies.

3. Insurer issuing policy on a participating plan can legally refund portions of the premium as dividends to insurer after termination of policy.

STATEMENT

CARSON CITY, June 30, 1932.

Some days ago you requested the opinion of this office concerning the right of mutual fire insurance companies to carry on the business of insurance in this State and their right to qualify under the laws of this State. In your letter you named Hardware Dealers Mutual Fire Insurance Company, the Minnesota Implement Mutual Fire Insurance Company, and the Retail Hardware Dealers Mutual Fire Insurance Company. You say that certain of these mutual fire insurance companies have been doing business in this State for several years, in fact, before you became State Controller and ex officio Insurance Commissioner of this State. In so far as the qualification of fire insurance companies as to paid-up, unimpaired cash capital and as to the schedule of rates and tariff of fire insurance companies is concerned, the law was not changed by the 1931 Legislature of this State. The law for some years has required, and still requires, that any insurance company organized outside of the State of Nevada shall show the Controller of this State, before being authorized to do an insurance business in this State, that it is possessed of a paid-up, unimpaired cash capital of at least $200,000 and file with the Controller a power of attorney setting forth certain things mentioned in the law but not essential to a determination of the questions asked by you, and shall also file in your office as Insurance Commissioner its special, specific and tariff rates.

Each of these above-mentioned mutual fire insurance companies has filed a certificate of the Commissioner of Insurance of the State in which it has its principal office, showing, in effect, that it is possessed of unimpaired net assets equivalent to at least $200,000 of paid-up, unimpaired cash capital, and certain printed tariff rates adopted by it. The tariff rates adopted by the above-named mutual fire insurance companies appear to be the tariff rates printed and published by the "Arizona Equitable Rating Office."

Your letter further shows that the qualification of these mutual fire insurance companies has been verbally protested by certain nonmutual fire insurance companies doing business in this State, upon the ground that these mutuals have not a "paid-up, unimpaired cash capital of at least $200,000" as required by the Nevada Compiled Laws 1929, section 3547, and, I believe, upon the ground that they do not have and have not filed their special, specific and tariff rates in your office as required by Nevada Compiled Laws 1929, section 3579; and upon the further ground that these mutuals, after charging and collecting their insurance rates or premiums from the insured, later return a part of such rate or premium to the insured as a dividend. These

nonmutuals have, therefore, protested the issuance of a license or a renewal of the license or licenses to these mutual fire insurance companies.

For the foregoing reasons, you have temporarily declined to issue licenses to these mutuals or to qualify them to do an insurance business in this State pending an investigation of the situation relating to these grounds of protest and of the law. Since these protests were made, and pending this investigation, these mutuals have filed in your office the above-mentioned certificates and specific and tariff rates.

As to the tariff rates so filed in your office, it is contended by the protesting nonmutuals that these tariff rates are not the tariff rates or property of the mutuals but are the tariff rates and property of the nonmutuals, inasmuch as they were printed and published by or in behalf of the nonmutual fire insurance companies, and that these mutuals are seeking to take advantage of the work and expenditures done and incurred by or on behalf of these nonmutuals. It will be observed, however, that these tariff rates have not been copyrighted by these nonmutual fire insurance companies or anyone else.

## INQUIRY

Under the above-mentioned conditions and circumstances, you ask for the opinion of this office, as we understand it, on the following queries:

Query No. 1. Do the above-mentioned certificates of the cash capital or cash assets comply with the Nevada Compiled Laws 1929, section 3547?

Query No. 2. Do the above-mentioned specific and tariff rates comply with Nevada Compiled Laws 1929, section 3579?

Query No. 3. Is there any reason, in the opinion of this office, why you should not qualify these and other mutual fire insurance companies that comply with the above-mentioned sections 3547 and 3579 by filing like certificates and rates and by otherwise complying with the law as the above-mentioned three mutuals have complied with it?

Query No. 4. Is there anything in the law of this State which prohibits a refund of a part of the premium as a dividend to the insured?

## OPINION

1. It is the opinion of this office that the certificate filed by each of the above-named mutual fire insurance companies does comply with Nevada Compiled Laws 1929, Section 3547, inasmuch as each of said certificates is the certificate of the Commissioner of Insurance of the State where said mutual has its principal or home office and certifies that the mutual named in the certificate "is possessed of unimpaired net cash assets equivalent to at least $200,000 of paid-up, unimpaired cash capital," or, in one instance, that the mutual named "has unimpaired net cash assets equivalent to at least two hundred thousand ($200,000) dollars of paid up unimpaired cash capital" and is duly organized under the laws of that State. From the language of the certificate, it is evident that each of these mutuals is qualified, in so far as cash capital is concerned, to do an insurance business in this State and that those who may insure in these mutuals would be as amply protected as if these certificates were in the exact language of said section 3547.

2. It is the opinion of this office that the above-mentioned specific and tariff rates so filed in your office do comply with the provisions of Nevada Compiled Laws 1929, section 3579. This section simply requires, among other things, that insurance companies shall file in the office of the Insurance Commissioner their special, specific and tariff rates; and the language of this section, in so far as it relates to these rates, is as follows: "Every fire insurance company, before it shall receive a license or a renewal of a license to transact the business of making insurance as an insurer in this State, must file or cause to be filed in the office of the Insurance Commissioner its special, specific and tariff rates."

We have before us a typewritten pamphlet or booklet marked "Nevada Specific Rates" for the above-named three mutuals. Since this pamphlet or booklet is typewritten, it appears that it was

prepared and adopted by these mutuals. The adoption of these specific rates by these mutuals and the nature of the pamphlet or booklet certainly make these specific rates the property of and the specific rates of each of these three mutuals. As to the printed booklet purporting to be the tariff rates of each of these three mutuals, but claimed by the nonmutuals to have been printed and published as the tariff rates of nonmutual fire insurance companies, it is our opinion that the adoption of these tariff rates by the mutuals makes them the property of and the tariff rates of the mutuals themselves as effectively and to the same extent as if these tariff rates had been originally printed and published by these mutuals, especially inasmuch as these tariff rates so originally printed and published by the nonmutuals were not copyrighted. We are not dealing with the question of whether these mutuals dealt fairly or equitably with the nonmutuals in taking advantage of the immense work and expenditures done and incurred by the nonmutuals in the preparation, printing, and publishing of this booklet containing these tariff rates; and this opinion is not to be taken as a sanction or endorsement of the conduct of these mutuals in so doing. We are not dealing with the question of whether this conduct of the mutuals was morally right or fair, but we limit this opinion entirely to the question of the legality of the conduct of the mutuals in using the tariff rates which seem to have been originally prepared, printed, and published by the nonmutuals. Inasmuch as this booklet of "Tariff Rates" was not copyrighted, we know of no law which would prohibit the use of it by the mutuals. It must be evident that every insurance company, in preparing its rates, has before it and uses in the preparation of its rates the schedule of rates charged by other insurance companies, for comparison at least, and that it follows, to a large extent, the rates of its competitors. If an insurance company can legally adopt a part of the rates of another insurance company, it must be evident that it could just as legally adopt the entire schedule of rates of such other company.

3. From the foregoing, it is the opinion of this office that you are correct in your conclusion that there is no reason why you should not qualify the above-mentioned three mutual fire insurance companies and such other mutual or other fire insurance companies as have qualified or may hereafter qualify as to unimpaired cash capital and as to the filing of rates as the above-mentioned three mutuals have qualified as to these matters, and otherwise as required by law.

4. It is apparent from your question numbered 4 that the practice which is objected to by the nonmutuals is that the mutuals charge the insured and collect the rates specified under the schedule of rates and then, at the end of the year or the termination of the policy, return to the insured a part of the rate or premium so collected, as a dividend. It is the information of this office that these dividends are not returned to the insured until the end or termination of the policies issued by these mutuals.

There is a provision of the law of this State to the effect that, in policies issued on a participating plan, a part of the premium may be returned to the insured as a dividend after the expiration of the term covered by the policy. This provision is contained in the following language: "Nothing in this section shall be construed to prevent an insurer issuing policies on a participating plan from returning a portion of the premium as a dividend after the expiration of the term covered by such policy." 1931 Statutes of Nevada, Chapter 204, section 2, page 343, which is intended to follow section 3558, Nevada Compiled Laws 1929, and to be numbered section 3558 1/2.

If, therefore, a policy issued by a mutual fire insurance company is on a "participating plan," it is evident that the above-quoted provision of the law of this State applies to such policy, and that there is nothing in the law which prohibits such practice or refund as a dividend.

The delay in furnishing you this opinion has been due to the great amount of work in this office incident to matters relating to the suits brought by the railroad companies in this State, to restrain the officers of the State and counties from collecting taxes levied against them, and to the work incident to suits brought by Six Companies Incorporated to prevent the application of State laws to territory within the so-called reservation at Boulder City, and to the fact that you assured me that, on account of the rush of such more important work in this office, there was no immediate necessity for this opinion.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General,*
HON. ED. C. PETERSON, *State Controller and ex officio Insurance Commissioner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-83. Gasoline Tax—Counties Not Exempt—Neither State nor Cities Exempt.**

Under Motor Vehicle Fuel Tax Law of Nevada (sections 6562-6570, inclusive, Nevada Compiled Laws 1929), neither city, county, nor State is exempt from payment of the gasoline tax provided for in that law; but all must pay such gasoline tax.

INQUIRY

CARSON CITY July 11, 1932.

You have asked the opinion of this office on the following question:

Whether a county, as a political subdivision of the State, is subject to gasoline tax now in effect in the State of Nevada; or, in other words, must such a county pay the gasoline tax just as the ordinary individual must pay it.

OPINION

In 1923 the Legislature of this State passed a law commonly known as "Motor Vehicle Fuel Tax Law," which law is found in Nevada Compiled Laws 1929, sections 6562-6570, both inclusive. Succinctly stated, this law provides for the collection by dealers in gasoline of a tax on all gasoline sold and distributed by them. The only exception to this policy of the law for the collection of this tax on gasoline is to the United States Government itself or to officers of the United States Government for the use of the Federal Government. Even the Federal Government and its officers are not exempt from the payment of this gasoline tax except in cases where "a *written statement* signed by a duly authorized agent, officer, or employee of the United States Government stating that such officer, agent, or employee is authorized to make such purchase of motor vehicle fuel *for and on behalf of the United States Government and that such motor vehicle fuel* (gasoline) *will be used by the United States Government or by its officers, agents, and employees for official use only*" is filed. Nevada Compiled Laws 1929, section 6565.

The method of collecting this gasoline tax as provided for by this law is for the dealer or distributor of gasoline in this State to make the initial charge of this tax by adding it to the regular price charged for the gasoline and to collect this tax from all purchasers except the United States Government itself and its officers, agents, and employees as above stated, and for this money to be paid direct to the State by the dealers and distributors of gasoline. The only purchasers of gasoline from whom the dealers and distributors of gasoline are authorized by law not to collect this gasoline tax are the United States Government and its officers, agents, and employees "*for official use only*." Other than this single exception and exemption the law requires that dealers and distributors of gasoline collect this gasoline tax from all purchasers. There is no provision in the law which exempts or excepts counties or cities from the payment of this gasoline tax.

From the foregoing, it is the opinion of this office that all counties of this State are subject to and must pay the gasoline tax just as individuals are required to pay it.

For your information and as a matter of public policy of this State, your attention is called to the fact that even the Highway Department of this State itself and all operators of gasoline-propelled motor vehicles owned by the State do actually pay this gasoline tax. Many applications have been made to the Tax Commission for exemption and for refunds of this gasoline tax for the State, county, and city motor vehicles; but all such applications have been denied and the

regular gasoline tax has been and is being collected and retained by the State on all gasoline used in city, county, and State motor vehicles just as in the case of the individual purchaser.

As to refunds, it is the policy of the law and definitely provided for in the law that refunds of gasoline tax are to be made only where the gasoline has not been used on public highways. In this connection, the expression "public highways" does not necessarily mean public roads constructed by the Highway Department of the State alone, but means all roads used and maintained by the public.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General.*

HON. FRED L. WOOD, *District Attorney, Hawthorne, Nevada.*

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SYLLABUS

**OPINION NO. 1932-84. County Commissioners—Powers.**

It is legal and constitutional for the Board of County Commissioners of White Pine County, Nevada, to pay out of moneys of the county, which have been collected by general taxation and budgeted, for the purpose of paying for advertising to homeseekers the agricultural, mining, and other resources of that county, certain sums of money which are, in fact, actually applied to the payment of part of the salary of the Secretary of the White Pine Chamber of Commerce and Mines at Ely, Nevada.

STATEMENT

CARSON CITY, July 12, 1932.

