BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF COLORADO,

CONTAINING

A SUMMARY OF THE WORK DONE BY THE OFFICE,
AND OPINIONS GIVEN TO STATE OFFICERS
AND BOARDS, FOR THE YEARS
1885 AND 1886.

THEODORE H. THOMAS, ATTORNEY GENERAL.

TO THE GOVERNOR.

DENVER, COLO.:
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1886.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, December, 1886.

To His Excellency,

BENJAMIN H. EATON,

Governor of Colorado:

I have the honor to submit the following report of the business done by and through this office during the years 1885 and 1886, with a few necessary recommendations:

None of my predecessors have deemed the office of sufficient importance to even make a report of their stewardship. This is the first report that has ever been made by any occupant of this office. It is one of the most important offices in the State, clothed with more power than any other, except that of Governor. I have endeavored, by strict attention to the duties of the office, during my term, to elevate the office to that dignity and respect to which its importance entitles it.

During my term of office, I have brought, prosecuted, or defended, fifty-six (56) cases for the State, in the different departments. Of these fifty-six (56) cases, thirty-eight (38) were in the Supreme court of the State; sixteen (16) in different District courts of the State; one (1) in the Supreme court of the United States, and one (1) in the United States Land office, at Gunnison.

Of the cases in the Supreme court, two (2) were for murder in the first degree, five (5) for manslaughter, four (4) for contempt, three (3) for grand larceny, two (2) for embezzlement, and eight (8) for other offenses. These

cases came to the Supreme court either by appeal or by writ of error.

The original actions brought or defended in the Supreme court, were five (5) for *mandamus*, one (1) *quo warranto*, one (1) *habeas corpus*, two (2) agree cases, and five (5) disbarment cases.

These thirty-eight (38) cases have all been disposed of by judgment or by being submitted ready for judgment, except seven (7). Four (4) of these seven (7) were returnable to the December term, 1886, and nothing could be done in any of them during my term, except to join the error. The other three (3) are cases in which the time for filing briefs has not yet expired. So it will be seen that I leave to my successor virtually a clean docket in the Supreme court.

The Supreme court being behind with its docket about two years and a half, I have been compelled by a sense of duty to the people, to move the advancement upon the docket of all criminal cases where the punishment is imprisonment; and it is gratifying to report that the Supreme court has invariably sustained the motions, and advanced the causes for decision, so that it can no longer be said that a person charged with crime has not received a speedy trial, nor can it be said that a criminal cause is kept pending in the Supreme court for such a length of time, that should a new trial become necessary, the witnesses have in the meantime died, or moved from the State, or cannot be found.

Of the sixteen (16) cases in the District courts, twelve (12) were instituted by me—six (6) against county clerks, on behalf of the Board of Equalization, for failure to return abstracts of assessment rolls; two (2) against assessors, on behalf of the Military Board, for failure to make enrollment of the militia; four (4) actions were brought on

behalf of the Board of Capitol Managers, to clear the title to lots and lands donated to the Territory of Colorado for the purpose of aiding in the erection of a capitol building; one (1) for the State Board of Land Commissioners, to recover rent due; one (1) cause was defended for the State Board of Land Commissioners, brought to cancel a sale of land; and one (1) case defended for said board in a contest in the United States Land office, at Gunnison, concerning mineral school lands, and one (1) case was defended on behalf of the Secretary of State. These cases have all been brought within the last six months, and the most of them are yet pending, and undisposed of.

In addition to all these lawsuits, I defended the suit pending in the Supreme court of the United States, at Washington, known as the *Capitol Site* case, which case was finally disposed of, in favor of the State, last January.

In addition to the foregoing litigation, I have rendered, during my term of office, some forty written opinions to the various State officers and boards, some of the most important of which are hereto annexed.

Under the law, the Attorney General is a member of the following boards: The State Board of Land Commissioners, The State Board of Equalization, The Military Board, The Board of Education, and others. These boards require no inconsiderable portion of his time and attention, chief among which is the State Board of Land Commissioners, which requires from one to two meetings every week; and at some meetings an entire day is consumed.

In addition to the labor and services required of the Attorney General, in performing the duties of the office, as above set forth, the different State institutions and the Board of Capitol Managers have claimed the time and services of this office, in matters of advice and otherwise,

which, in all cases, has been freely given. It will, therefore, be seen that an enormous amount of labor has been heaped upon this office, without even an assistant or a clerk, and much of the work has not been done as carefully and thoroughly as a conscientious officer might wish to do it. I have been compelled to labor in season and out of season during the day time, and very often at night, to perform, in a measure, the duties of this office. The salary of this office is a mere pittance compared with the duties and amount of labor required. The salary ought to be increased to at least four thousand dollars per annum, and an assistant ought to be provided, with a salary sufficient to command the services of a competent lawyer. This is one of the most important offices in the State. It has done more work, single-handed and alone, during the last two years, than any other State officer, with his assistant. Heretofore no importance has been attached to this office. It has been looked upon as a position of honor and salary, without any labor. Successive Legislatures have indulged in the most flagrant and unlawful extravagances. The revenue laws of the State, with reference to the assessment and collection of taxes, have, with impunity, been violated by county officers, without even a protest from the law officers of the State. As a result from such a policy, the finances to-day are in a most deplorable condition. Whereas, with a proper enforcement of the revenue laws, the treasury of the State would be full to overflowing. To see that the laws of the State are obeyed and enforced is the highest duty of the State's law officer. To command the services of a lawyer of sufficient courage and ability to enforce the law, requires the payment of a salary commensurate with the duties and labors to be performed. This has not been done in the past; it should be done at once.

THE GOVERNOR OF STATE.

The Governor has frequently and continually asked and received advice from this office. He has frequently advised and directed suits to be brought or defended. Among the opinions requested by the Governor, are the following:

OPINION CONCERNING THE RIGHT OWNERS TO PROTECT THEIR PROPERTY.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 24, 1886.

HON. B. H. EATON,

Governor,

Denver, Colorado:

DEAR SIR:

Your request for my written opinion has been received. The facts upon which I am to give my opinion are as follows:

The Marshall Coal Mining Company are the owners in fee of coal mines and lands, including valuable machinery, in Boulder county. The company desires to place certain machinery in the mine, for the purpose of working the same, to which the miners object, and threaten the destruction of the property of the company, if the machinery is placed therein, and order the superintendent to leave the property. The owners of the property, or lessees, call upon the sheriff of the county for protection; the protection is refused—thereupon the owners or lessees of the property employ a certain number of men to guard and protect the property. These men are supplied with arms, and are organized into a company, and are sent upon the property to protect the same, and to prevent the destruction thereof. They are in the employ of the company or the lessees of the property, and are there at the instance and request of

the owners of the property, for the sole purpose of protecting the same.

Upon this state of facts, my opinion is asked as to the right or authority of the Marshall Coal Company, or the lessees, to keep armed men upon their property. And, secondly, what force might lawfully be employed by such armed men in protecting the property? In reply to which, I have this to say: The right of defending a man's person or property from violence is Nature's first law. The right to bear arms for such purpose cannot be called in question. And the right to use such arms, even unto death, in defense of one's property, is as ancient as the liberties of our country.

The Constitution of our State (Sec. 13, Art. 2,) provides "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

I am therefore of the opinion, that this company, or the lessees, have the right to employ such person, or persons, as they may see fit, and station them upon their property, with arms, and these persons so stationed, acting for and on account of the owners, and under their instructions, have the right to eject any trespassers upon the property, and have the right to prohibit any person, or persons, entering upon such property, who seek to enter upon it with intent to destroy or trespass upon the same; and they have a right to use any force necessary to prevent any person, or persons, from entering, who persist upon entering for an unlawful purpose.

From the facts submitted, the Marshall Coal Company is violating no law; it is upholding the law, in that it is attempting to prevent the violation of the law, in preventing the destruction, by violence, of its property, and for that purpose, I am of the opinion it can use all the force and arms necessary to accomplish such an end.

Respectfully yours,

THEODORE H. THOMAS,

Attorney General.

OPINION CONCERNING WOMEN AS NOTARYS PUBLIC.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, December 19, 1885.

To His Excellency,
B. H. EATON,
Governor of Colorado:

DEAR SIR:

My opinion is asked upon the question, as to whether you, as the Governor of the State of Colorado, under the law, were authorized to confer the appointment of notary public upon women in this State?

Art. 7, Sec. 6, of our Constitution, provides that "No person, except a qualified elector shall be elected or appointed to any civil or military office in the State."