Some time ago Mr. L.C. Branson, one of the Assemblymen of White Pine County, Nevada, addressed a letter to the Attorney-General of this State calling attention to a situation which he claimed existed in White Pine County and which he contended was both illegal and unconstitutional and asked for the opinion of this office concerning the same. Since that time there has been considerable correspondence between this office and Mr. Branson and also some correspondence with the District Attorney of White Pine County and Mr. Vail M. Pittman, President of the White Pine Chamber of Commerce and Mines, Ely, Nevada, and some conferences with the above-named persons at Ely, Nevada concerning these matters and in an effort to ascertain as nearly as possible the exact situation and conditions out of which the controversy arose and the facts relating to the controversy.

From this correspondence and these conferences, it seems that the Board of County Commissioners of White Pine County, Nevada, has been paying to the White Pine Chamber of Commerce and Mines, for some considerable time and upon the advice and approval of the present and former District Attorneys of White Pine County, a certain sum of money each month which, although paid under the guise or theory of paying for advertising the agricultural, mining, and other resources of the county, has actually been applied in fact to the payment of part of the salary of the Secretary of said Chamber of Commerce and Mines. It is noted that these payments have been made by the Board of County Commissioners pursuant to legal advice; and Mr. Branson says in his letter that they have been paid "upon the advice of the present and former District Attorneys." He also says that the Board of County Commissioners "finds its authority for so doing in the Act of 1915, which is chapter 44, page 64, of the laws of 1915." This law is found in Nevada Compiled Laws 1929, sections 2027-2029, both inclusive, and is commonly referred to and is entitled "Exploitation of County Resources." It is important to note the wording of the title of the Act, which is as follows:

> An Act authorizing and empowering the boards of county commissioners of the several counties of this state to exploit and promote the agricultural, mining, and

other resources, progress, and advantages of their respective counties; providing ways and means for this purpose, and repealing all acts and parts of acts in conflict herewith.

Mr. Branson in his letter commends the general principle of the exploitation and advertising of the county's resources and the action of the White Pine Chamber of Commerce and Mines in its endeavors along this line by referring to its efforts as "a quite laudable one." He refers to certain trips made by the President and Secretary of this Chamber of Commerce and Mines and, in a general way, to what these officers, and especially the Secretary, have done in this regard, by saying that "in theory, I approve all that." In referring to one particular meeting, he says that one of the meetings "wound up late that night with great enthusiasm for Ely and the Lincoln Highway." In other words, he thoroughly approves the general principle of "advertising" the agricultural, mining, and other resources of the county at the expense of the county and the payment for what he considers legitimate "advertising" of this kind by the Board of County Commissioners out of the funds of the county derived from general taxation and budgeted by the County Commissioners to pay for such advertising.

From the statements received in this office, it appears that the sole purpose of White Pine Chamber of Commerce and Mines is to exploit, promote, and publish to homeseekers and the public at large the agricultural, mining, and other resources and the progress and advantages of White Pine County. In other words, the very purpose of this Chamber of Commerce is to get people interested in the resources of White Pine County. We have literature, consisting of pamphlets, leaflets, and other advertising matter, which show that this Chamber of Commerce and Mines has actually been engaged in advertising the agricultural, mining, and other resources of White Pine County. Some of these pamphlets and leaflets show that they were published by this Chamber at the request of or on behalf of the Board of County Commissioners of White Pine County, and are entitled "Published by White Pine Chamber of Commerce and Mines for the Board of Commissioners of White Pine County." Some of these pamphlets and leaflets show extensive pictures of the copper pit at Ruth in White Pine County and of the reduction plant and smelter at McGill in that county and pictures of large flocks of sheep and herds of cattle. Some of these show the extensive pay roll of the mining industry of the county; its agricultural, stock raising, and other resources and opportunities; the church, school, and fraternal facilities of the county and the cities of the county; and the appeal of the county to the homeseeker, miner, and investor. In a report by this Chamber of what it has done in advertising its community and county, it is shown, among many other things that it has given the mining industry of White Pine County wide publicity; caused the publication of a special edition of the Ely Times-Record; published illustrated stories of the district in nationally circulating newspapers and magazines, including The San Francisco Chronicle, The San Francisco Examiner, Des Moines Register, Motor Land, and Arrowhead Magazine, and many others; and has given attention to hundreds of inquiries regarding the industries, opportunities, and attractions of the county.

In other words, it is evident that the White Pine Chamber of Commerce and Mines is actually engaged in advertising the agricultural, mining, and other resources, progress, and advantages of White Pine County.

## INQUIRY

In view of this situation and upon the above-mentioned facts, Mr. Branson asks the opinion of this office in answer to the following questions, as we understand the matter; and Honorable V. H. Vargas, District Attorney of White Pine County, the latter being entitled to the official opinion of this office, joins in this request, to wit:

(1) Is it legal for the Board of County Commissioners of White Pine County, Nevada, to pay out of moneys of the county which have been collected by general taxation and budgeted for the purpose of paying, as he contends, for "advertising" to "homeseekers" the agricultural, mining, and other resources of that county,

certain sums of money which are, in fact, actually applied to the payment of part of the salary of the Secretary of the White Pine Chamber of Commerce and Mines at Ely, Nevada?

(2) Is the act of such Board of County Commissioners in paying money to such Chamber of Commerce and Mines constitutional?

OPINION

We shall consider both of these questions together in stating the general principles which apply alike to both. In such consideration, it is well to have the section of law authorizing expenditures by Boards of County Commissioners for such purposes. This section of the law is Nevada Compiled Laws 1929, section 2027, and it reads as follows:

> The boards of county commissioners of the several counties of this state are hereby authorized and empowered to, in their discretion, annually include in their respective county budgets items to cover the expense of *exploiting*, *promoting*, and *publishing* to homeseekers *and the public at large,* by *any* means in their judgment calculated to accomplish this purpose, the agricultural, mining, and other resources, *progress*, and *advantages* of their respective counties.

It is well also to consider the title of the Act as hereinabove quoted, in order that we may have definitely before us the exact purpose of the Legislature of this State in enacting this law and of the Governor of this State in approving it.

Certainly, it must be clear and uncontrovertible that the sole purpose of this enactment is to secure publicity for the resources, progress, and advantages of the State. It certainly cannot be questioned that the purpose is a commendable one. We must not lose sight of the fact that the above-quoted section of the law provides a means of giving this publicity not only to "homeseekers" but also to "*the public at large*." We must also keep in mind that the activities of the Boards of County Commissioners in giving this publicity are not limited to the sole means of "advertising" in the sense that the moneys expended must be paid for newspaper publicity or published articles in magazines and other printed matter. The terms of the Act, as above quoted, are as broad as the English language is capable of making them. The language used contemplates and includes every method of giving publicity. The expenses which Boards of County Commissioners are authorized to incur are those of "exploiting, promoting, and publishing." Certainly, these words "exploiting, promoting, and publishing" are broad enough to include any kind of publicity, whether this be by word of mouth or by print. Certainly, the method of giving publicity to the county's resources is not limited to printed "advertising," as Mr. Branson's letter indicates that he believes.

The efforts of Boards of County Commissioners to give this publicity is not limited to "homeseekers" alone, as Mr. Branson seems to believe. The above quoted section of the law expressly provides that this exploiting, promoting, and publishing of the resources of the county is to be directed also to "*the public at large*." Certainly, this expression is broad enough to cover our entire population, every man, woman, and child in existence, not only in this State but elsewhere. Certainly, it is broad enough to cover "tourists," the class of people that Mr. Branson seems to object to being reached by this publicity. Evidently, the purpose of the enactment was to give publicity to all who might be reached, regardless of whether such persons are homeseekers, tourists, or other classes of people.

It must be evident from the language used that the great purpose of the enactment was to give publicity to the resources, progress, and advantages of the State by whatever means the Boards of County Commissioners might adopt. In fact, the section of the law relating to this matter and above quoted expressly says that this entire matter of the means by which publicity is to be given to these matters is entirely within the discretion of the County Commissioners. The section says that the Boards of County Commissioners may give this publicity "by *any* means in their judgment calculated to accomplish this purpose." Evidently, those responsible for this enactment

thought the means by which this publicity was to be given was not important. The chief thing, the great thing, in the minds of those who enacted this law, was to give publicity to our resources, progress and advantages, no matter what means the Boards of County Commissioners might deem was best calculated to accomplish this purpose and which might be adopted by them. The means of giving this publicity is left by law entirely to the good judgment of the Boards of County Commissioners.

Now, what was to be given publicity? Again, the above-quoted section of the law answers the question. It says that this publicity is to be directed toward the "agricultural, mining, and other resources, progress, and advantages" of the respective counties of the State. This is a complete answer to the above question. The things to which the Boards of County Commissioners are to give publicity are not agriculture and mining alone, as indicated in Mr. Branson's letter, but also all the "other resources" of the counties, and not only all the other resources but also the "progress" and "advantages" of their respective counties. If the word "resources" is not broad enough to cover the scenic and road attractions in the counties of our State, then certainly the words "progress" and "advantages" are broad enough to cover every attraction in our counties that might appeal to "the public at large."

It is difficult indeed to even imagine language of broader significance than the language contained in this section of the law. It covers every means of giving publicity, and contemplates publicity not only to the homeseeker but to "the public at large," and provides for this publicity to be given concerning everything in our counties that would attract anyone at all.

There is a limit, however, imposed in Nevada Compiled Laws 1929, section 2028, on the amount of tax which may be levied for the purpose of furnishing the above-mentioned publicity. This section of the law limits the tax levy for this purpose to an amount which "shall not in any one year exceed three (3) cents on each one hundred dollars of the assessed valuation of the property" in the county. It is not legal, therefore, to levy a tax of more than three cents on each one hundred dollars of assessed valuation of the property for this purpose of publicity.

From the foregoing, it is the opinion of this office that the above-stated two questions should be answered, and they are answered, as follows:

1. Yes. 2. Yes.

Our attention has been called to Opinion No. 100 of the Attorney-General of this State as included in his Biennial Report for the years 1923-1924, pages 114-119, both inclusive, and the contention is made that that opinion is controlling in this case upon the theory that the two cases are parallel. To the mind of the layman, the two cases might seem somewhat parallel; and there is some slight similarity between the two cases. However, from the standpoint of the lawyer, the two cases are quite different and easily distinguished from each other. The case under discussion in the above-mentioned Opinion No. 100 involves a donation of State moneys, while the case now under consideration involves an expenditure of money to pay for services rendered and to be rendered. The above-mentioned Opinion No. 100 turned almost completely upon the constitutional provision of the State of Nevada which prohibits donating or lending the State's moneys or credit. The Attorney-General in that case held that the money involved in that case and turned over to a private association was a donation pure and simple and that article VIII, section 9, of the Constitution of the State of Nevada absolutely prohibited the donation or lending of the State's money or credit. To some extent, said Opinion No. 100 also turned upon the fact that the claims to be paid under such appropriations or attempted appropriations must be passed upon by the Board of Examiners of the State, and there was no provision in the law being construed for such claims to be passed upon by the Board of Examiners of the State. The case before us at present does not involve any such situation. The moneys to be expended are not State moneys, but county moneys and, therefore, need not be passed upon by the State Board of Examiners. Opinion No. 100 also turned to some extent upon the fact that the expenditures to be turned over to the private association under the law under discussion in that opinion passed entirely out of the supervision and control of the board making the donation. In the case now before us, the Board of County Commissioners still retains supervision and control over the moneys in the fund, in that the Board of County Commissioners of White Pine County may, at any time, cease paying these moneys to the White Pine Chamber of Commerce and Mines. In

addition to this, the Board of County Commissioners of White Pine County may, at any time, require an accounting as to what these moneys have been used for.

Certainly, under the circumstances involved in the case now under consideration, it cannot be said that the moneys expended for the publicity given White Pine County and its resources and advantages are donations.

Webster defines what is meant in law by a donation in the following language:

> The act or contract by which a person voluntarily transfers the title to a thing of which he is the owner, from himself to another, without any consideration, as a free gift.

Webster also defines a donation as a gift or present or gratuity.

Certainly, it cannot be claimed that this money is "a free gift" or that it is "without any consideration" or is a "gratuity."

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. V. H. VARGAS, *District Attorney, and* HON. L. C. BRANSON, *Assemblyman, of White Pine County, Ely, Nevada.*

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SYLLABUS

**OPINION NO. 1932-85. Motor Vehicles—Truck Licenses.**

Where a four-wheel truck is converted into a six-wheel truck and such conversion results in the doubling of the former's carrying capacity, the Public Service Commission of Nevada should collect the "for-hire license fee" based upon double the carrying capacity of the original four-wheel unit as rated by the manufacturer.

STATEMENT

CARSON CITY, July 13, 1932.

You have called the attention of this office to the fact that a good many truck operators operating for hire in this State are purchasing six-wheel trucks or purchasing four-wheel trucks and adding two additional wheels to increase their pay load or carrying capacity and to the further fact that the Public Service Commission of Nevada has been collecting the for hire tax based upon the original manufacturer's rating of the four-wheel truck, or the manufacturer's original rating as for a four-wheel truck, even after the additional unit has been added to the four-wheel truck and the converting of the truck thereby into a six-wheel truck.

You have also presented to me letters and literature from manufacturers who make and sell these six-wheel attachments, or the attachments by which the original four-wheel truck is converted into a six-wheel truck, and it is noted that in these letters and this literature these manufacturers express the view that, when the additional wheels by which the truck is converted into a six-wheel truck are added, the carrying capacity is doubled or increased one hundred percent.

INQUIRY

Upon these facts, you ask the opinion of this office on the following question:

> Would it be possible for the Public Service Commission of Nevada to proceed to collect for hire license fees based upon double the carrying capacity as rated by the

original manufacturers, when a six-wheel attachment is added as provided for in Nevada Compiled Laws 1929, sections 4404-4413, both inclusive?

OPINION

It is the opinion of this office that it was the intention of this enactment that the Public Service Commission of this State, in determining the amount of "for hire license fees" to be charged operators under this law, should base the amount of these fees upon the carrying capacity of the entire transportation unit as actually operated over the roads of this State, as rated by the manufacturers of the entire unit or units so operated. In arriving at this amount, you should take into consideration both the rating on the original unit turned out by the manufacturer and then the added rating of the manufacturer of the additional unit. In other words, when the original manufacturer turns out a four-wheel truck, he gives it a carrying capacity rating; and the manufacturer of the additional unit gives it also a carrying capacity rating when combined with the original unit. Each of the units are, therefore, rated by the original manufacturer of each and these ratings of each, when added together, constitute the carrying capacity of the entire truck or transportation unit. These added ratings constitute the "carrying capacity *as rated by the manufacturer*" of the entire transportation unit or truck. If the additional wheels double the carrying capacity of the original unit and the manufacturer of the additional wheels or unit so rate the resulting carrying capacity, then the added carrying capacity is as much the "carrying capacity as rated by the manufacturer" as was the rating of the original unit turned out by the original manufacturer on the original four-wheel unit. Both the original capacity of the truck and the added capacity resulting from the additional wheels are manufacturers' ratings of the carrying capacity of the enlarged unit or truck.

If the conversion of the original four-wheel truck into a six-wheel truck or carrying unit results in doubling the carrying capacity as rated by the original manufacturer and the manufacturer of the added unit, then you should collect, and the law contemplates that you should collect, the "for hire license fee" based upon double the carrying capacity of the original four-wheel unit as rated by the manufacturer.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. J. F. SHAUGHNESSY, *Chairman, Public Service Commission of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-86. Waters—State Engineer.**

A canal company, in the absence of a permit from the State Engineer under an application to change the place of use, has no legal right to distribute the water which was decreed to specific lands to the shareholders of the canal company, whoever they may be, and where such distribution may mean the use of such water on lands not mentioned in the court decree.

STATEMENT

CARSON CITY, July 14, 1932.

On 27th ultimo you requested an opinion from this office as to the "legal right" of an incorporated canal company to distribute the water conveyed by its canal, ditches, and other diversion and distributing works and which water had been decreed to specified lands, to the shareholders of the canal company, although such distribution might mean that the water would be used on lands other than those to which it had been decreed.

Your statement indicates that the canal company has been duly incorporated and that it is operating as a corporation for the distribution of water. It also indicates that the water distributed through the canal company's distributing works is taken from a stream system in this State through its ditches or ditch system; that the water rights in this stream system have been adjudicated in accordance with the provisions of sections 18 to 36 of the Water Code of this State; that the State Engineer of this State has proceeded to make his final order of determination of the relative rights of the water users on this stream system; that, thereafter and pursuant to law, the matter was heard in a proper court; and that the court made and entered its final decree adjudicating the relative rights of the water users on this stream system, among them being the water users obtaining water through this canal company's distributing system, and allotted water or water rights to certain specific lands of the water users who obtained their water through this canal company's diverting and distributing system.

INQUIRY

The specific question which you asked reads as follows:

> Has the canal company, in the absence of a permit from the State Engineer under an application to change the place of use, a legal right to distribute the water which was decreed to specific lands to shareholders of the canal company, whoever they may be, and where such distribution may mean the use of such water on lands not mentioned in the court decree?

OPINION

Your question calls for an answer defining the rights and duties of an incorporated canal or ditch company, not the rights and duties of the State Engineer, as to the distribution of this water. In other words, you ask what the corporation, the canal company, can legally do or "has a legal right" to do, as to distributing this water which is diverted and distributed through its works and which the court had expressly allotted to certain specific and described lands. Your question does not relate, even in the slightest manner, to what the State Engineer or his Water Commissioners may legally do or has "a legal right" to do in this regard.

As to what the canal company itself has "a legal right" to do in this regard, this would depend upon the lawful provisions of its own articles of incorporation or charter, and its by-laws, and the wording or provisions of the stock or other certificates issued to its water users or stockholders, and its contract with those water users who obtain their water supply through the canal, ditches, and other means of diversion of the corporation. We have none of these papers before us and have not the slightest information as to what they contain or as to what their or any of their provisions are. Besides this, the final decree of the court which you mention may also have some effect upon the "legal right" of the canal company in distributing this water and upon what its rights and duties are in this regard. Each of these papers may have some effect upon each and all of the others, and any one of them might materially change the canal company's "legal right" as to how and to whom it should distribute this water. It would be impossible for this office, or any other lawyer, to give an opinion that would be worth anything at all to anybody at all without having all these papers present and giving each of them a thorough examination and carefully comparing each of them with the others. In addition to this, the decree of the court may refer to the State Engineer's final order of determination in such a way as to make the final decree of the court depend upon the order of determination to some extent. It would be necessary, therefore, to consider the order of determination with the final decree of the court in order to arrive at any conclusion which would be worth anything at all.

In addition to the foregoing difficulties in the way of giving a dependable opinion on the exact question you have asked, this office is not under any obligation to furnish legal advice or official opinions to this corporation or to guide it in the path of its legal duties. It is not the province of this office to give free advice to private individuals or private concerns.

As to the duty of the State Engineer concerning the distribution of the water on an adjudicated stream system, it is his duty to distribute the water to the intake of the various ditches diverting the water directly from the stream system, to wit, the intake of the main diversion ditch of each water user entitled to the use of the water. In the case of canal or ditch companies through whose diversion and distribution works various users obtain the water to which they are entitled, it is the duty of the State Engineer to distribute the amount decreed to the particular canal or ditch company to the intake of its diversion ditch or ditches; and his duty ceases there.

From the nature of the question asked and from conversations had with Mr. H.W. Reppert, your assistant State Engineer, and the papers he has shown me, I am inclined to the view that the point upon which the opinion of this office is really desired is the method which should be pursued by the canal company in distributing the water to the various water users under the diversion and distributing works of the canal company and particularly as to priority of appropriation as it relates to the stockholders or shareholders in the canal company, and whether the place of use of the water may be changed by these users or shareholders at will and without application to the State Engineer for permission to change the place of use.

As to priority, the same rule of "First in time, first in right" applies to water appropriators and users taking their water through a canal company just the same as it does among water users who take their water directly from the stream system itself. In other words, the canal company is not the owner of the water right or the right to use the water. No absolute right to the water itself may be had by any individual or concern. It is only the right to use the water which may be obtained under our law. This right to use the water, usually called a water right, can be had only by the person who actually converts the water to a beneficial use, the actual user, the person who actually applies the water to a beneficial purpose, not to the agency through which the water is diverted. A canal company is simply the agent by or through which the water is diverted. The canal company owns the diverting and distributing works, but the actual user of the water is the person who owns the water right or right to use the water. This water right is his property, not the property of the canal company. The user of the water, having obtained his water through the diverting and distributing works of the canal company for a considerable period of time, has a right in the nature of an easement in the canal for the carrying of the water to be used by him. Prosole v. Steamboat Canal Co., 37 Nev. 154-163; Lanning v. Osborne, 76 Fed. 319; Mandell v. San Diego Co., 89 Fed. 295.

It requires more than mere diversion of water to complete an appropriation under the Nevada Water Law. Prosole v. Steamboat Canal Company, 37 Nev. 154, and particularly 159-163.

In Prosole v. Steamboat Canal Company, supra, page 162, the Supreme Court of Nevada uses this language:

> *He who applies the water to the soil, for a beneficial purpose*, *is in fact the actual appropriator*, although the application may be made through the agency of another, who by and through his own means and instrumentalities diverts the water, in the first instance, from its natural course.

The Supreme Court of Nevada says in that opinion that the above-quoted statement of the law "has been reasoned out by many courts of last resort in able and well-considered opinions."

In the Prosole v. Steamboat Canal Company case, supra, on page 162, the Supreme Court of this State quotes with approval from the opinion of the Supreme Court of Arizona in the case of Slosser v. Salt River Valley Canal Company, 65 Pac. 337, to sustain this statement of the law, as follows:

> "The appropriator may thus, immediately" (in the first instance), "by constructing and owning his own ditch or canal, or, mediately" (through other agency), "by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation. * * * The doctrine of agency, therefore, unless we concede to such corporations a right not enjoyed by other inhabitants under the statute, must be

> invoked, in order to confer upon them any right to the diversion of water from a public stream."

From the foregoing, it follows that, instead of the canal company being the owner of the water right, it is merely the agency of the actual user or appropriator of the water for the purpose of diverting and conveying the water to the place where the user applies it to the land. Prosole v. Steamboat Canal Company, supra.

In distributing the water to the various users under the canal company, it is the duty of the canal company to distribute in accordance with the priority of the various individual users or appropriators. In other words, the canal company cannot curtail the amount of water to which a prior appropriator is entitled in order to furnish or distribute water to a later appropriator. Prosole v. Steamboat Canal Company, supra.

The right of the water user to use the ditch or canal of a canal company is simply an easement or the right to use of the canal to convey his water through it, so long as he pays the reasonable price charged and complies with his agreement with the canal company and there is sufficient water therefor after supplying prior rights. Prosole v. Steamboat Canal Company, 37 Nev. 163; Lanning v. Osborne, 76 Fed. 319; Mandell v. San Diego Co., 89 Fed 295.

As to the right of the water user to change the place of use of the water without application to the State Engineer for permission to do so, it is well settled both by statutory law of this State and the decisions of the Supreme Court of this State that water is appurtenant to the land on which it has been applied to a beneficial use and to which it has been allotted. In fact, section 7893, Nevada Compiled Laws 1929, specifically states:

> All water used in this state for beneficial purposes shall remain appurtenant to the place of use.

It is stated by the Supreme Court of this State that

> A water right for agricultural purposes, to be available and effective, must be attached to the land and become in a sense appurtenant thereto by actual application. Prosole v. Steamboat Canal Company, 37 Nev. 161.

It is also said by the Supreme Court of this State that

> The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former becomes, by reason of necessity, appurtenant to the latter. Prosole v. Steamboat Canal Company, supra, p. 164.

This question of the appurtenance of water to the land on which it has been applied for beneficial purposes and to which it has been allotted and many other questions involved in the application of the water laws of the various States have been quite fully considered and discussed by the Supreme Court of Oregon in the case of In Re Water Rights of Deschutes River and Tributaries, 286 Pac. 563 et seq. We quote the following excerpts from the opinion of the Court in that case:

> Water for irrigation purposes is appurtenant to the land for which it is appropriated and applied. * * * In other words, the water right is appurtenant to, but not inseparable from the land. In Re Water Rights of Deschutes River and Tributaries, 286 Pac. 574.

In the last above-mentioned case, the Supreme Court of Oregon cites many cases to sustain this statement of the law; and this statement of the law is further sustained by the quite recent

Idaho case of Leland v. Twin Falls Canal Company, 3 Pac. (2d) 1105 et seq. and, particularly, 1107, 1108.

As indicated in one of the quotations from Prosole v. Steamboat Canal Company, supra, the water right is not necessarily an inseparable appurtenance to the land; in fact, our own statutory law recognizes this theory of the severability of the water right from the land, as shown by the following quotation:

> If for any reason it should at any time become impracticable to beneficially or economically use water at the place to which it is appurtenant, *said right may be severed from such place of use* and simultaneously transferred and become appurtenant to other place or places of use * * *. Nevada Compiled Laws 1929, sec. 7893.