And Sec. 1153 of the General Laws, 1883, provides that "Every qualified elector shall be eligible to hold any office of this State, for which he is an elector, except as otherwise provided by the Constitution."

I am therefore of the opinion that the office of notary public is a civil office, and that it requires the qualification of an elector, in order to qualify any person to hold the office of notary public, and as women are not qualified electors, under our Constitution, they cannot be appointed to such offices.

Respectfully submitted,

THEODORE H. THOMAS,
Attorney General.

THE SECRETARY OF STATE.

The Secretary of State has occasionally called upon the Attorney General for his advice and services, and among others was the following:

The Fifth General Assembly passed an act relative to the fees to be charged in the Secretary's office upon the filing of articles of incorporation. The Secretary of State did not fully grasp the meaning of this law (if any it has), as the following will indicate:

EXECUTIVE DEPARTMENT,
DENVER, COLO., June 26, 1885.

HON. THEODORE H. THOMAS,

Attorney General:

DEAR SIR:

I beg leave to call your attention to an act of the Fifth General Assembly of the State of Colorado, approved April 10, 1885, page 153, Session Laws, and ask you for the following information: This act specifies that corporations "shall pay to the Secretary of State, upon the issuing of the certificate, as provided in said chapter, the sum of ten dollars." By referring to chapter 19 of the General Laws of the State of Colorado, you will find that there is no such clause in said chapter requiring the Secretary of State to issue a certificate. Please advise me as to my duty in filing articles of incorporation after July 10, 1885.

Yours, very truly,

MELVIN EDWARDS,
Secretary.

OFFICE OF ATTORNEY GENERAL,
DENVER, June 29, 1885.

HON. MELVIN EDWARDS,

Secretary of State:

DEAR SIR:

Your communication of the twenty-sixth instant at hand, asking what your duty may be in filing articles of

incorporation after July 10, 1885? I have to say: This involves the construction to be placed upon H. B. No. 93, concerning corporations, and found on page 153 of the Session Laws of 1885. This act is as clear as a mud-pile to an ordinary mind. It is one of those inexcusable blunders which a Legislature sometimes makes. If the Legislature by this act meant anything, it is our duty to find out the meaning and intent of the act. It is my opinion that the primary object of the act was to increase the filing fee in your office on all corporations hereafter to be organized under chapter nineteen of the General Statutes, excepting those not organized for pecuniary gain; that is, to increase the filing fee from what it was, by virtue of the General Statutes, section 1416, from two dollars and fifty cents to ten dollars for the filing and recording of each certificate of incorporation, wherein the capital stock does not exceed $100,000, and 10 cents per thousand dollars of capital stock in excess of the first $100,000.

I am of the opinion that the intention of the General Assembly was to repeal all acts in conflict with this act, relating to filing fees of corporation papers, and therefore repealed all laws heretofore existing in relation to fees for filing certificates of incorporation, and that therefore the fees last above mentioned ought to be collected after July 10, instead of the fees collected heretofore for the filing of certificates of incorporation for all corporations organized for pecuniary gain. The "issuing of the certificate" must mean the filing of the certificate of incorporation. While the "issuing of certificates" is not provided for in chapter nineteen, the filing of the certificates is provided for in said chapter. That is the only rational conclusion to be arrived at; and, by reading the word "filing" for "issuing," you will, perhaps, arrive at the meaning of the act.

Respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

During the month of July, 1886, the Denver and Rio Grande Railway Company was reorgonized and a new corporation formed, with a capital stock of $73,500,000. The

Secretary, under the aforesaid opinion, demanded the sum of $7,350 as a filing fee, which was finally paid, under protest, by the company, and immediately a suit was brought against the Secretary to recover the amount, and a temporary injunction was obtained from the District court of Arapahoe county, enjoining him from paying the said amount, over to the State Treasurer. The suit was tried on demurrer, and the District court rendered judgment against the Secretary for said amount, and made the injunction perpetual. An appeal was then taken to the Supreme court, where the cause now stands.

It is a matter of regret that the Fifth General Assembly, containing so many good lawyers, should permit a bill to become a law without investigation or examination, for, as the law stands, it has no meaning, unless the word "issuing" is read for "filing." It is an inexcusable and unpardonable blunder.

Another suit, in the nature of mandamus, was brought in the Supreme court against the Secretary of State, seeking to compel him to approve a certain bill, but upon a hearing and argument, the suit terminated in favor of the Secretary.

A law should be enacted, either establishing a purchasing agent for the State, or, the law should be so amended as to require the Secretary of State to disburse to the State officers and departments whatsoever may be necessary, in the nature of stationery and supplies, by a requisition on him.

THE STATE TREASURER.

The State Treasurer is the only officer of the executive department who has escaped litigation during my term. I have, however, among others, rendered the following opinions for that office:

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, April 6, 1885.

HON. GEORGE R. SWALLOW,

State Treasurer:

DEAR SIR:

In reply to your inquiry of this date, asking my opinion as to whether the law is such as would protect you in the payment of any warrant drawn upon you by the Auditor of State, providing the warrant was in due form of law, or whether you are required to go behind the warrant to ascertain whether or not the warrant was drawn according to law. The statute provides as follows: "The Treasurer shall disburse the public moneys upon warrants drawn upon the Treasurer, according to law, and not otherwise." (Chap. 37, Sec. 32, General Statutes). By section 63 of the same chapter, you have free access to all books, accounts and papers pertaining to the Auditor's office; they are there for your inspection.

Section 67 provides: "If the Treasurer shall wilfully and unlawfully refuse to pay *any warrant lawfully* drawn upon the treasury, etc." This does not speak of every warrant which may be drawn, but means those lawfully drawn.

Section 59 provides that no warrant shall be paid by you unless the money has been previously appropriated *by law*; and though the warrant may be ever so correct in form, you cannot pay it, and it is left for you to decide the matter.

The Constitution provides, (Art. 5, Sec, 33): "No money shall be paid out of the treasury, except upon appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof." A warrant, therefore, which is not drawn in pursuance thereof—that is, of the appropriation—you cannot pay.

The fact that a warrant is in due form alone will not authorize you to pay. It is your right and your duty to go behind the warrant to see what it was issued for, and whether the same was issued according to law. For that purpose the Auditor's books are open to your inspection at all times, as well as his papers and accounts.

I do not believe that the law contemplates you shall minutely examine every warrant, or that you should go behind every warrant and ascertain what the same was issued for. But I am of the opinion that the law requires you so to acquaint yourself with the books, accounts and papers of the Auditor's office, that you may have a general knowledge of what a warrant drawn on you is for, and, if at first glance, you are not satisfied that the warrant is drawn *according to law*, or that it is not *lawfully drawn*, then the law has given you the means to ascertain the fact, and you should exhaust all the means you have to ascertain the facts and satisfy yourself before paying the same; otherwise, the law might hold you liable.

Respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

OPINION CONCERNING LEASE MONEY.

OFFICE OF STATE TREASURER,
DENVER, COLO., June 24, 1885.

HON. T. H. THOMAS,
Attorney General,
Denver, Colo.:

DEAR SIR:

By virtue of section 85, page 102, of the General Statutes of Colorado, the funds arising from the leasing of State or school lands are to be disposed of in the same manner as is provided for interest arising on the proceeds of the sale of such lands. By an act of the last Legislature (page 298 of Session Laws, 1885,) there appears to be a retirement of the funds arising from leasing school and university lands. If these funds are to be regarded as permanent, and retired from the distribution here-

tofore made of them, a great hardship will result to the school interests of the State. I desire to know what the duty of the State Treasurer is in the matter. I hope you will be able to find legal authority for disposing of these funds, as provided by section 85.

Yours, truly,

GEO. R. SWALLOW,
State Treasurer.

OFFICE OF ATTORNEY GENERAL,
DENVER, COLO., June 25, 1885.

HON. GEORGE R. SWALLOW,
State Treasurer:

DEAR SIR:

Your communication of June 24, to hand, requesting my opinion as to what disposition is to be made of the funds arising from the leasing of the State school lands, under the laws as passed by the last General Assembly, I have this to say:

Under our enabling act, Congress set aside two sections of land in each township "for the support of common schools." The proceeds of the sale of the land should "constitute a permanent school fund, the interest of which to be expended in the support of common schools."

In 1879 the General Assembly passed the following act: "All money arising from the leasing of State or school lands, which is now or may hereafter be received into the treasury, shall be treated, in all respects, in the same manner as is provided by law for the disposition of the interest on the proceeds arising from the sale of the same class of lands." (General Statutes, section 2758.)