But this severance can only be effected in the manner provided by our own statute, for the last above section of our law specifically says that this can be done "*in the manner provided in this act*, *and not otherwise*." As a punishment for undertaking to sever the water right from a prior place of use, to wit, from the land to which it is appurtenant, without proceeding "in the manner provided" in the Act, said section of the Nevada law specifically says that this severance cannot be done "without losing priority of right heretofore" (theretofore) "established."

The method prescribed in our Water Law for such a severance is set forth in section 7944, Nevada Compiled Laws 1929, and simply provides that this can be done only by "application to the State Engineer for a permit" to make this change or severance. In other words, the only way in which a change in the place of use of water, or a severance of the water right from the land to which it is appurtenant, can be legally made is by application to the State Engineer and obtaining his permission to such change or severance. If a water user attempts to change the place of use or sever the water right from the land to which it is appurtenant without such application and permission, the punishment inflicted by section 7893, Nevada Compiled Laws 1929, is that he shall lose his priority of right theretofore established.

This theory of the law is established by decisions of the supreme courts of other States that have a similar provision of law: "The water right is appurtenant to, *but not inseparable from the land*." In Re Water Rights of Deschutes River and Tributaries, 286 Pac. 574, and many cases there cited.

The Supreme Court of Oregon further comments upon this theory of the law in the following language:

> Our statute makes a water right separable from the land to which it is appurtenant *only after application to, and approval of, the state engineer, subject to review by the courts.* Similar statutes exist in several states." In Re Water Rights of Deschutes River and Tributaries, supra, p. 574, paragraphs numbered 19-21.

The Supreme Court of Idaho comments upon this theory of the law in the following language:

> It is well settled in this State and elsewhere that a water right is a property right. * * * One of the valuable incidents of this property right of which the owner cannot be deprived is the right to use it where he will and to change its place of use, provided the rights of others are not injured thereby. First Security Bank v. State, 291 Pac. 1065.

The latter part of the last above quotation would indicate that the water user may change the place of use at will; but the case followed the last above statement of the law with this definite statement that a water user's right to change the place of use must be exercised in the manner provided by law: "of course, the procedure indicated by the statute must be followed where the statute applies." First Security Bank v. State, supra, p. 1065, paragraph numbered 4, 5.

This theory that the water right cannot be separated from land to which it is appurtenant and transferred to other land by the owner of the water right without pursuing the method provided by law therefor, to wit, application to the State Engineer and his permit for such change, is further sustained by the recent decision of the Supreme Court of the State of Idaho on October 19, 1931, in which the Supreme Court of that State speaks of the water right as "dedicated to his land" and as being "appurtenant to the land to which it was dedicated," and then uses the following language: "In the absence of a separation *authorized by law,* the water right dedicated in the contract and evidenced by the certificate became an appurtenance to the land." Leland v. Twin Falls Canal Company, 3 Pac. (2d) 1108.

This same theory of the appurtenance of the water right to the land and the exclusive method by which it may be severed from the land and applied to other land, and that it cannot be legally so severed except in the manner provided by law, is further sustained by other provisions of Nevada Compiled Laws 1929, sections 7893 and 7944, and the Deschutes River case above referred to.

The fact that all water is subject to the Water Law of this State, no matter whether the method of diverting and applying it is through a canal company and its works or directly from the stream system by the water user is further sustained by the holding of the Supreme Court of our own State as follows:

> That the determination and control of *all* water rights, without regard to date of acquisition, is contemplated and required by the Water Law, is too obvious to admit of discussion. Bergman v. Kearney, 241 Fed. 892; Ormsby County v. Kearney, 142 Pac. 810.

That the power of the State to control the use of water in the State is sovereign is held by the Supreme Court of Nevada in the following language:

> The idea that the individual has a vested right to enjoy the use of running water *without public regulation* or control *is subversive of the sovereignty of the state.* The state cannot divest itself of, or surrender, grant, or bargain away, this authority. Bergman v. Kearney, 241 Fed. 893.

From the foregoing, it must be evident that, although the canal company may have distributed water to the water user for use on the land to which the water was not appurtenant and had not been decreed or allotted, the water user cannot obtain a legal right to use the water or obtain a legal right thereby for land other than the land to which the water had been allotted and decreed in the above-mentioned decree of court adjudicating the water rights on this stream system, without application to and permission of the State Engineer to so change the place of use thereof.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General.*

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-87. State Engineer—Fees.**

The fees to be charged by the State Engineer for the filing or recording of any instrument are those specified in the law which is in force and effect at the time of the filing or recording of the particular instrument offered for filing or recording.

INQUIRY

CARSON CITY, July 19, 1932.

On 28th ultimo you referred me to Nevada Compiled Laws 1929, sections 7959 and 7974, relating to fees to be collected by the State Engineer in advance in connection with water applications made to your office, it appearing that, in 1921, the Legislature made some change in the fees to be charged by your office on such applications; and you asked for the opinion of this office as to whether you should collect fees in accordance with the law in effect at the time of the making of the original application or with the law in effect at the time of the filing and recording of the particular paper filed or recorded.

Your question is as follows:

> In approving at this time application filed prior to the enactment of section 73, chapter 106, Statutes 1929, should the State Engineer in determining the amount of fees for issuing and recording permit thereunder, use the statutes in effect at the time of filing the application, or should he use section 73, chapter 106, as the basis for determining same?

OPINION

The portion of the above-mentioned section 7974 to which you particularly refer reads as follows:

> The repeal of a law by this Act shall not affect any application for permit made to, or permits granted by, the State Engineer to appropriate the public water when any such instrument was filed or approved before the repeal takes effect, and any action or proceeding heretofore commenced, or initiated under any law repealed by this Act, shall be completed in accordance with the provisions of the law in force at the time of such filing and approval.

It is the opinion of this office that the above-quoted portion of said section 7974, Nevada Compiled Laws 1929, relates to the procedure incident to the completion and perfecting of the water right under the application, not to the fees to be charged. In other words, this quotation from said section 7974 simply means that the rights of an applicant for water who has filed his application before the repeal of the law shall not be affected or defeated by such repeal. Under this provision of the law, a person who has made application for a water right shall not be deprived of his right to perfect his application and water right by the repeal of the law. It simply means that the merits of his application and his right to the use of water shall not be defeated by some change in the Water Law or the procedure by which he is to secure his water right. If the application to appropriate the water to a beneficial use was filed or approved "before the repeal takes effect," as stated in the law, then the applicant may legally proceed to perfect his water right in accordance with the repealed law, notwithstanding the repeal of it. In other words, the application having been initiated under a law in force at the time the right was so initiated by such application "shall be completed in accordance with the provisions of the law in force at the time of such filing and approval," notwithstanding the fact that the law under which the application was initiated has been repealed.

It is, therefore, the opinion of this office that the State Engineer, in determining the amount of the fees to be collected on an application filed either prior to or after the enactment of 1921 Statutes of Nevada, chapter 106, section 10 (section 73 of the original Act as amended), page 177, which is section 7959, Nevada Compiled Laws 1929, for issuing and recording permit thereunder, shall collect the fees specified therefor in said section 7959 until changed by later enactment. In other words, the fees to be charged by the State Engineer for the filing or recording of any instrument are those specified in the law which is in force and effect at the time of the filing or recording of the particular instrument offered for filing or recording.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-88. Employer and Employee—Eight-Hour Law.**

1. Employees are bound to work only eight hours in any one twenty-four-hour period on public works under section 6170, N.C.L. 1929. Contractors themselves are not bound by this section.
2. A general contractor cannot be held for permitting a subcontractor in excess of eight hours under section 6170, N.C.L. 1929.
3. Differentiation between a "contract of employment" and a "subcontract."

INQUIRY

CARSON CITY, July 21, 1932.

You have written me stating that it has been called to your attention that some highway contractors in this State who have contracts with the State Highway Department had designated certain of their employees as subcontractors and were permitting them to work in excess of eight hours in each calendar day and that, in your opinion, this was in violation of the Eight-Hour Law of this State, and have asked the opinion of this office on the following questions:

(1) Is a contractor bound to work only eight hours in any one twenty-four hours along with his employees in connection with his contract under the provisions of section 6170, Nevada Compiled Laws 1929?

(2) Can the general contractor be held for permitting a subcontractor to work in excess of eight hours in connection with the contract under the provisions of section 6170, Nevada Compiled Laws 1929?

(3) Is the contract between such contractor and alleged "subcontractor" (a copy of which you have furnished me) a subcontract or a mere contract of employment; and is the alleged "subcontractor" a real subcontractor or merely an employee?

STATEMENT

The contract or agreement between the contractor and the alleged "subcontractor," a copy of which you have furnished me, omitting the names, contract number, the sum to be paid for the work, and the price per eight-hour day, reads as follows:

AGREEMENT between....., herein termed the Contractor, and ....., herein termed the Subcontractor, WITNESSETH:

The Subcontractor hereby agrees to perform and execute a portion of the work specified in Contract No....., between the Department of Highways of the State of Nevada and said Contractor, the Subcontractor to receive and to accept as full compensation for all work in the execution of which he shall be engaged the sum of $.....per.....of acceptable work completed during the life of this agreement. Settlements hereunder shall be made semi-monthly. Either party hereto may terminate this agreement at any time without previous notice of intention. Subcontractor shall only be required to furnish his personal services in connection with said work. Contractor agrees that the compensation of the Subcontractor shall not be less than $.....per day of eight hours. The portion of the work included herein shall be such only as the Contractor shall designate.

Dated....., 193.....

.....

By.....

.....
Subcontractor.

The contractor or contractors involved in this controversy are contractors with the Department of Highways of the State of Nevada and are under contract with the Highway Department of this State, having made and executed with the Department of Highways of this State contracts in regular form; and they are engaged in the construction or reconstruction of highways in this State for the State of Nevada. They are, therefore, contractors with the State of Nevada and have a contract "with the State of Nevada * * * for the performance of public work," as described in Nevada Compiled Laws, section 6170. These contractors are, therefore, limited and prescribed by the provisions of that section of the law and by the provisions of their contracts with the State of Nevada or the Highway Department thereof. There is a provision in these contracts which absolutely prohibits the contractors from subletting, selling, or assigning any portion of their contracts, or of the work provided for therein, *without the written consent of the State Highway Engineer.* This provision is found in section 8 of the contract under the heading "PROSECUTION AND PROGRESS" and is in the following language:

> *Subletting or Assigning of Contract.* The Contractor shall not sublet, sell or assign any portion of his contract or the work provided for therein without the written consent of the Engineer, and such permission with reference to subcontractors shall relieve the Contractor of no responsibility.

These contractors have all expressly agreed that they will not *"sublet, sell, or assign"* any portion of their contracts or any portion of the work provided for in their contracts *"without the written consent of the Engineer."* Under the terms of their contracts, they have expressly agreed not to have any "subcontractors" *without the written consent of the Engineer.* None of these contractors have the "written consent" or any consent of the State Highway Engineer to sublet, sell, or assign any portion of the contract or of the work provided for therein.

These contracts provide that any such violation of the terms of the contract, as well as any violation of the Labor Laws of this State, shall be sufficient cause for cancellation of these contracts. Nevada Compiled Laws 1929, section 6171.

You refer in your questions to Nevada Compiled Laws 1929, section 6170. This section of the law reads as follows:

> §6170. *Eight-Hour Day for All Employees on Public Works.* §1. The services and employment of all persons, except as otherwise provided herein, who are now, or may hereafter be, employed by the State of Nevada, or by any county, city, town, township, or any other political subdivision thereof, or by any contractor, subcontractor or other person having a contract with the State of Nevada, or with any county, city, town, township, or any other political subdivision thereof, for the performance of public work, is hereby limited and restricted to not more than eight hours in any one calendar day and not more than fifty-six hours in any one week; and it shall be unlawful for any officer or agent of the State of Nevada, or of any county, city, town, township, or other political subdivision thereof, or any contractor, subcontractor or other person having a contract as herein provided, whose duty it shall be to employ, direct or control the services of such employees, to require or permit such employees to work more than eight hours in any one calendar day or more than fifty-six hours in any one week, except in cases of emergency where life or property is in imminent danger; *provided,* nothing in this act shall apply to officials of the State of Nevada, or of any county, city, town, township, or other political subdivision thereof, or to employees thereof who are

engaged as employees of a fire department, or to nurses in training or working in hospitals, or to deputy sheriffs or jailers.

There is another section of the law of this State which also relates to the situation under discussion. It is Nevada Compiled Laws 1929, section 10460, and reads as follows:

> §10460. *Public Work—Eight Hours to Constitute Day.* §513. On public works, all works or undertakings carried on or aided by the state, county or municipal governments, eight hours shall constitute a day's labor. Any violation of the provisions of this section shall be deemed a misdemeanor and shall subject the employee as well as the person or persons acting on behalf of the state, county or municipal government in the employment of such employee, to a fine of not less than ten dollars nor more than fifty dollars, and in case any contract is let for any state, county or municipal government work, the contractor or contractors violating the provisions hereof shall be punished by a fine of not less than five dollars nor more than fifty dollars for each and every man so employed by such contractor or contractors, and in addition thereto such contract shall be forfeited and be null and void; *provided,* that nothing herein shall be so construed as to prevent the preservation or protection of property in cases of emergency.

It may be contended by these contractors that Nevada Compiled Laws 1929, section 5416, also applies to this situation and controversy; but a mere reading of the title of the Act in which this section 5416 is found and a comparison of the provisions of this section with the title are sufficient to show that this section 5416 has absolutely no application at all to road work done under contract or by contractors, but applies only to road work done directly by the State or some political subdivision thereof by employees employed for such work. It is the unqualified opinion of this office that this section 5416 has absolutely no application to the work being done by the contractor or contractors involved in this discussion and controversy or by the alleged "subcontractors" under them.

It will be observed that said section 6170 applies not only to *"all"* persons "employed by the State or other political subdivision thereof" but also to "all persons" *employed* "by any *contractor,* subcontractor *or other person*" who is rendering any *"services"* or is under *"employment"* of *"any contractor"* with the State or any political subdivision thereof.

In other words, the limitations expressed in this section and the penalties provided for in sections 6171 and 6172, Nevada Compiled Laws 1929, apply to all contractors who employ persons who render services under any such contracts. Said section 6170 limits the "services and employment" of persons so employed to not more than *eight hours* in each calendar day or *fifty-six hours* in each week.

This section 6170 makes it unlawful for *"any contractor"* or other person having any such contract and having any direction or control over any such employee "to require or *permit*" any employee to work more than eight hours in any one calendar day or fifty-six hours in any one week, except under the conditions expressly provided for in that section. These exceptions are as follows: (a) Cases of emergency, (b) officers of the State or some political subdivision thereof, or (c) employees engaged in a fire department, or as nurses in training or in hospitals, or as deputy sheriffs or jailers. This section of the law defines what is meant by the above-mentioned expression "cases of emergency" and limits these "cases of emergency" to cases "where life or property is in imminent danger." The expression "imminent danger," of course, means actual, impending, and immediate danger, not simply a possibility of danger to life or property.

The penalty provided for violation of the provisions of said section 6170 is prescribed in Nevada Compiled Laws 1929, section 6171, immediately following said section 6170. This section 6171 provides that every contract made by the State or any of the political subdivisions mentioned therein shall contain a condition or provision *prohibiting the working of employees more than eight hours each calendar day,* except in the cases mentioned in the last-above paragraph of this opinion, and also provides that the contract may be canceled for any such

violation of the law or the terms of the contract; and the next section, to wit, section 6172, Nevada Compiled Laws 1929, provides also for a fine and imprisonment for violation of the provisions of the law. Punishment of contractors for working their employees more than eight hours each calendar day on public works is also provided in the above-quoted section 10,460. [10460.]

OPINION

1

Your question No. 1 is really two questions, the first portion relating to the contractor and as to whether or not he is bound to work only eight hours per day and the second portion thereof relating to employees of his and as to whether they may be required or permitted by the contractor to work more than eight hours each calendar day.

It is the opinion of this office that said section 6170, Nevada Compiled Laws 1929, does not prohibit the contractors themselves from working more than eight hours in any one calendar day, but there is a strong inference, at least, in said section 10460 that even the contractors themselves are prohibited from working more than eight hours in each calendar day. The provisions of this section 10460 seem to apply alike to both the "employee" and "the person or persons" employing the employee. The first sentence in this section simply prescribes what shall "constitute a day's labor" on public works and provides that on such works participated in by the State, county, or municipal governments "eight hours shall constitute a day's labor." The first portion of the next sentence provides that it shall be a misdemeanor to violate the Eight-Hour Per Day Law and that such violation shall subject both the employee and the employer acting on behalf of the State, county, or municipal governments to the fine therein prescribed. However, that portion of this section beginning with the words "and in case any contract is let" applies to the contractor contracting for any such work participated in by the State, county, or municipal governments, and provides that such contractor shall also be punished by the fine there prescribed for the violation of the Eight-Hour Day Law. Notwithstanding this inference, as contained in said section 10460, it is the opinion of this office that the contractors themselves are not prohibited from working more than eight hours in any one calendar day on such work.

But, as to employees employed by such contractors, it is the unqualified opinion of this office that both said sections 6170 and 10460 absolutely prohibit such contractors from either requiring or *permitting* such employees to work more than eight hours in any one calendar day on such public works and, specifically, on road work in which these contractors are engaged.

2

This question really involves a determination of who is a "subcontractor" and whether the alleged "subcontractors" mentioned in your inquiry are really subcontractors. This question is discussed in our answer to your question No. 3. Insofar as your question No. 2 is concerned, we must answer it in the same manner as we have answered your question No. 1. If the people referred to by you as "subcontractors" are really subcontractors, and not employees of these contractors, the same rule would apply to them as applies to the original "contractors." In other words, if they are actually "subcontractors," it is the opinion of this office that they are not prohibited by law from working more than eight hours each calendar day in such work; but, if they are employees, then these contractors are absolutely prohibited by law from working them, or either or any of them, more than eight hours in each calendar day.

3

An examination of the contract between these contractors and alleged "subcontractors" as hereinbefore quoted and of the terms of these so-called "contracts" is interesting and shows

definitely, positively, and conclusively that the arrangement, understanding, and agreement between these contractors and so-called "subcontractors" is merely a contract of employment.

In this regard, it will be observed that the contract between the contractors and alleged "subcontractors," does not specify the portion of the work to be done, but simply says "*a* portion." In the last sentence of this contract it is provided that the "portion" of the work to be done "shall be such *only* as the contractor shall designate." In other words, the contract does not specify the portion of the work to be done by the alleged "subcontractor" but leaves this matter entirely to the direction of the original contractor. This matter of the place or the amount of the work to be done by the alleged "subcontractor" is left entirely to the direction and control of the contractor. There is nothing definite as to the amount or place of work. It is fundamental that a subcontract must point out the portion of the work to be done by the subcontractor.

It will also be noted that the contract does not provide for any definite duration or term of the contract. It specifically provides that the contract may be terminated by either party to it *"at any time."* To make the matter worse, it expressly provides that this may be done *"without previous notice of intention."* It is fundamental that a subcontract must call for the completion of the certain portion of the contract "in accordance with the terms of the original contract."

It is also noted that the contract is not a contract requiring the completion of any portion of the original contract. It provides expressly that the alleged "subcontractor" shall *only "furnish his personal services."* In other words, it is a contract calling for "services" only; and the "services" called for by the contract are the *"personal services"* of the alleged "subcontractor." Certainly, no one will contend that a contract calling for "personal services" only can be other than a contract of employment. In other words, this agreement is simply an employment of the alleged "subcontractor" by the contractor. To make the matter worse, the contract definitely and expressly provides that the alleged "subcontractor" is merely to be paid wages. It provides expressly that the person doing the work is to be paid not less than a certain stated wage for each eight-hour day.

Certainly, a subcontract should point out the exact amount and place of the work; that it is to be completed in accordance with the original contract; and that the person so completing this definite portion of the original contract is to be paid a definite sum for the completed work, not so much per day for the work, and not a mere contract calling for personal services, and should not leave the person doing the work under the direction and control of the original contractor. If the person performing the portion of the work is under the direction and control of the original contractor, such person is a mere employee and not a contractor.

It is said that "the determinative factor in determining whether one is an employee or an independent contractor" (subcontractor) "is usually found in the solution of the question, *Who has the power of control,* not as to the *result* of the work only, but as to the *means* and *method* by which such result should be accomplished?" 3 Words and Phrases (3d series), pp. 203, 204; Fidelity & Casualty Company of New York v. Industrial Accident Commission of California, 216 Pac. (Cal.), 578, 43 A.L.R. 1304, and note; Amalgamated Roofing Company v. Travelers Insurance Co., 133 N.E. (Ill.), 259; Gailey v. State Workmen's Insurance Fund, 133 Atl. (Pa.), 498; Moody v. Industrial Accident Commission, 260 Pac. (Cal.), 967.

A subcontractor "is one who agrees to do a specific piece of work for a lump sum" and "who has control of himself and his labors as to when, within reasonable time, he shall begin and finish work, method of accomplishing it, and who is not subject to discharge because he does work as to method and detail in one way rather than in another"; while, as to an employee, the employer "has control and direction, not only of the work as to its result, but as to *details* and *method."* Dutcher v. Victoria Paper Mills, 220 N.Y.S. 625, 219 App. Div. 541; Helmuth v. Industrial Accident Commission of California, 210 Pac. (Cal.), 428; In Re Amonds Estate, 210 N.W. (Iowa), 923.

A subcontractor is one who contracts with the original contractor for the performance of all or a part of a completed job which the original contractor has himself contracted to perform and in accordance with the specifications of the original contract. Fitzgerald v. Neal, 231 Pac. (Ore.), 645; Producers' Lumber Company v. Butler, 209 Pac. (Okla.), 738; Amerman v. State, 239 Pac. (Okla.), 740; People v. Valley Mantle & Tile Co., 166 N.W. (Mich.), 839; People v. Morrison,

199 N.W. (Mich.), 689; McGrath v. Pennsylvania Sugar Co., 127 Atl. (Pa.), 780; People v. Connell, 161 N.W. (Mich.), 844; Laffery v. U.S. Gypsum Co., 111 Pac. (Kan.), 500.

The Indiana Supreme Court has said, in distinguishing between a subcontractor and an employee, "We do not believe that a laborer working by the day or a materialman who delivers ties or lumber is a subcontractor. * * * A subcontractor is one who takes from the principal contractor a specific part of the work, as, for instance, one who agrees with the principal contractor to construct ten miles of a roadbed out of a line of twenty or more miles, which the principal contractor had undertaken to build" in accordance with the specifications of the original contract. Farmers' Loan & Trust Company v. Canada & St. Louis R. Co., 11 L.R.A. (Ind.), 743; Barker v. Buell, 35 Inc. 297; Colter v. Frese, 45 Ind. 96; Duncan v. Bateman, 23 Ark. 327; Huck v. Gaylord, 50 Tex. 578.

"A laborer working by the day is not a subcontractor." 4 Words and Phrases (2d), 726; Johnson v. Spencer, 96 N.E. (Ind.), 1041; Rankin v. Rankin, 86 Pac. (Kan.), 1120; Smith v. Wilcox, 74 Pac. (Ore.), 708.

"A subcontractor is an under-contractor, one who takes under the original contract, and is to perform *in accordance with such original contract*—and according to plans and specifications of original contract." People, For Use of Davis v. Campfield, 114 N.W. (Mich.), 675; People, For Use of Bohl Sons Co. v. Finn, 127 N.W. (Mich.), 481.

A contract which provides for an alleged "subcontractor" to do and complete only the work on any part of the roadbed covered by the original contract or where directed by the original contractor or the mileage directed by the original contractor, *without definitely specifying where the work was to be done,* was a contract of employment only, and not a subcontract; and the person who was to do the work was not a subcontractor. Rankin v Atchison, Topeka & San Francisco R. Co., 129 S.W. (Mo.), 755.

An employee is defined to be "a person working for salary or wages" (Century Dictionary), while a subcontractor is defined as one who contracts with a contractor to perform a part or all of the latter's contract, and a subcontract is defined as a contract subordinate to another contract, *as one for the subletting of part or all of another contract* (Webster's Dictionary and Standard Dictionary). In Re Courtland Manufacturing Co., 45 N.Y.S. 630; Palmer v. Van Santvoord, 47 N.E. (N.Y.), 915, 38 L.R.A. 402; United States v. Schlierholz, 137 Fed. 616.

From the foregoing, it must be evident that the alleged "subcontractors" under these contracts and involved in this controversy are mere employees. These contracts do not meet any of the above-mentioned tests for subcontractors as distinguished from employees, in that these contracts do not point out the definite portion of the work to be performed by the alleged "subcontractors"; they leave the work to be done under them within the direction and control of the original contractor; they do not provide for the completion of any definite portion of the work covered by the original contract but leave the agreement to be terminated at any time by either party and even without previous notice of intention; they provide for *"personal services,"* instead of a completed portion of the work; and they provide simply for wages per day rather than compensation in a lump sum for a completed portion of the work.