This act then provides for the use of the lease money in the same way and manner as interest money, which is to be expended in the support of the common schools.

The Fifth General Assembly passed an act, being Senate Bill No. 51, page 298, Session Laws, 1885, containing the following language, to wit: "The proceeds arising from the sale or leasing of all lands granted to the State for school and university purposes, shall be invested by the State Treasurer: First—In the bonds of the State of Colorado. Second—In warrants of the State of Colorado," etc.

It is clear that the money arising from leases cannot both be invested and expended in the support of the common schools. One act must give way to the other. This is a matter entirely within the control of the Legislature, and they having enacted that the money arising from the leasing of all lands granted to the State for school purposes, shall be invested in bonds or warrants of the State, necessarily repeals all acts in conflict therewith.

A great deal has been said that the Legislature never intended to thus cripple our common schools, or withdraw from the schools a source of revenue which they sorely need, and even members declare now it was not their intention, that there is some mistake, etc. With this we, as officers, have nothing to do; we are required to take the law as we find it and execute it. If the Legislature has made a mistake, it is their fault, and not ours. I have endeavored to find some law or some authority which would avoid Senate bill No. 51, so far as it applied to the investing of lease money arising from school lands, but I have been unable to find any. The bill seems to be free from doubts, that is, if the Legislature means what it says in that bill. If they did not mean what they said, they should have said what they did mean.

I am, therefore, of the opinion that, under the law as it now stands, the money arising from the leasing of all lands granted to the State for school and university purposes, must be invested in either bonds or warrants of the State of Colorado.

Very respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

THE AUDITOR OF STATE.

The Senate and House of Representatives of the Fifth General Assembly, by resolution, ordered extra pay for their several officers and employés, and issued extra pay warrants therefor. The question arose as to their legality, and the following opinion was given to the Auditor of State in regard to the matter:

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 2, 1885.

HON. H. A. SPRUANCE,
Auditor of State:

DEAR SIR:

In reply to your inquiry of a recent date, asking what compensation the employés of the Fifth General Assembly are entitled to under the law, and asking whether the compensation fixed by law can be increased by resolution passed by either branch of the General Assembly, I have this to say:

The Constitution of our State (Art. 5, Sec. 27,) provides as follows: "The General Assembly shall prescribe, by law, the number, duties and compensation of the officers and employés of each House," etc. In pursuance of this constitutional requirement, the Legislature did prescribe, by law, the compensation of the officers and employés. (See Chap. 47, Secs. 5, 6 and 7, of the General Statutes.) This law was approved and in force November 23, 1876.

The fifth section of this act designates the number and kind of officers and employés of each branch of the General Assembly.

The sixth section is as follows: "The secretary and chief clerk shall each receive six dollars per day, and the said assistant secretary and assistant clerk shall each receive, as compensation, five dollars per day for each and every day of service, including seven days after each session of the General Assembly, for completing the records

of the proceedings of the session. The said messengers, doorkeepers and janitors shall each receive three dollars per day, chaplains two dollars, and the pages one and one-half dollars for each day of service, and all other officers and employés provided for in this act, each four dollars per day, except interpreters, assistant doorkeepers and janitors, if appointed."

The seventh section provides that either House may, by resolution, employ such other clerks and assistants as may be found necessary, etc. And if interpreters are appointed they shall receive three dollars per day. And if assistant janitors and assistant doorkeepers are appointed, they shall each receive two dollars and fifty cents per day.

You will see from the foregoing that the compensation of employés is to be prescribed *"by law."* To enact any law, or to amend any law, three things are required, to wit: The assent of the House, the assent of the Senate, and the approval of the Governor. Neither one of the three independent branches of the government, alone, have the authority to alter or amend any law by resolution or otherwise. It takes a concurrence of all three. Were it otherwise, either House might, by resolution resolve out of existence any law upon our statute book. The compensation of the employés having been prescribed by law, in obedience to the mandates of the Constitution, the only way to alter or amend that law, is by a law regularly enacted in the manner pointed out by the Constitution.

The Constitution further provides, Art. 5, Sec. 28, as follows:

"No bill shall be passed, giving any extra compensation to any public officer, servant or employé, agent or contractor, after services shall have been rendered or contract made, etc."

This constitutional provision being in force at the time of the appointment of the employés, and in force after the services had been rendered, it would, in my opinion, be unconstitutional and unlawful to pass even a bill, say nothing of a resolution, giving any extra compensation to any public officer, servant or employé.

I am, therefore, of the opinion, that the compensation to be paid the officers and employés of the Fifth General

Assembly is that which is prescribed by sections 6 and 7 of the statute above quoted, and that the compensation thus fixed cannot be increased by a resolution of either House of the General Assembly.

Respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

The Auditor of State acted upon this opinion, and declined to draw warrants for these certificates; whereupon some of the employés holding some of these certificates applied to the Supreme court for a writ of *mandamus* to compel the Auditor to audit these accounts, and draw warrants for the same. An alternative writ was granted, and upon hearing, the Supreme court sustained the opinion of the Attorney General, and denied the writ. It is estimated that some $20,000 of this illegal paper was issued.

The Fifth General Assembly having neglected to make appropriation of $1,000 per annum for the support of the State Horticultural Society, said society, notwithstanding, applied to the Auditor to draw a warrant in their favor for $1,000 for the year 1885, and upon the advice of the Attorney General, the Auditor refused to draw said warrant; whereupon said society applied to the Supreme court for an alternative writ of *mandamus*, compelling the Auditor to draw said warrant, or show cause. The writ being issued, and on hearing had by the Supreme court, the opinion of the Attorney General was sustained and the writ denied.

THE BOARD OF CAPITOL MANAGERS.

The Attorney General has devoted a good deal of his time and attention to this board—very frequently attending its meetings.

He drew the contract between the board and Mr. Richardson for the erection of the Capitol building, and other deeds, bonds, and papers. At the request of the board, and with the assistance of Mr. Thornton H. Thomas, who was employed as special counsel, we defended the suit in the Supreme court of the United States, involving the title to the Capitol site. In October, 1885, I proceeded to Washington and made a motion before the Supreme court to advance the cause upon the docket, which motion was granted, and the cause set for hearing in December following. After a hearing and argument by the assistant counsel, the cause was, on the fourth day of January, 1886, decided in favor of the State.

Four other suits, in the nature of ejectments, were also brought in the District court of Arapahoe county, to settle the title to block 81 and block 320, belonging to the State. These suits were brought in October and November, 1886, and are yet pending. The prospect of an early trial is encouraging.

The time having arrived in which the proceeds of the sale of the lots and blocks donated to the Territory of Colorado, are to be used, if at all, a law should be enacted by the coming Legislature, granting the Board of Capitol Commissioners the authority to sell said lots and blocks, with direction as to who shall execute deeds for the same. A further law should be enacted, making provision for the incidental and contingent expenses of the board.

Among the opinions given the board are the following:

OPINION CONCERNING THE ACT OF 1885.

STATE OF COLORADO,
OFFICE OF THE BOARD OF CAPITOL MANAGERS,
DENVER, COLO., August 11, 1885.

HON. THEODORE H. THOMAS,
Attorney General,
State of Colorado, Denver:

SIR:

I am instructed by the Board of Capitol Managers to submit to you for consideration, and your legal opinion, the following questions in regard to the construction of the State Capitol building, under the act passed by the General Assembly of 1885:

First—Can the board decide and adopt three plans or designs for a Capitol building, and award the premiums mentioned in said act before it is ascertained that at least one of them will not cost to exceed the sum of one million dollars?

Second—Can the board, without prejudice or liability to any of the three architects, whose plans are entitled to the award or premiums, proceed to alter, change or omit such things as may be a betterment, or bring a plan to a cost within the limit, or, if necessary, copy from one plan into another, for the purpose of making a more desirable plan, with the understanding that the plan which will have its principal features retained, is to be the adopted plan, and its author retained as architect of the building?

Third—Is it understood by the act that the author of the plan adopted, should necessarily become the supervising architect?

Fourth—In the adoption of the three plans, is it absolutely required that the plan receiving the highest premium should be the one used for the model of the building, or may it and the two others be used to make a more suitable or satisfactory plan, from which the building shall be constructed?

Fifth—Can the board positively adopt a plan for a building until they have definitely ascertained that the cost will not exceed the sum of one million of dollars?

Sixth—Does the awarding of the premiums adopt any plan for a Capitol building, and would the board be liable if they did not use any of the plans for which premiums were awarded?