If it be contended that the State of Nevada has no right to prescribe by law the hours of labor on public works or that the Act is, for that reason, unconstitutional, the entire weight of modern authority is to the effect that the State has an absolute right to prescribe by law the hours of labor on all public works and to limit the hours of work to eight hours per day. 16 R.C.L., pp. 494, 495, sec. 66 and cases there cited; Clark's Law of Employment of Labor, p. 78; Atkin v. Kansas, 191 U.S. 207, 48 L. Ed. 148.

In the Atkin v. Kansas case, supra, the Supreme Court of the United States thoroughly considered the law of the State of Kansas, which is exactly like the law of the State of Nevada now under consideration. This was an appeal from the decision of the Supreme Court of Kansas in which that court upheld the Kansas law. Justice Harlan of the United States Supreme Court reviewed the Kansas statute (exactly like the Nevada statute) and a history of modern legislation limiting the hours of labor on public works and unqualifiedly sustained the Eight-Hour Law of the State of Kansas and its constitutionality in a most able opinion.

From the foregoing, it is the opinion of this office that the contract hereinbefore quoted is not a subcontract, but is a mere contract of employment; and that the alleged "subcontractors" are not real subcontractors, but are mere employees; and that the hours of labor of such alleged "subcontractors" on said public work are limited by law to eight hours per calendar day.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

WILLIAM ROYLE, *State Labor Commissioner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-89. Public Schools—Reimbursements.**

1. Refers to Attorney-General's Opinion No. 71 of February 4, 1932.
2. The Las Vegas School District and its School Board have authority to reimburse the county and State funds to be apportioned to such school district by reason of increased attendance in the event the school district and board should ever receive a reimbursement from the Federal Government.

INQUIRY

CARSON CITY, July 23, 1932.

On 21st instant you wrote this office that a question had arisen in your mind "as to the legality of apportioning funds to the Las Vegas School District on the basis of the average daily attendance of pupils from the Hoover Dam Area" and asked this office the following questions:

1. Has the State Superintendent of Public Instruction the authority to apportion to the Las Vegas School District, from the county and State moneys, an apportionment based on the average daily attendance of pupils from the Hoover Dam area and who have attended school at Las Vegas?
2. In case the Federal authorities reimburse the Las Vegas School District for the attendance of these pupils from this area, has the local school board the authority to reimburse county and State funds for the moneys now apportioned to the Las Vegas School District on account of this average daily attendance of pupils from the Hoover Dam area?

OPINION

1

In your letter which contained these questions you questioned your authority to take into consideration the increase in daily attendance of pupils in the Las Vegas schools caused by the attendance of pupils from the territory between Las Vegas School District and the Colorado River, for the reason, as stated by you, that it appears that the Federal Government and people operating in the Hoover Dam area are not paying State or county taxes for the support of schools and local and State government and that the Las Vegas School District has presented a claim to the Federal Government covering the cost of educating a certain number of pupils as coming from the territory between Las Vegas School District and the Colorado River, part of them coming from the so-called reservation and part from unorganized territory. In other words, you question your authority under the law to base the apportionment of school funds to the various school districts upon the daily attendance of pupils in such school districts as shown by the reports of such school districts for the last preceding school year.

We must call your attention to your letter to this office of January 25, 1932, in which you stated it to be your opinion that the law *"seems to make it mandatory that school moneys be*

*apportioned on the basis of average daily attendance of pupils for the preceding school year."* In other words, you were quite positive on January 25, 1932, that the law made it *"mandatory"* for you to base your apportionment of schools moneys on average daily attendance for the last preceding school year; but, in your letter of 21st instant and in personal conferences concerning this matter, you question your authority to do the very thing you were contending for in your former letter.

On February 4, 1932, I gave you a rather full and complete opinion to the effect that your views as expressed in your letter of January 25, 1932, were correct, and agreeing with you that the law of this State requires you to base your apportionment of school moneys on the *"average daily attendance as shown by the last preceding annual school report."*

There has not been any session of the Legislature of this State since you wrote your letter of January 25, 1932, nor has there been any change in the law; and my opinion as to what the law is has not changed since I wrote my opinion of February 4, 1932. I must, therefore, refer you to my Opinion No. 71 of February 4, 1932, for full and complete answer to your question No. 1, as there seems to be no other method of apportionment provided by law.

2

In considering your question No. 2, I call your attention to the fact that under no consideration is the Federal Government required to pay any taxes on anything. It is not required to pay taxes on its post-office building even in the city of Las Vegas itself. You refer to the pupils who constitute the increase in attendance of the Las Vegas schools as coming in part from "unorganized territory." It would seem, therefore, that these children do not come from the so-called reservation area. If not and if their parents own property, they must be contributing to the State and county taxes at least. If they do not come from the so-called reservation area, it would be difficult to determine any proper basis for contribution for their education from the Federal Government, for, if not within that area, even the Federal Government and its contractors concede that they are within and a part of the State of Nevada. Under such circumstances, the State, and not the Federal Government, is responsible for their education. It is our information, however, that the contribution requested by Las Vegas School District from the Federal Government covers only such pupils as reside within the so-called reservation. Our understanding is that the application of Las Vegas School District and its board for reimbursement from the Federal Government for the attendance and education of these pupils from the so-called reservation is by way of a bill introduced in Congress for such reimbursement. Congress has adjourned and without passing this bill. Usually, bills do not hold over from one session of Congress to another, but must be introduced anew. In the new bill providing for this reimbursement, if any be introduced, proper provision will no doubt be made to see that Las Vegas School District does not receive double pay for this increased attendance due to pupils residing within the so-called reservation. Even if an attempt should be made to pass the old bill, that is to say the bill pending in the Congress which has adjourned, it would be an easy matter for this old bill to be amended so as to properly safeguard the interests of the other schools within the State by a provision that Las Vegas School District should properly apportion the money to cover the education of these additional pupils among the other school districts of the State whose apportionments were decreased by reason of this increase of daily attendance in the Las Vegas schools. Our congressional delegation will certainly see that complete justice is done in this regard by seeing to it that Las Vegas is not paid twice for this increased daily attendance.

In any event, the Las Vegas School District and its school board would certainly see the injustice to the other schools of the State in any such double pay for this increased attendance, and we are sure would not be a party to any such injustice.

Answering your question No. 2 specifically, it is the opinion of this office that the Las Vegas School District and its school board have authority to reimburse the county and State funds to be apportioned to such school district by reason of this increased attendance in the event this school district and board should ever receive any such reimbursement from the Federal Government. We are of the opinion, however, that, as to the increase in the portion of the State Distributive

School Fund to be now apportioned to Las Vegas School District or Clark County by reason of this increased attendance, the better method of reimbursement from the Federal Government would be for the congressional bill to provide that this money be distributed direct to the State for the State Distributive School Fund, and, as to the remainder thereof, that the reimbursement be made direct to Clark County in order that you may properly apportion this reimbursement where it belongs.

In view of the fact that the *"average daily attendance as shown by the last preceding annual school report"* is the only basis of apportionment provided by law, it is our opinion that you cannot legally adopt any other method of apportionment. It is the contention of the State that the so-called reservation has not been legally created; that the territory embraced therein is still a part of the State of Nevada; that all the laws of the State of Nevada apply therein; and that all of the privately-owned property, including the property owned by Six Companies Incorporated and all of the other persons and concerns operating within this territory, is subject to taxation, both for State, county, schools and other purposes. The State is even now engaged in litigation in an attempt to collect these taxes. The assessing officers of the State have actually assessed all property within the so-called reservation except property actually owned by the Federal Government. This assessment amounts to several millions of dollars and the taxes which we are attempting to collect on it amount to many thousands of dollars. Some of the owners of this privately-owned property have already paid their taxes. It is our opinion that the State and county taxing authorities will succeed in establishing in court the right to tax all this privately-owned property. When this tax is collected, every school district in the State will obtain its just proportion of the State Distributive School Fund included therein, as determined by the average daily attendance of each school as shown by its last preceding annual school report. In this way, no school district of the State will be injured by your apportionment at this time of the school funds in exact accordance with the law of this State, to wit, upon the basis of the average daily attendance as shown by the last preceding annual school report.

In addition to the fact that the law requires this apportionment to be made upon the basis of the complete average daily attendance of each school district, and the fact that the State is already committed to the policy that the so-called reservation is in fact still a part of the State of Nevada and that the State taxing laws apply therein, it seems to us that it is but common justice that you follow your usual custom and the manner provided by law and base your apportionment as to the Las Vegas School District upon its complete average daily attendance. In other words, both the law and justice seem to us to require that this method be pursued as to this particular school district as well as to all other districts.

We base this conclusion as to justice upon the situation as it existed at the time of your above-mentioned letter of January 25, 1932, and when we furnished you our Opinion No. 71 of February 4, 1932, as compared with the condition which existed at the time you asked for this opinion on 21st instant. At the time you wrote your former letter, the Las Vegas School District had been crowded to overflowing by reason of the increased attendance due to the pupils coming from the so-called reservation area. It had been necessary to employ additional teachers and to incur a great deal of additional expense incident to maintaining the school at Las Vegas and furnishing these and the other pupils there proper educational facilities. The school authorities of the Las Vegas School District had sought to obtain relief from this situation by asking that a census be taken and that it be allowed an increased apportionment by reason of the increased attendance or increased census, to cover, in some measure at least, these additional expenses which the school district was then actually incurring. In this distressing situation we were forced to deny them this relief for the very simple reason that the law prohibited this relief by specifying definitely that the basis of apportionment was the average daily attendance as shown by the last *preceding* annual school report; and we held accordingly and that the then present increased attendance could not be taken into consideration in making the apportionment made or about to be made at the time we furnished you our opinion on February 4, 1932. In justifying that opinion in our minds and consciences, we took into consideration both the fact that the law permitted no other construction and the fact that the Las Vegas School District would, at the next apportionment (the present apportionment), be able to take advantage of this increased average

daily attendance. In our view, it would not be justice to this school district to now deny it this advantage and the very promise held out to them as the justification, in part at least, of our conclusions as expressed in our Opinion No. 71 of February 4, 1932.

Under all the circumstances involved in this matter, it is our opinion that you should base your apportionment of school funds to Las Vegas School District upon the complete average daily attendance of all pupils attending the schools in that district as shown by the last preceding annual school report; and that this is the only legal basis of apportionment that you can adopt.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. WALTER W. ANDERSON, *State Superintendent of Public Instruction, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-90. Elections—Residents of Federal Reservations.**

Civil attachés of the Government Ammunition Base at Hawthorne, Nevada, residing within the so-called reservation at the munition base on government land, have the legal right to vote.

INQUIRY

CARSON CITY, August 9, 1932.

In your letter to me of 4th instant, you ask the opinion of this office on the following question:

> Have civil attachés of the Government Ammunition Base at Hawthorne, Nevada, residing within the so-called reservation at the munition base on Government land, the legal right to vote?

OPINION

In Opinion No. 316 of Honorable M.A. Diskin, Attorney-General of Nevada, as published in his Biennial Report for the years 1927-28, Mr. Diskin, as Attorney-General, has quite an exhaustive discussion of a similar question. It is true that he was discussing the right of Government employees residing on Indian Reservations to vote; but, in large measure, the principles announced in that opinion are applicable to this situation as it exists at what you designate as "The Government Ammunition Base at Hawthorne" and which you later designate in your letter as "The Reservation at the Base." The conclusion arrived at by him in that opinion applies with equal force in this case. You are, therefore, referred to said Opinion No. 316 for a discussion and statement of the principles applying in such cases and for the conclusion reached.

My information is that no Federal Reservation, in the true sense of the words, has been created at the Base at Hawthorne. I do not know of any congressional legislation creating such a reservation there; and no map and affidavit, as provided for in the 1921 Statutes of Nevada, chapter 23, page 27, have been filed in the office of the Governor of this State, as was done at Boulder City. I am informed that there has not been any such congressional legislation, and know that no such map and affidavit have been so filed. The most that has been done by the Federal Government is that the land belonging to the Federal Government has been withdrawn from entry and homestead.

Even if the map and affidavit above mentioned had been made and filed in the office of the Governor of this State, it is our contention that the State laws would still apply, including the right of franchise. In fact, arrangements are being made for the people within the so-called Boulder Canyon Project Federal Reservation of the United States in Nevada, at Boulder City, Nevada, to vote at the September primary election and the November general election,

notwithstanding the fact that the attempt has been made to create a Federal Reservation by the filing of the map and affidavit in the Governor's office.

Nevada Compiled Laws 1929, section 2539, reads as follows:

> Electors of the State of Nevada in the military service of the United States may, when called into such service, vote in accordance with the provisions of the Act approved March 14, 1899.

This Act of March 14, 1899, provides the manner in which electors in the military service of the United States may vote. There is nothing in the Act which would prohibit the civil attachés mentioned in your inquiry from voting.

It is the opinion of this office that the attachés of the Federal Government residing in the so-called reservation at Hawthorne may legally vote at elections in this State; provided, they meet all the other requirements as to residence specified in the Nevada law governing the elective franchise. In other words, the people residing within the so-called reservation have the same right to vote at elections in this State as they would have if they resided elsewhere in the State; and the mere fact that they reside within the so-called reservation does not prevent them from having the legal right to vote, and is not a cause for disfranchisement.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General.*

HON. FRED L. WOOD, *District Attorney, Hawthorne, Nevada.*

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SYLLABUS

**OPINION NO. 1932-91. Public Schools—Census.**

The taking of a school census is entirely within the discretion of the State Board of Education.

INQUIRY

CARSON CITY, August 10, 1932.

About 6th instant, I received a long letter from you, dated August 4, 1932, in which you discussed the apportionment of school moneys in this State, and particularly the apportionment of the proper portion thereof to Las Vegas School District; and Opinions Nos. 71 and 89 of this office relating to such apportionment.

In your letter you accept as correct the above-mentioned Opinions Nos. 71 and 89, but say that the information furnished this office by you, upon which those opinions were based, was not as full and complete as it should have been and that the questions asked this office by you and upon which those opinions were based were not sufficiently complete to bring out in those opinions the entire information you desired. In this connection, you call attention to Nevada Compiled Laws 1929, section 5772, which relates to "Resident children" and "Nonresident children," and deals with the method of the taking of the school census and the duties of census marshals in connection therewith, and ask the following questions:

> 1. Is any part of this section to be construed as affecting reports of average daily attendance of pupils as submitted by school districts to the Deputy Superintendents? If so, what parts are in effect and what parts void?
> 2. Is there anything in sections 5772 or 5778, N.C.L. 1929, authorizing the Deputy Superintendent of Public Instruction to strike from the district reports of average daily attendance the names and thus the average daily attendance of any pupil?

3. Is there anything in the law that can be construed as giving the State Superintendent the authority to refuse to apportion State and county funds when it is definitely known to both the Deputy and the Superintendent that children reported in average daily attendance by a school district are not residents of the State?

OPINION

Before giving my opinion on the above questions, it is necessary to devote some time to a discussion of the facts, as we understood them, before this office at the time said Opinion No. 71 was written. While it is possible your questions were inspired by a request from Las Vegas School District that it be allowed to file "An amended report" of the average daily attendance to take the place of the "Last preceding annual report" as the basis of apportionment, it is true that our discussions all related to the right of the district to take a census without the direction of the State Board of Education or other proper authority, and have the apportionment based on such census, and of what is the proper basis of apportionment of school funds. Opinion No. 71 held definitely that the *only* basis of apportionment of school funds provided by law in such cases was the *"Average daily attendance,* as shown by the last preceding annual school report." Our opinion on this point remains the same as it was at that time.

While the contractor engaged in the construction of Hoover Dam and affiliated enterprises has raised some question as to whether the laws of the State of Nevada apply within the area designated as Boulder Canyon Project Federal Reservation of the United States in Nevada, and has commenced two suits in the Federal Court in this State to test the question as to whether the State laws apply within the area, the State of Nevada and Clark County and the officers thereof are contesting these suits and are contending that the reservation has not been properly and legally created and that, even if so created, all the laws of the State of Nevada apply within that area. One of these suits is directed against the Governor of this State and several other State officers and the law enforcement officers of Clark County, Nevada. All these officers are contesting this question and are contending that all the laws of Nevada apply within the area. Therefore, instead of assuming, as you do, that the laws of the State do not apply within the area and that the children residing there are "Nonresident children," we should assume, in order to be consistent throughout all the departments of State, the opposite, and that all the laws of this State, including also our school laws, do apply within the area and that the children residing there are "Resident children." It would certainly be a peculiar situation and weaken the entire contention of the State, if one department of State should "assume" that the laws of the State, or a part of them, do not apply within the area, while all the other officers and departments of State "assume" that the laws of Nevada do apply within the area. The law is not an exact science like mathematics, and is more or less unsettled. It would be impossible for anyone to say of this area definitely whether the laws of the State apply within the area or not; but, until the courts finally settle this question, the State should not so lightly surrender jurisdiction over such a considerable portion of the State, and leave people living in that area without law to govern them, and thereby consent to a "No man's land" within the borders of our State.

Now, we shall proceed to give you the opinion of this office as to the meaning of said section 5772, Nevada Compiled Laws 1929, as it applies to your three questions as follows:

1. This section 5772, Nevada Compiled Laws 1929, simply relates to the method of the taking of a school census, when such census is ordered by the State Board of Education or in the manner provided by law; the taking of an oath by the school census marshals; the duties of such census marshals; the responsibility of such census marshals for a correct school census and the persons to be included in such census when so ordered. Among other things, it defines the expression "Resident children," and prescribes the children who are included within and the children who are excluded from that expression, and, in that way, the children who are to be included in such school census and those who are to be excluded from such census, when so taken. There is nothing in this section, however, which requires a school census to be taken; and

section 5770, Nevada Compiled Laws 1929, as amended in 1925, expressly leaves the taking of a census to the discretion of the State Board of Education, and provides that the school census of a school district may be taken "whenever in the judgment of said State Board it appears advisable that such a school census should be taken." There is nothing in this section or in the law that makes it compulsory upon the State Board of Education to order or to have a school census taken; but the law merely *authorizes* that board to order a census if, in its discretion, it deems it advisable to do so.

It is, therefore, the opinion of this office that neither this section nor any part of it affects in anyway the reports of daily attendance of pupils made by school districts to Deputy School Superintendents. Even in cases where the State Board of Education has directed that a school census be taken, and such census is taken pursuant to such direction, and it is found by such school census that there are more "Resident children" within the school district than the average daily attendance record shows, the school district should not allow such showing of increase in "Resident children" within the district to affect or influence its "Report of average daily attendance of pupils" for the last preceding school year as made to the Deputy Superintendent. The matters revealed by the school census, even when directed by the State Board of Education, should be covered separately, or in such a way as not to affect the report of average daily attendance.

As to the second question included in your designation 1, to wit, that portion of it which asks "What parts (of section 5772) are in effect and what parts void?" we have to say that the entire section is in effect, and none of it is void, when used in cases where the State Board of Education has ordered a school census, except as to the method of appointing a school census marshal as specified in said section 5772 and changed in said amended section 5770. In this connection, it is important to keep in mind that the sole purpose of said section 5772 is to prescribe the method of the taking of a school census in cases where the State Board of Education directs that a school census be taken, and to prescribe the children who are to be included in such school census.

2. There is nothing in either section 5772 or 5778, Nevada Compiled Laws 1929, which authorizes the Deputy Superintendent of Public Instruction to strike from the district reports of average daily attendance any name, and thus the average daily attendance of any pupil.

We must not lose sight of the fact that the whole of chapter 9 of the School Law, to wit, sections 5770 to 5782, both inclusive, does not relate in anyway to "Reports of average daily attendance" or to daily attendance in any way. It relates solely to the method of the taking of a school census and matters relating to the school census alone. Both said sections 5772 and 5778 are included in said chapter 9; and there is absolutely no provision anywhere in this chapter which relates in anyway to "Average daily attendance." Absolutely the only reason for including any of said chapter 9, to wit, Nevada Compiled Laws 1929, sections 5770 to 5782, both inclusive, in the 1929 compilation of the laws of this State was to guide census marshals and other school officers in this State in the taking of a school census when the State Board of Education, in its discretion, orders and directs that a school census be taken. If we keep in mind the fact that this chapter 9 does not relate in anyway to average daily attendance, but is devoted entirely to the school census, and that only in cases where the State Board of Education, in its discretion, orders and directs that a school census be taken, we would avoid a lot of misunderstanding as to the provisions of said sections 5770-5782, both inclusive, and particularly of sections 5772 and 5778.

As to the school *census,* when so taken pursuant to the order and direction of the State Board of Education, the Deputy Superintendent of Public Instruction has the right to strike from the school *census* the names of such children as he knows are wrongfully included in the *census report*, as separate and distinct from the report of the school district of *"Average daily attendance,"* as provided for in said section 5778. But this section does not authorize the Deputy Superintendent of Public Instruction to so correct *"Reports of average daily attendance."*

In holding that the Deputy Superintendent of Public Instruction may so correct *census* reports, we are mindful of the holding of the Supreme Court of this State in State v. Wedge, 27 Nev. 61-69, to the effect that the Superintendent had no power, under the law as it existed at that time, to correct a *census* report as provided by the law as it existed at that time. That case and the holding

of the court that the Superintendent had no power to correct the census report himself turned upon the fact that the law, as it existed at that time, provided expressly for a different method of correcting an erroneous census report, to wit, by ordering a new census. Since that case was decided, the law of this State has been changed; and this change is expressed in said section 5778, which provides expressly that the Deputy Superintendent of Public Instruction shall compare and correct census reports by striking names from it which he knows are erroneously included in it. This change in the law makes the case of State v. Wedge, supra, inapplicable and of no force and effect insofar as our present law is concerned.

But it must be kept in mind that this right to correct or strike relates solely to *census reports*, and that it does not in anyway confer upon Deputy Superintendents of Public Instruction the right to so correct *"Reports of average daily attendance."*

It must also be kept in mind that "Average daily attendance" is the present basis of apportionment of school funds.

3. In answering your question No. 3, it must be kept in mind that the entire theory of the School Law of this State is that the school funds of the State are for the education of "Resident children" of the State. There is not even a hint in the School Laws of this State that even one cent of the school funds paid by the taxpayers of the State on property situated in the State is to be spent for the education of children who do not reside in the State or who do not come within the class designated in said section 5772 as "Resident children."

Upon this general principle and general purpose of the School Law, it is the opinion of this office that the Superintendent of Public Instruction of this State has the implied authority at least to refuse to apportion State and county moneys to a School District or for a School District to cover children reported in "Average daily attendance by a School District who are not residents of the State." So, if you know of any school district in this State which has included within its report of average daily attendance for the last preceding school year any child or children who are not resident in this State, to wit, who are nonresidents of this State or do not reside within this State, you have implied authority at least to eliminate such nonresident children from consideration in your apportionment of school funds to such school district.

From my conversations with you, I understand that this situation relates solely to school districts which are situated on and near the border-line between this State and adjacent States, and where children from these adjoining States attend the public schools of this State. It is unfortunate, but the fault is in allowing such nonresident children to attend the public schools of this State, supported by moneys of this State, free of tuition. Such a practice should not be permitted and is not sanctioned by the law. In this connection, it should be kept in mind that the children living within the so-called reservation at Boulder City and adjacent territory are not nonresident children of this State, as we now construe the law of this State.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. WALTER W. ANDERSON, *Superintendent of Public Instruction, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1932-92. Elections—Referendum.**

A mere majority of the votes of the qualified electors of the county voting on the question submitted for referendum vote is sufficient to legally approve or disapprove, as the case may be, a law relating to that county alone.

INQUIRY

CARSON CITY, October 3, 1932.

In an election involving a referendum vote in which a law relating to a county alone is submitted to a vote of the qualified electors of that county alone for their approval or

disapproval, what majority is required for approval or disapproval of such local law, that is to say, is a majority of all votes cast in the county at that election necessary to the approval or disapproval of such a local law or is a majority of the votes cast on that question alone sufficient to legally approve or disapprove such a law?

OPINION

The above question presents an entirely different question and the construction of an entirely different law from those involved in Opinion 389 of Honorable M.A. Diskin, Attorney-General, in his Biennial Report for the years 1929 and 1930. That opinion related to a State referendum vote and the Constitution and law governing such a State referendum, while the above question involves the Constitution and a law of this State as they relate to a county referendum or a referendum vote on a law which relates to a county alone.

This opinion is limited to a referendum vote in a county alone and to a law relating to that county alone. Article XIX, section 3 of our Nevada Constitution, provides in part as follows:

> The legislature may provide by law for the manner of exercising the initiative and referendum powers as to county and municipal legislation, but shall not require a petition of more than ten per cent (10%) of the qualified electors to order the referendum, nor more than 15 per cent (15%) to propose any municipal measure by initiative.