Seventh—To definitely ascertain the cost of the building by the plans adopted by the board, must the same be submitted to the contractors for tenders or bids, or can the plan be adopted by the board upon the best information obtainable, that the cost will not exceed the sum mentioned?

Eighth—What is chargeable to the cost of erecting or constructing said Capitol building, so that it shall not exceed the cost mentioned in the act?

Ninth—Are the following items, in your opinion, to be charged to the cost of erecting said building under the provisions of the act, to wit: The cost of advertising the "Notices to Architects," "To Owners of Stone Quarries," the compensation to experts to examine and make estimates of cost from plans submitted, and the incidental and necessary expenses thereto; the salary of the secretary of the board; the compensation and actual traveling expenses of the Board of Managers; office expenses, such as books, stationery, blanks, telegraphing, advertising, etc., that will be incurred during the erection of the building?

Tenth—What, if any, would be the liability of the Board of Managers, or State, if they refused to adopt a plan, when it could be positively shown that the cost of the erection of same would not exceed the sum of one million dollars, but by adding to said cost the incidental expenses, it would increase the cost over and above said amount?

The board requests your careful attention and consideration of the foregoing questions, as they are vital to their deliberations at this time. They do not wish to evade the law in any particular, but to faithfully perform

the duties imposed upon them, and cause to be erected such a building as will be an honor and credit to the State.

Your early reply to the above would greatly oblige.

Yours, very respectfully,

GEO. T. CLARK,
Secretary.

OFFICE OF ATTORNEY GENERAL,
DENVER, COLO., August 14, 1885.

To the Board of Capitol Managers:

GENTLEMEN:

In reply to your communication of August 11, I have to say, that I have very carefully considered the several questions submitted for my opinion, and beg leave to submit the following:

Answer to First Question.

In my opinion, the act contemplates, as also your "Notice to Architects," that any plan submitted should not exceed in cost the sum of one million dollars. Unless, therefore, the board had information that any of the plans submitted were not submitted in accordance with the notice, you would be authorized, without going to the expense of definitely ascertaining the cost, to decide upon the three best plans, and award the premiums mentioned in said act. After the three best plans have been decided upon, and the premiums paid, they become the property of the State, and before either of the three plans is *adopted*, the cost of the building must be definitely ascertained.

The time of deciding as to the best plans, and the awarding of the premiums is a matter which rests in the sound discretion of the board.

Answer to Second Question.

After the premiums are awarded, the three plans become the property of the State, and I am of the opinion that before any one of the plans is adopted, changes can be made, which, in the opinion of the board, would be a betterment, or which would bring the cost within the required limit. For instance, three plans are decided upon, and premiums therefor awarded "A," "B" and "C." The board, desiring to adopt the principal features of "A," with the wide stairs of "B" and the dome feature of "C." In such event the architect should be informed that plan "A" was adopted, with the stairs modified to conform to "B," and the dome modified to conform to "C." These changes should be definite and specific, so that it would be plan "A," with such and such alterations, so that the architect, in giving his bond for the carrying out of said plan, will understand definitely that he is to carry out plan "A," with the alterations mentioned.

Whatever changes are made in any plan sought to be adopted, ought to be made before the plan is adopted, and upon that adopted plan the State is to be secured by the bond.

Answer to Third Question.

In my opinion, it does not necessarily follow that the author of the plan adopted should become the supervising architect, because by section four of the act the board "have full power to appoint or employ, and discharge, at their discretion, an architect and a superintendent."

Answer to Fourth Question.

In my opinion, it is not absolutely required that the plan receiving the highest premium should be the one used for the model of the building. When the premiums are awarded and accepted by the owner of the plans, a bill of sale or receipt should be taken from the owner, in which the board should reserve the right to use all or any of the features in said plan as the board may see fit to select or adopt. This will avoid all complications with any of the owners of the plans, then the board can select what features

in each they desire, or make a new plan, if desirable; but this ought all be done and definitely determined before the bond is taken.

Answer to Fifth Question.

In my opinion, the board cannot positively adopt any plan for a building until they have definitely ascertained that the cost of the same will not exceed the sum of one million dollars.

Answer to Sixth Question.

I am of the opinion that, in the awarding of the premiums, the board thereby does not adopt any plan for a capitol building; and the board would not be liable beyond the amount of the premiums, even though they should not use either of the plans for which premiums had been awarded.

Answer to Seventh Question.

This is a hard question for an attorney to answer. If there is any mode by which you can "*definitely* ascertain the cost," besides submitting the matter to contractors and ascertaining what they will build it for, that mode might be pursued. I know of no other mode than that of getting contractors to bid, and when you have the bids in on a certain plan, and those bids are within the limit, then adopt your plan and make the contractors give their bonds. Should the bids not come within the limit, reject them, and alter the plans by cutting off here a little and there a little, and then try the contractors again, and so on.

Answer to Eighth Question.

The latter part of section six of the act says: "Before any plan is adopted, it must be ascertained that the cost of the supervision, labor, material *and all other expenditures necessary for the erection and completion of said capitol* building, including steam heating apparatus, and all other fixtures of the same, will in no event exceed the sum of one million of dollars, it being understood that it is the object of this *act to restrict* the *aggregate and entire cost* of the *capitol building* to this sum, and the Board of Managers herein appointed shall have this object in view," etc.

I am, therefore, of the opinion that the cost of supervision, labor, material, *and all other expenditures* which are necessary to erect and complete the building, are properly chargeable to the one million dollars, because the act "restricts the aggregate and entire cost of the capitol building to this sum." The question in creating any expense with the board should be, "is it necessary for the erection and completion of said capitol building that this expense should be incurred?" If an expense is not necessary for the erection or completion of said building, then the act gives the board no authority to create such an expense or pay the same; that is, unless it can be paid out of the one million dollars. The board has no authority under the act to pay it from any other fund, and additional legislation is necessary; and I am of the opinion that where the Legislature restricted the board to one million dollars for the aggregate and entire cost, they mean thereby that any contract made or any expense incurred by the board for any cause, or account, should be payable out of the one million dollars appropriated.

Answer to Ninth Question.

I am of the opinion that, under the act creating the Board of Capitol Managers, the items mentioned in this question are chargeable to the cost of erecting the Capitol building, because: First—These items of expenses are necessary in the erection and completion of the said building. Secondly—Because, were they not, in the judgment of the board, necessary to the erection of the building, and not payable from the Capitol building fund, the act gives the board no authority to create an expense which is payable from any other fund. The Board of Capitol Managers is a statutory board, and must, if at all, act by virtue of the authority of that statute, and that statute makes no provision authorizing the payment of the slightest expense of the board outside of the sum appropriated.

It will be conceded by all, that, upon a casual reading of the act, one would be apt to infer that the intent of the Legislature was to allow the contractor bidding, to bid on a building which would cost one million dollars, thereby excluding the incidental expenses, which would be neces-

sarily incurred by the board during the time the building is in course of erection, but I am unable to come to any such conclusion, because the Legislature has made no provision for such incidental expenses, and because, under the act, the board is powerless in creating any expense which is not paid from the amount appropriated.

I am, therefore, of the opinion that the items of expenses mentioned in this question are to be embraced in the terms: "All other expenditures necessary for the erection and completion of said Capitol building," and "the aggregate and entire cost of the building," used in said section 6.

Answer to Tenth Question.

In my opinion, there would be no liability, either to the board or to the State, if the board should refuse to adopt a plan, the building of which, in addition to the incidental expenses of the board, would exceed the sum of one million dollars, but if the board would assume, under such a state of fact, to adopt a plan and build a building, you would have to rely upon a future Legislature to appropriate an amount in addition to the one million dollars, sufficient to pay the incidental expenses, and, in that event, the aggregate and entire cost of the building would be the one million dollars, which was put into the immediate building, together with the amount of the incidental expenses of the board.

Respectfully submitted,

THEODORE H. THOMAS,
Attorney General.

THE MILITARY BOARD.

The National Guard is mainly supported by a poll tax, levied against each male inhabitant of the State, not exempt by law. The various county assessors are required to make

the enrollment of the militia of the State, and report the same to their various counties, for the purpose of levying the poll tax and other purposes. A great many assessors failed to properly make the enrollment required for the year 1885; some of them wilfully neglected their duty in this particular. Accordingly, two suits have been instituted, one against the assessor of Arapahoe county, and one against the assessor of Lake county, for failure to make the enrollment required by law for the year 1885. These suits are still pending.

It is very evident from the nature of the finances of the State, that the means to support the militia and National Guard must be obtained from the poll tax for some time to come, and in order that the poll tax may be properly and equally collected all over the State, some stringent laws should be enacted, under which the enrollment, assessment and collection of the said tax can be made. As the law now stands, it is ineffective. During the year last past, the Military Board has prepared a "Military Code," and promulgated the same, with the hope that the discipline and efficiency of the military service might be promoted and increased. Yet, there are some amendments which ought to be made to the law relative to the dicipline of the service.

Among others, I have given the following opinions touching the military law of the State:

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 23, 1886.

GOVERNOR B. H. EATON,
Commander-in-Chief of Militia,
Denver, Colorado:

DEAR SIR:

Your communication through the Adjutant General, requesting my opinion as to who is intitled to vote for brigadier general, in the approaching election, is received.

In reply to which, permit me to say, that I have carefully examined the subject matter, and find by section 2283 of the General Statutes that "There shall be elected, by a vote of the commissioned officers of the organized militia of the State, one brigadier general," etc. I further find, by section 2294 of the General Statutes, that the term "organized militia" is defined to wit: "The organized militia shall be designated 'The Colorado National Guard,' and in time of peace shall consist of not more than three regiments of infantry, one regiment of cavalry, and three batteries of artillery, with a total membership of not over five thousand (5,000) persons. I am, therfore, of the opinion that none except the commissioned officers belonging to the infantry, cavalry and batteries mentioned in section 2294 of the General Statutes above quoted, are entitled to vote for brigadier general.

Respectfully yours,

THEODORE H. THOMAS,
Judge Advocate General.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 20, 1886.

To His Excellency,
B. H. EATON,
Governor, and
Commander-in-Chief of Militia:

In answer to your inquiry, asking my opinion in regard to the following matter:

First—Who, under our law at present, is required to pay a military poll tax?

Secondly—What are the duties of the several county assessors, relative to making the enrollment of the State?

As to the first question, I find, that by an act of the Fifth General Assembly, it was provided that "An annual poll tax of one dollar shall be levied upon each male

inhabitant of the State above the age of twenty-one years, excepting active members of the National Guard, and such other persons as may be exempt by law." I find no exemption from military poll tax, except in the law of 1885, which exempts active members of the National Guard. Prior to the enactment of the last Legislature, there was a law upon our statute book, that a poll tax shall be assessed upon every able-bodied male inhabitant of the State over the age of twenty-one and under fifty years.

This law is repealed by the act of 1885, under which act, I am of the opinion that a poll tax must be assessed against every male inhabitant of the State, the only exemption being of active members of the National Guard. The act of 1885 does not even exempt the aged, the infirm or any State or county officer from his liability to pay a poll tax. It takes in every male inhabitant. And it will be the county commissioners' duty, under the law, to assess such a poll tax on every inhabitant of the State, except active members of the National Guard. This law may be a surprise to the members of the Fifth General Assembly. They may never have intended to assess a poll tax on the aged and infirm; yet we live in the age of surprises, and what has been enacted is the law until changed by a succeeding Legislature.

Second—In my opinion, it is the duty of the several assessors, in making the enrollment, to enroll every able-bodied male citizen of Colorado, and those who have declared their intention to become citizens of the United States, between the ages of eighteen and forty-five years, (except persons exempt from military duty by law). These are subject to military duty. Two lists are to be made—one embracing every able-bodied male citizen of Colorado, and those who have declared their intention to become citizens of the United States, between the ages of eighteen and forty-five years, and one of those persons exempt from military duty, as laid down in section 2290 of the General Statutes, embracing State and county officers, ministers, etc.

Respectfully yours,

THEODORE H. THOMAS,

Judge Advocate General.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., July 17, 1886.

HON. BENJAMIN H. EATON,
Commander-in-Chief of the Militia:

DEAR SIR:

In reply to the letter of Colonel Klee to General Taylor, submitted to me, and asking my opinion as to whether active members of the National Guards are liable to poll tax, for the benefit of public highways, I have this to say:

Section 2811 of the General Statutes of 1883 provides as follows: "Active members of all companies, troops, and batteries, shall, during their membership, be exempt from labor on the public highways and from service as jurors."

If they are exempt from labor, they necessarily are from poll tax. This section, therefore, exempts, in my opinion, active members of the National Guards, not only from a payment of a poll tax for street or road purposes, but also exempts them from labor on the same. It is not only a salutary, but a most just provision. These men devote a good deal of their time to military matters, without compensation, and the State, counties, cities and towns compensate them very little by exempting them from such a poll tax. In my opinion, they are exempt by law from such poll tax and service, and of right ought to be.

Respectfully, yours,

THEODORE H. THOMAS,
Judge Advocate General.

THE STATE INSURANCE DEPARTMENT.

This department has given the Attorney General no little concern. It has occupied no small portion of the

time and attention of this office. There is, practically, no law upon our statute books applicable to what is known as mutual insurance companies, either as to domestic or foreign companies of this class.

The Farmers' and Merchants' Mutual Fire Insurance Company, which is a domestic company, and the Department of Insurance, being unable to agree as to the mode of conducting a mutual business in this State, an agreed case was submitted to the Supreme court, for the purpose of declaring the law applicable to mutual insurance, pending further legislation on that subject. The Supreme court, at its April term last, rendered its decision on the matter, which will be found in Ninth Colorado. It is absolutely essential that further legislation be had on this subject, both as to domestic and foreign mutual companies seeking to do business in this State. Some law should be enacted, declaring the requirements of such companies. If that is not done, and the doors are thrown open for all such companies to do insurance in this State, legitimate insurance is liable to suffer and be driven from the State. The people will be liable to be imposed upon by "wild-cat" and irresponsible companies, and the insurance law, as it now stands, become a dead letter on our statute books.

The statute, as it now stands, construed according to the letter, imposes fines, taxes aud conditions upon joint stock companies, and none whatever upon mutual companies. Joint stock companies are required to have an actual paid up cash capital, while mutual insurance companies are not required to have any cash capital, yet each are claiming the right to collect the premiums in advance, without any regard to the loss sustained.

Among others, this office has rendered the following opinion:

OPINION IN REGARD TO FOREIGN MUTUAL COMPANIES.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., August 2, 1886.

HON. H. A. SPRUANCE,
Auditor and Ex-Officio
Superintendent of Insurance:

DEAR SIR:

The communication of the National Mutual Fire Insurance Company, of Salina, Kansas, to your department, has been carefully read by me, on which you desire my advice. I therefore advise you to return to that company all the money which they have paid into the department. If, however, they will conform in every detail to the requirements of the department in regard to the plan of mutual insurance, as construed by your department in regard to the collecting of premiums and the mode of working or operating a mutual company which is organized without this State, then I would advise you to admit them to do business in this State. It is a matter of discretion for your department to admit a foreign mutual insurance company into this State, unless such a company has an actual paid up cash capital of not less than $200,000, or a surplus amounting to that sum. I therefore advise you, before any foreign mutual fire insurance company be admitted, you require of them the submission to you of all their blanks, etc., and unless such blanks conform to a strict mutual business, that you refuse to admit any such company.

Respectfully yours,

THEODORE H. THOMAS,
Attorney General.

THE STATE BOARD OF LAND COMMISSIONERS.

This board requires a good share of the time and attention of the Attorney General. Regular meetings are held on Wednesdays of each week, and additional meetings at the call of the Governor. The sale and handling of the State lands are committed to its care. The business of the board has grown to enormous proportions. The law under which the board acts needs an entire overhauling. More clerical force is necessary. A system of fees to be charged for work done and papers prepared should be established. An agent should be provided for, whose duty it should be to visit and examine the lands to be sold, in order that the State might obtain a fair value for the land disposed of. A stringent law should be enacted to protect the timber on State land, with authority in the board to dispose of the timber separate from the land. The payment of lease money and purchase money should be made directly to the secretary of the board, and the receipts daily turned over to the Treasurer of State. And authority should be granted the board to lay out any portion of the State lands into town lots, and the lots to be disposed of to the best advantage.

During my term, I have had three suits for the board. The most important one was a case in the United States Land Office, involving the right of the Government of the United States to declare lost to the State sections 16 and 36, where mineral had been discovered since the approval of the survey by the United States Government. The case was decided against the State in the Land Office at Gunnison, and an appeal taken to the Commissioner of the General Land Office at Washington, and from thence to the Secretary of the Interior, where the case now is submitted on briefs.

One case was brought against this board and other parties, the object being to cancel a sale of land made by a prior board. A demurrer was interposed to the complaint and argued, but before a decision was reached the case was settled by the parties in interest, and the suit dismissed.