Pursuant to the above-mentioned authority so delegated to the Legislature of this State, the Legislature of Nevada enacted a law in 1915, now known as section 2585, Nevada Compiled Laws 1929, in which it is provided as follows:

> When a majority of the electors of such county voting upon the question submitted shall by their vote signify approval of such law or resolution, such law or resolution shall stand as the law of the state, and shall not be overruled, annulled, set aside, or in anyway made inoperative, except by direct vote of such county. When a majority of the electors of such county shall so signify disapproval, the law or resolution so disapproved shall be void and of no effect.

It is evident from the above-quoted language of said section 2585 that the Legislature of this State has definitely provided that a mere majority of the electors of a county *"voting upon the question"* is sufficient to either approve or disapprove local legislation relating to the county alone. If a majority of the electors voting upon the question vote to approve the law, then the law is approved. If a majority of the electors voting upon the question vote to disapprove such a law, then the law so disapproved shall be "void and of no effect."

Since the Constitution of the State delegated to the State Legislature the authority to "provide by law for the manner of exercising the initiative and referendum powers as to county and municipal legislation," the Legislature of the State was entirely within its delegated authority in enacting said section 2585.

From the foregoing, it is the opinion of this office that a mere majority of the votes of the qualified electors of the county voting on the question submitted for referendum vote is sufficient to legally approve or disapprove, as the case may be, the law relating to that county alone.

Respectfully submitted,
GRAY MASHBURN, *Attorney-General.*

HON. HOWARD E. BROWNE, *District Attorney, Austin, Nevada.*

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SYLLABUS

**OPINION NO. 1932-93. School Teachers—Certificates.**

The granting of a certificate to teach school does not revert or relate back to a time prior to the granting of the certificate.

INQUIRY

CARSON CITY, October 3, 1932.

In your letter of October 1, 1932, you ask this office for an opinion on the following question, in effect:

> Does the granting of a certificate to teach school revert or relate back to a time prior to the granting of the certificate so as to make valid and binding upon the Trustees a contract entered into between the School Trustees and the teacher prior to the granting of the certificate and so as to legally bind the Trustees to pay the teacher for services rendered prior to the granting of the certificate?

OPINION

The statement of facts contained in your letter and upon which you base the above question is substantially as follows:

> During the summer of 1932, H.J. Swingle, Mildred B. Powell, and George H. Chester signed, as Trustees of Northam School District in your county, a contract with two teachers to teach the public school in that district. You state, "There is no contention about Mr. Swingle and Mrs. Powell being legal Trustees, but George H. Chester and Mr. Harriman" (E.L. Harriman) "both claim to be Trustees by reason of a recall election in which Mr. Chester received the most votes and a certificate was issued by the election board and was delivered to Mr. Chester." You further state, "Mrs. Powell now states that she will not sign a requisition for payment of the teachers for the time they taught previous to September 27." It appears that on September 27, 1932, the State Board of Education granted certificates to these teachers authorizing them to teach school in this State thereafter for the current year, and that it was distinctly understood at the time these certificates were granted that they would be dated September 27, 1932, and be effective only after they were so granted. These teachers began teaching in this school district at the beginning of the school term and taught for the month of September of this year, although they had no certificates to teach school in this State until September 27, 1932. In other words, these teachers were not legally qualified to teach school in this State, by legal certificate in date, at the time of the employment or at the time they began their services as such teachers early in September of this year or until September 27 of this year. From investigation, I find that the Superintendent of Public Instruction or his Deputy for that district has filed a protest with the school board of that district or the County Auditor of Churchill County, Nevada, against the payment of the salary of these teachers for the month of September, 1932, and for the services rendered prior to September 27, 1932, the time of the granting of the certificates.

From the foregoing statement of facts, it is the opinion of this office that a majority of the Board of School Trustees, legally qualified as such Trustees, may legally employ legally qualified teachers to teach in their school district. Nevada Compiled Laws 1929, section 5714, and paragraph 11 of section 5715.

Since Mr. Swingle and Mrs. Powell were legally qualified School Trustees, the disqualification of Mr. Chester as such Trustee is immaterial, if the employment was made in accordance with paragraph 11 of said section 5715.

As to whether Mr. Harriman or Mr. Chester is the legally qualified Trustee of said school district, we call your attention to Opinion 42 of this office, dated July 14, 1931, in which it was held that, since the recall election was illegal, Mr. Harriman is still the legally qualified School Trustee of said school district; and this is still the opinion of this office, based upon the facts before us at the time said opinion was given.

Answering your above-mentioned question directly, it is the opinion of this office that the salary of the school teachers of said school district for the services rendered by them prior to September 27, 1932, cannot legally be paid, as the school law of this State definitely provides that no salary of a school teacher can be paid unless the school teacher was legally employed and *had a legal certificate to teach school in this State which was in force and effect at the very time the services were rendered.* Nevada Compiled Laws 1929, section 5684.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. E. E. WINTERS, *District Attorney, Fallon, Nevada.*

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SYLLABUS

**OPINION NO. 1932-94. Elections—Absent Voters.**

1. When an elector who has been duly registered and who, by reason of illness, expects to be confined in bed on election day, voted by absent ballot and died before election day, his or her ballot should not be deposited in the ballot box for counting.

2. If a duly qualified elector becomes ill less than three days prior to the date of election and is therefore unable to appear at the polls on election day, he nevertheless, under the law, has no right to cast his ballot at his home in the presence of two members of the election board.

INQUIRY

CARSON CITY, November 23, 1932.

1. If an elector who has been duly registered and who, by reason of illness, expects to be confined in bed on election day voted by absent voter's ballot and dies prior to the day of the election and the election board has notice of his or her death, can his or her ballot be deposited in the ballot box for counting?

2. If a duly qualified elector becomes ill less than three days prior to the date of an election and is unable to appear in person at the polls on election day and makes request for permission to vote his ballot at his home, can he cast his ballot in the presence of two members of the election board, said members being of opposite political faith?

OPINION

In answering the above queries, submitted under date of November 15, and after the general election of this year, we do so because the opinion is desired for future reference.

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Section 2561, Nevada Compiled Laws 1929, the same being section 10 of the Absent Voters Law, reads as follows:

> On the day of election, at the close of the regular balloting, the inspector of election who received the absent voters' ballots from the county clerk shall, in the

> presence of a majority of the election officers, proceed to deposit the ballots in the ballot-box in the following manner:
>
> The name of the voter, as shown in the carrier envelope, is to be called and checked as if the voter were voting in person. If found entitled to cast his vote, the envelope is then, but not until then, opened, the number torn off, and if the number on said envelope agree with the number of the ballot taken from said envelope, the ballot shall then be deposited in the regular ballot-box, without examining or unfolding it, and the clerk of election shall mark opposite the name of the voter the word "voted."

and discloses that a further check on the absent voter's right to vote is to be had by the election board by whom the absent voter's ballot has been received from the County Clerk before such ballot is deposited in the ballot box, the same check that is had where an elector presents himself in person and requests a ballot for the purpose of voting.

While it is provided in section 4 of the law, *i.e.*, section 2555, Nevada Compiled Laws 1929, that the County Clerk shall determine that the person applying for an absent voter's ballot is entitled to vote and to cast his ballot at a particular place, still section 2561 above quoted makes it mandatory upon the election board to check the records and further determine that such person is eligible to vote, and this is and must be done at a particular time, *i.e.*, at the close of the regular balloting on the day of election. This requirement of the law clearly negatives the proposition that the right and eligibility of the voter to vote is to be determined as of the time he marked the absent voter's ballot. Under the statute, such right and eligibility to vote is to be further determined *at the time* the envelope containing the absent voter's ballot is, by the inspector of election receiving the ballot from the County Clerk, about to be opened and the ballot therein contained deposited in the ballot box. Then and there the voter's name is called and checked as if the voter were voting in person. Thus, the right and eligibility is further determined at that particular time. When such absent voter's name is called and checked and it is known to the election board that such person is dead, then, most assuredly, such person is not then eligible to vote. There is no person then in being capable of exercising the elective franchise evidenced by such ballot.

The theory and the principle of the Election Law is that the body of the electors shall evidence the will of the electorate on the day of the election and on that day only. The Absent Voters Law simply provides a means for those entitled to vote by absent voter's ballot to record their will in advance of the day of election, but this is as far as such law goes. It does not provide that the will of such electors shall be registered and become effective for any purpose until the day of election; and it is on that day, and that day only, and at the close of that day, that the absent voter in fact casts his ballot. We think it most clear that such absent voter shall then and there be in being or, at least, be presumed to be living by the election board at the time his ballot is deposited in the ballot box and thereby becomes the active agent of the voter's will. If such absent voter be then and there dead, it follows that he could not vote in person; so, likewise, his ballot after his death cannot be the active agent of a will no longer in existence.

We conclude that your query is correctly answered in the negative. We therefore concur in your opinion upon this question contained in your letter submitting the queries.

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The elector mentioned in this query is not within the terms of the Absent Voter Law, inasmuch as it appears that the elector's ability to appear at the polling place did not become hampered until within three days prior to the day of election. Such elector, even though he applied to the County Clerk for a ballot for the purpose of voting it under the provisions of this law, could not be furnished such ballot by the Clerk without a manifest evasion of the law. Sections 2554 and 2559, Nevada Compiled Laws 1929. We think the provisions of these sections of the statute are mandatory and do not provide discretionary powers upon the County Clerk. No provision for meeting the situation disclosed in the query being contained in the Absent Voter

Law, we must look elsewhere for authority for the election board to provide a voting place for the elector in question elsewhere than at the fixed and established voting place of and for said elector. An examination of the Direct Primary Law and the law governing general elections fails to disclose any right or power in the election board to permit the voting of or the casting of ballots of any elector elsewhere than at the duly and regularly established voting places, save and except the voting of absent voters' ballots under the provisions of that law which is not applicable to the instant question.

It might be said that the Direct Primary Law is to be liberally construed because section 1 of that law, *i.e.*, section 2404, Nevada Compiled Laws 1929, provides for a liberal construction of the law; but we think such provision pertains to the construction of the Primary Law for the purpose of effectuating the participating of minority groups and parties in the election for the nomination of their respective candidates and not to permit of some action on the part of the election board tending to invade the purity of elections and the secrecy of the ballot. Further, section 15 of the Direct Primary Law, *i.e.*, section 2418, Nevada Compiled Laws 1929, provides, among other things, that the qualifications and regulations of voters at primary elections shall be subject to the same test and governed by the same provisions and rules and regulations as are now prescribed by law for other elections, meaning the General Election Law. As stated above, an examination of the General Election Law fails to disclose any provision granting any right or power in the election board to permit the voting of or the casting of ballots elsewhere than at the established voting places. On the other hand, this law contains many provisions and interdictions clearly evidencing the legislative will that the voting shall be done at the regularly established voting places and that the election board and the members thereof shall conduct the election in strict accord therewith and in strict accord with other provisions tending to effectuate the purity of elections and secrecy of the ballot; and it is provided in such law, *i.e.*, in section 67 thereof (section 2505, Nevada Compiled Laws 1929), that "No person shall remove any ballot from any polling place before the closing of the polls." This provision of the law is mandatory. To provide the elector mentioned in the query a means and a mode of voting at his residence would undoubtedly violate this provision of the law, if not other provisions, save and except that such elector could vote at his residence under the provisions of the Absent Voters Law if he came within its provisions, but the elector here does not come within the terms of such law.

We think that the Legislature in the enactment of the Absent Voter Law evidenced an intention to provide facilities for electors who fall sick prior to election day so far as it was possible for it so to do and maintain the purity of elections and secrecy of the ballot; and, while it is no doubt a great disappointment for electors to be deprived of their vote by an illness occurring so near to the day of election that they were unable to secure an absent voter's ballot and thereby exercise their right of franchise, still, in view of the right of the body of the electorate to have the safeguards provided by law for the purity of elections maintained by those in charge of the conduct of elections, it follows that a manifest evasion of the law, even though it affords an elector an opportunity to vote and no intent to perpetrate a fraud is had, would tend at least to invade the purity of the election. Further, should the members of the election board accede to the request of such elector in one instance, it would have to do so in all like situations and thereby the door to abuses which the election law was enacted to prevent would be opened.

Entertaining the views above set forth, we are constrained to answer your query in the negative. The right to vote conferred by sections 1 and 6 of article II, Constitution of Nevada, is a mere political privilege and not an inherent, unqualified personal or political right. Riter v. Douglass, 32 Nev. 400; In Re Walker River Irr. District, 44 Nev. 321.

The Legislature has the power to adopt such provisions as may be deemed necessary to preserve order at elections and guard against fraud, undue influence or oppression and to preserve the purity of the ballot. State v. Findlay, 20 Nev. 198.

Respectfully submitted,

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