THE STATE BOARD OF EQUALIZATION.

This board meets twice annually, once in the month of April, for the purpose of making the assessment of the property of railroads and other corporations, and once in the month of August, to order the levy of State taxes, and to equalize the assessment in the different counties of the State. The board met in April last, for the purpose of assessing the railroad and other property. One of the great difficulties in the way of assessing railroad property is the want of knowledge in the board as to the value of the several properties they are required to assess. The law requires that all taxable property "shall be assessed at its full cash value." The only information the board has of the value of the property which they are required to assess is that which is derived from the reports handed in by these corporations. The law should be amended, requiring the board to visit the several properties after the reports are in, and make a personal inspection of the property, in order to obtain an intelligent idea of its value. The railroad, telegraph, telephone and Pullman car companies' property, which is assessed by this board, is not assessed at its "full cash value," as the law requires.

There was a considerable difference of opinion among the members of this board as to the value of the property which they were required to assess. Some members

thought the property assessed too low, and desired an increase in the assessment, while others opposed it. It was finally decided by a vote of three to two, to increase the railroad assessment 20 per cent. a mile from what it had heretofore been assessed at. This increased the total value of railroad property nearly $3,000,000 in the State. For instance, the Denver and Rio Grande property is this year (which includes the increase) assessed at $8,091,599.58, while its debt is $28,000,000, and its stock is $38,000,000, making a total debt of nearly $70,000,000.

The property of the Union Pacific company is this year assessed at $9,148,281.37, including the increase made by the board of 20 per cent. on the last year's valuation per mile, while its debts amount to $22,000,000, and its stock $9,900,000, making a total debt and stock of $31,900,000.

The same facts in regard to the assessment of property apply to a great number of counties of the State. For instance, in Arapahoe county, it is a notorious fact, that a good portion of the best real estate, as well as the banks and other capital, is only assessed at one-third or one-half of its full cash value. The same thing is true of live stock and farms throughout a large number of the counties of the State.

A stringent law should be enacted for the enforcement of the assessment of all property at a uniform valuation all over the State, and a heavy penalty against the officers whose duty it is to make the assessment, in case of a failure to make the assessment according to law.

The board met again in the month of August, for the purpose of ordering the levy of the taxes for State purposes, and to equalize the assessment of the property of the several counties of the State. At the date of the meeting of the board, nearly one-half of the county clerks had not returned the abstract of assessment rolls of their counties. An adjournment was taken, and the delinquent county

clerks were notified to send in their abstracts of assessment rolls. At the last day which the board could meet under the law, the abstracts of the assessment rolls had not been received from the counties of Clear Creek, Lake, Summit, Pueblo, Archeluta and La Plata. The board was therefore compelled to adjourn without making any equalization whatever, though it was sadly needed. The statutes provides a penalty of $500 against any county clerk who fails or neglects to send in the abstract of assessment roll of his county. Suits were therefore instituted by me against each of these delinquent county clerks, to recover the penalty provided by law. The suits were instituted in the District courts of the several counties and are yet pending. I find that in some cases, the assessors have failed or neglected to report the assessment roll of the county to the clerk in time for the clerk to make an abstract, and send it to the Auditor of State, within the time provided by the statute. A law should be enacted, prescribing a penalty against county assessors, who fail in their duties in this matter.

At the August, 1886, meeting of this board, the question arose as to how much should be ordered levied for State purposes, excluding the special levies made by the Legislature for the several State institutions. I advised the board that, as the Legislature had made special levies for the various State institutions, amounting to one and seventeen-thirtieths mills on the dollar, that the board could only order the levy of two and thirteen-thirtieths mills for remaining State purposes—making a total of four mills for all State purposes. The board declined to follow the advice, and ordered a levy of four mills in addition to the levies made by the Legislature, by a vote of 4 to 1, I, alone, voting in the negative. Thereupon I brought an action, in the nature of mandamus, in the Supreme court of the State against the county clerk of Arapahoe county, to compel him to extend upon the tax books of the county

the taxes as ordered by the Legislature and the Board of Equalization. While it was contrary to my view of the law, yet it was important that the Supreme Court should set at rest this vexed question. The case was argued in the Supreme court and submitted, and on December 24, last, an opinion was delivered, sustaining my view of the law; which was that the county clerk was obliged only to extend on the tax roll of the county the one and seventeen-thirtieths mills for the various State institutions, and the remainder of the four mills for State purposes—making a total of only four mills for all purposes. It will be seen at a glance that two and thirteen-thirtieths mills is not sufficient to conduct the affairs of State.

In my opinion there is only one remedy, and that is for the approaching General Assembly to repeal all special acts of former General Assemblies making levies for the several State purposes. The four mill tax must then go to the general fund, and that fund be appropriated to the various needs of the State. If the four mills is then not sufficient, the only other remedy will be to submit an amendment to the people. Ask for a higher rate of taxation. But I am of the opinion that a four mill levy is sufficient for all purposes, provided we had an honest and fair assessment of the property in the State. The assessable valuation in the State this year is $124,000,000, when by rights it should be $200,000,000. A four mill tax upon $200,000,000 would produce ample revenue for all legitimate purposes.

THE STATE BOARD OF EDUCATION.

Under the direction of the Legislature, this board, during the early part of 1885, investigated the management of the Industrial school, at Golden, a report of which has

already been made. We found that the institution had been poorly managed by a majority of the Board of Control, arising, principally, from the want of knowledge of what the law required of them, and the lack of business management. It would do no harm if a law were enacted providing a penalty against the board if they exceed their authority, either negligently or wilfully; it would make the officers a little more watchful.

The Board of Education has met whenever business required it to meet, and it has decided several matters and questions brought before it on appeal. One case which the board decided was an appeal from the order of the County Superintendent of Pueblo county, establishing a new school district. His decision was reversed, whereupon the losing party applied to the District court for a writ of review, but the writ was denied, and an effort was thereupon made before the Supreme court to have the case reviewed, but that court also declined to entertain the cause. The President of the board has been a very frequent applicant for advice from this office, which at all times has been freely given.

THE STATE UNIVERSITY.

An opinion, with reference to the funds appropriated for the State University:

HON. THEODORE H. THOMAS,
Attorney General:

DEAR SIR:

Section 14, of Article IX., of the State Constitution says that the Board of Regents of the State University shall have the exclusive control and direction of all the funds of, and appropriations for, the university.

Two years ago the General Assembly authorized the levying of a tax of one fifth of a mill for the university, and specified for what particular purposes it should be employed.

May I trouble you for your opinion as to whether the regents have the right, under the provisions of the Constitution, to use that fund for any other purposes than those specified in the act levying the tax.

Respectfully, your obedient servant,

R. W. WOODBURY,

Regent.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., June 10, 1885.

The Board of Regents of the State University:

GENTLEMEN:

In your communication of May 25, you ask whether, in my opinion, "under the provisions of the Constitution, you could use the University special fund for any other purposes than those specified in the act levying the tax."

Article IX., section 14, of the Constitution, provides as follows: "The Board of Regents shall have the general supervision of the University, and the exclusive control and direction of all funds of, and appropriations for, the University."

In 1877, a tax of one-fifth of a mill was required to be levied, and each year thereafter, for the support of the University. (Section 19, chapter 112, General Statutes.)

This fund has been created by tax, levied for the general expenses and support of the University. There is no restriction as to how or in what manner this money shall be expended, nor, indeed, under the Constitution, there could be no restriction.

In 1883, the General Assembly levied a special tax, for the years 1883 and 1884, of one-fifth of a mill, for the purpose of creating a special fund, which fund was to be used *exclusively* for certain purposes named in the act.

While the Board of Regents have exclusive control and direction of that special fund, I am of the opinion that it will require legislation before the Board of Regents would be authorized to use said special fund for any purpose other than for the purposes mentioned in said act.

This fund was given for certain purposes. If the Board of Regents desire to use that fund, it belongs to them for that purpose; if they do not, it does not belong to them, for, you might as well say, after having the money appropriated for certain purposes, we will place it in our permanent fund, and thereby defeat the objects for which it was appropriated.

This fund was created exclusively for the special purposes of improving the present building by steam heating fixtures and gas fixtures, improving the rooms, to supply additional furniture, to purchase books, to construct another building, etc.

You will observe that no time is limited in which to complete these objects, nor is the manner of doing the same, nor the amount to be expended for each object, specified, or taken from the control of the board.

I am, therefore, of the opinion that the act of 1883 is not in conflict with the constitutional provision above quoted.

Respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

THE STATE VETERINARY SANITARY BOARD.

This board has frequently called upon this office for advice and the drawing of papers. Among others, the following opinion has been rendered:

OPINION—THE APPRAISAL OF DISEASED STOCK.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., May 1, 1885.

THE STATE VETERINARY SANITARY BOARD,
Denver, Colorado.

GENTLEMEN:

In reply to your communication as to my opinion of the construction to be given the proviso of section 11 of "An act to prevent and suppress infectious and contagious diseases among domestic animals of the State," etc., I have this to say:

Section 11 of the act is as follows: "Whenever the State Veterinary Sanitary Board decide that it becomes necessary to condemn stock," it shall be appraised, and "the appraisers should take into consideration the diseased condition of the animal."

After the appraisers have been appointed, it is the duty of the appraisers, in making the apprasement and in ascertaining the value of the animal, "to take into consideration the diseased condition of the animal." If the appraisers find that the animal is absolutely worthless, they should so find. Take a diseased horse for instance, "one which shows decided symptoms of a contagious disease," yet that horse may be capable of doing work for three, six or twelve months before the disease would be liable to get the mastery of the animal, the value, in my opinion, of that horse would be the value of the labor or services of that horse for and during the time he would be capable of performing labor. It would be absurd to suppose that an animal afflicted with a contagious and incurable disease, is worth as much as an animal of the same kind which is perfectly sound.

It is not the intention of the law that the State should pay as much for the killing of a diseased animal as the animal would be worth if it were not afflicted with a contagious disease, and hence, the law declares that, "in making the appraisement of the value, the appraisers shall take into consideration the diseased condition of the animal." If an animal is worth as much with a contagious disease as the same animal is without such disease, why should

the animal be ordered killed? If the contagious disease does the animal no harm, or surrounding animals no harm, or the value is not depreciated, there is no reason for killing the animal. The question is, not what the animal was worth before it became diseased, but what is it worth now, with the disease? The law seems to contemplate that there is some value to an animal which has a contagious disease, and whatever that value may be will depend upon the nature and state of the disease, for the law does not contemplate that the owner should be deprived of that value without compensation.

And, therefore, in my opinion, the question should be: What is the difference between the value of a sound animal and the same animal in its present diseased condition, which difference would be the present value of the animal.

I find nothing in the law which prohibits the board from reconsidering its action to have an animal killed.

If therefore, the board, having ordered the destruction of any stock, and after having it appraised, I think it is in the discretion of the board to rescind the order for destruction. You might then order quarantine, and, afterwards, another appraisement.

The board has great discretion in these matters, and in order to prevent yourselves and the State from being imposed upon, you have a right to use that discretion in such a manner as would be just and fair to all parties concerned.

Very respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

There seems to be no present necessity for a professor of Veterinary Science at the Agricultural College. The chair, as I am informed, has been lately declared vacant. By this act of the college management, there is a vacancy in the State Veterinary Sanitary Board, with no provision to fill the vacancy, unless the college management see fit

to employ some person as professor of Veterinary Science for the college.

The law ought to be amended, so that the appointment of a Veterinary Surgeon could be made in like manner as other members of the board are appointed.

THE STATE PENITENTIARY.

The State Penitentiary has claimed and received no little share of the time and services of the Attorney General. A suit was brought against the board, praying for an injunction, restraining the construction of the sewer over the route proposed. But the cause was finally settled before trial.

Among the most important opinions delivered to that institution are the following:

Opinion concerning the payment of $10 on the discharge of convicts:

COLORADO STATE PENITENTIARY,
CAÑON CITY, COLO., January 11, 1886.

HON. THEODORE H. THOMAS,

Attorney General,
Denver, Colorado:

DEAR SIR:

I enclose herewith a copy of an official copy of the judgment in the matter of the application of James H. Lowrie for a writ of *habeas corpus.*

There being a question as to whether I am authorized to pay to the person discharged under this order the usual sum of ten dollars, allowed by law, and, as the payment of that sum in each case likely to arise hereafter will involve

the State in great expense, I would ask that I be furnished with your opinion, to the end that I may act advisedly in the matter.

Respectfully,

R. A. CAMERON,

Warden.

January 12, 1886.

HON. R. A. CAMERON,

Warden, Canon City, Colo:

DEAR SIR:

Your inquiry of yesterday received, asking my opinion as to whether convicts taken out of the penitentiary under the recent opinion of the Supreme court, in the Lowrie case, are entitled to the $10, as provided by section 2600 of the General Statutes. I am of the opinion that that section contemplates only final discharges, such as expiration of term of sentence, pardons, or where, by the order of court, they are set at liberty. Under the Lowrie opinion, the prisoners are returned to the officers of the law, to be tried for crime. While they are discharged from the penitentiary, they are not, by the judgment of the court, set at liberty, and to such I am of the opinion that the Legislature did not intend the said section to apply.

Respectfully yours,

THEODORE H. THOMAS,

Attorney General.

OPINION CONCERNING THE RIGHT OF A GUARD TO SHOOT.

COLORADO STATE PENITENTIARY,
CAÑON CITY, COLO., January 29, 1886.

MY DEAR GOVERNOR:

The enclosed note of warning, from a prisoner not interested or affected by the decision of the Supreme court, is worth thinking of:

If these men were not legally tried, and are not legally held, they should be taken from here and indicted and legally tried.

Now, please see the Attorney General, and have him write me an opinion, which I can show to the guards, so they will have no hesitation in the matter.

This is rather ticklish business, and, if not attended to, may make us serious trouble.

Very truly, yours,

R. A. CAMERON,
Warden.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., February 23, 1886.

HON. R. A. CAMERON,
Warden, State Penitentiary,
Canon City, Colorado:

DEAR SIR:

Your communication of the twenty-ninth of January, to the Governor, was handed me, with request to furnish you my opinion relative to the status of convicts held by you who were convicted on an information, and your duties in regard to them.

I have given the matter careful attention, and have no hesitation in saying to you that I am of the opinion that you must retain all such convicts; they must be treated as other convicts are treated, the same force necessary to detain them is to be employed as against any other of the convicts. You are not a court to judge as to whether your prisoners were legally convicted; your duty is to detain them at any cost, until you have a proper order for a discharge by a competent court, or by the expiration of the sentence. You may, and doubtless have some, among the convicts who are absolutely innocent of the crime of which a conviction resulted, and you may absolutely know that fact, yet you are only the keeper of them. You cannot inquire into their guilt or innocence; that remains for the

courts to do. You are by law required to keep them ; you are by law invested with such power, to use such force as to prevent an escape, even if you are compelled to use force sufficient to deprive of life.

Respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

OPINION CONCERNING THE AUTHORITY OF THE BOARD OF PENITENTIARY COMMISSIONERS TO PURCHASE REAL ESTATE.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, June 28, 1886.

HON. B. H. EATON,
Governor, and
DAVID NICHOLS,
Penitentiary Commissioner:

DEAR SIRS:

My opinion is asked in the following matter:

The Board of Penitentiary Commissioners desire to purchase one hundred and twenty acres of land adjoining the Penitentiary grounds at Cañon City, to be used as a stone quarry and the burning of lime. The land is offered for the sum of $5,500, and the question submitted is: Is the Penitentiary Board authorized to purchase the same for the State, under the law?

The Board of Penitentiary Commissioners are the agents for the State. As such, they are charged with certain duties, and invested with certain powers and authority; all of which is clearly defined by the statute. But I find no authority to purchase real estate for the State; nor do I find any appropriation therefor. In order to permit an agent to buy real estate for the principal, there must be express authority. The only way to get such authority from

the State must be through the Legislature. Without such authority, the Board of Commissioners of the Penitentiary cannot purchase. There must also be an appropriation therefor by the Legislature. The last Legislature appropriated for "lime kilns and quarry expenses the sum of $20,000." In this there is not sufficient authority to permit the Board of Commissioners to expend $5,500 for the purchase of lands.

I am, therefore, of the opinion that sufficient authority does not exist for the Board of Penitentiary Commissioners to purchase the land at an expense not provided for by the Legislature. I am also of the opinion that the State should secure the land mentioned, and would advise the board to make a contract for the purchase, subject to the approval of the Legislature. If such a contract is made, I have no doubt but that the Legislature would gladly and willingly concur with the board, and ratify the contract and grant the necessary authority to complete the purchase.

Respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

COLORADO STATE PENITENTIARY,
CAÑON CITY, August 28, 1886.

HON. THEODORE H. THOMAS,

Attorney General of Colorado,

Denver City:

DEAR SIR:

On the sixth day of October, 1885, Benituro Cardenas and Denijan Dominguez, at the county of Las Animas, were severally sentenced by Judge Yeaman, of the Third Judicial district, to a term of imprisonment in the State Penitentiary for "one year each from and after date" of sentence, as the *mittimus* reads.

Chapter 86, section 2596, page 766, General Statutes of Colorado, 1883, provides, among other things, "No con-

vict can be discharged from the Penitentiary until he has remained the full term for which he was sentenced, *to be computed from and including the day which he was received into the same.* * * * *Provided,* That prisoner shall not be deprived of any reduction of time which he may be entitled to." etc. Claim is now made by the aforesaid named parties, that they are entitled to be discharged, with all allowance of good time, at the date of expiration, computed from date of sentence.

Statute states discharges be at date computed from date of delivery with allowance of good time. Now then, which is to be the rule in the premises, *i. e.*, which shall govern, the judgment of the court, or the provision of the statute?

Following the statute, the sentences of said prisoners, with proper allowance of good time, will expire on September 13, 1886; following order of court, in like manner, they will expire September 6, 1886.

The prisoners claim latter date, being so advised, as they assert, by the judge pronouncing judgment.

I take it, I am to follow the statute, ignoring order of judgment.

Please favor me with your opinion in the premises.

Respectfully, yours,

R. A. CAMERON,

Warden.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., September 1, 1885.

GEN. R. A. CAMERON,

Warden, Canon City:

DEAR SIR:

Your letter of the twenty-eighth at hand. I would advise you to retain the convicts during the term of sentence, computing the same from the date of reception at the institution. While there may be room for doubt as to what the Supreme Court may decide on such question being submitted to them, I am inclined to the opinion that

you are in duty bound to follow the statute, and to hold the parties for the full term from the date of reception, deducting the time for good behavior allowed by statute.

Respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

THE MUTE AND BLIND INSTITUTION.

AN OPINION IN REGARD TO THE BOARD OF TRUSTEES CREATING A DEBT.

COLORADO SPRINGS, COLO., April 6, 1886.

HON. THEODORE H. THOMAS,

Attorney General of Colorado:

The Board of Trustees of this institution respectfully request you to give us a written opinion upon these points:

Have we, as a board, a right to contract an indebtedness for the maintenance of this institution and the payment of the salaries of officers and wages of employés?

If we, as a board, contract such indebtedness, are we in any manner individually responsible for the payment of such indebtedness?

HENRI R. FOSTER,

President Board of Trustees.

A. L. LAWTON,

Secretary.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLORADO, May 21, 1886.

To the Board of Trustees of the
Mute and Blind Institute,
Colorado Springs:

GENTLEMEN:

Your communication of April 6 last was handed me on yesterday. I beg leave to reply as follows: To the ques-

tion, "Have we, as a board, a right to contract an indebtedness for the maintenance of this institution and the payment of the salaries of officers and wages of employés?" I am of the opinion you have not; that is to say, you have no right or authority to contract any indebtedness beyond the amount provided by the Legislature for your support. Of course you can employ officers and servants in anticipation of the revenue provided by the Legislature. If you have exhausted the amount provided for, it will be you duty to curtail the expenses to the very lowest possible point, and rely upon the Legislature to make provision for the payment of the necessary bills. The payment of these bills must be left to the honor and justice of the Legislature. Legally, you cannot contract a debt which will be binding beyond the limits of the prescribed revenue. The Legislature has prescribed the amount which you are to use, and has invested you with the power of contracting to the amount of the sum provided. Any contract which goes beyond that is illegal, the payment of which lies in the discretion of the Legislature. This is the legal status of the matter, yet I believe it is your duty (the appropriation being exhausted), to do everything in your power to preserve the school, protect the property, and rely upon the good sense and patriotism of the members of the General Assembly to pay the necessary bills. Of course, this being a State institution, you being but agents of the State, in making a contract for any of the necessaries for the institution, with a knowledge on the part of the party with whom you contract, that it is for the institution, you would not be individually responsible for the payment of such a debt.

Respectfully, yours,

THEODORE H. THOMAS,

Attorney General.

THE STATE INDUSTRIAL SCHOOL.

This board has been a frequent applicant for advice from this office. Among others, the following opinions were given:

OPINION CONCERNING PURCHASING AGENT.

GOLDEN, COLO., May 18, 1885.

HON. THEODORE H. THOMAS,
Attorney General of Colorado:

DEAR SIR:

Will you please inform me as to your legal opinion, whether the Board of Control of the State Industrial School has the legal authority to appoint one of their own members as "purchasing agent" for said school, and to allow such person so appointed by them extra compensation (over and above his salary as a member of the board) for such extra services rendered. Do you consider such a step would be legal and advisable? A reply before our next meeting would oblige me very much. Next meeting occurs June 17, 1885. Address me at Golden.

Yours, truly,

WILLIAM G. SMITH,
Secretary Board of Control.

OFFICE OF ATTORNEY GENERAL,
DENVER, COLO., June 8, 1885.

WILLIAM G. SMITH, ESQ.,
Secretary of Board of Control,
State Industrial School,
Golden, Colo.:

DEAR SIR:

In reply to your communication of May 18, as to whether the board is authorized to pay a member of the board extra compensation, or compensation in addition to the regular salary, for being purchasing agent,

I am of the opinion that no extra compensation can be allowed to a member for any service required to be done. The law allows $25 per month, and requires such services

as are necessary to run the institution, yet the expenses, whatever they may be, would be a proper charge.

Very respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

OFFICE OF STATE INDUSTRIAL SCHOOL,
W. C. SAMPSON, SUPERINTENDENT,
GOLDEN, COLO., March 22, 1886.

HON. THEODORE H. THOMAS,

Attorney General of the State of Colorado:

DEAR SIR:

The enclosed receipts were given the Commissioners of Pueblo county, acknowledging the receipt of board, as they state. It was paid under the following circumstances. The Board of Control being, in 1884, short of funds, ordered that new inmates should not be received, except on payment of board at $3 per week.

Pueblo county wished to send us boys; they were refused, except on above conditions. These conditions were complied with, and payment made. Pueblo County Commissioners wish to regard those payments as a loan, and now ask repayment from the Board of Control.

The Board of Control desire to ask: "Is there any fund under their control from which this claim could be paid?"

Most respectfully,

W. C. SAMPSON,
Superintendent.

OFFICE OF STATE INDUSTRIAL SCHOOL,
W. C. SAMPSON, SUPERINTENDENT,
DENVER, COLO., March 22, 1886.

TO THE HON. THEODORE H. THOMAS,

Attorney General, Colorado:

DEAR SIR:

The Board of Control desire to submit the following:

The Commissioners of Custer county owe the Board of Control $156 for payment of board of a boy from that county. They offer to pay the claim by county warrant.

Should the board receive such warrant, and would you advise them to sell the bond or warrant for its market value, and realize the cash for the same?

Most respectfully,

W. C. SAMPSON,
Superintendent.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 25, 1886.

TO THE BOARD OF CONTROL,
Industrial School,
Golden, Colorado:

GENTLEMEN:

In the matter of the claim of Pueblo county, I am of the opinion that there is no fund out of which you can pay the claim, and that Pueblo county must ask its relief from the Legislature.

In the matter of Custer county, I think it is advisable to accept a warrant from the county for the pay, and either hold the warant until it is paid in the regular order by the county, or sell it at its market value.

Respectfully, yours,

THEODORE H. THOMAS,
Attorney General.

THE STATE DAIRY COMMISSIONER.

The Fifth General Assembly enacted a law concerning oleomargarine and establishing the office of State Dairy

Commissioner, yet failed to make any appropriation for the salary or expenses of the office. It therefore became necessary to issue certificates of indebtedness for the expenses of that office.

Since the establishment of this office the Government of the United States has enacted a law concerning oleomargarine, which probably answers all the purposes of our State law, and I therefore recommend the repeal of the entire oleomargarine law and the abolishment of the office of State Dairy Commissioner.

In conclusion, permit me to say that, during my term of office, I have been treated with the utmost courtesy by all the various State officers, and, strange as it may appear, during this entire time there has not been one harsh word exchanged, nor the slightest ill-feeling engendered between this office and any officer in the employ of the State. And I desire to thank you, and, through you, to thank the different officers of the State, for the uniform kindness and courtesy displayed by them on all occasions during the business and social intercourse which has necessarily brought us in contact with each other.

Most respectfully,

Your obedient servant,

THEODORE H. THOMAS,

Attorney General.

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