REPORT

OF THE

ATTORNEY GENERAL

OF COLORADO,

FOR THE

YEARS 1889-90.

SAM. W. JONES, ATTORNEY GENERAL.

DENVER, COLORADO:
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Letter of Transmittal.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, December —, 1890.

To His Excellency,

JOB. A. COOPER,

Governor of Colorado:

SIR:—In obedience to law, I submit to you the following official report for the years 1889 and 1890, with such recommendations upon the various matters coming under my official observation, as can well be made within brief limits.

The business of this office has increased during my incumbency in a far greater ratio than at any time heretofore, keeping pace, in that regard, with the general advance of the State. Not only has the greater volume of business in the various departments entailed much additional labor in this, but errors in previous legislation, defective statutory provisions, desigued for a more contracted era, and unsuited to the complexities of the present day, have constantly been submitted to this office, for adaptation to present demands. The extent of this work is by no means perceived in the mere written opinions furnished the various officers and departments.

So constantly are requisitions made on this office, in the less conspicuous, but not less important, matters affecting the various departments, that little time is afforded for other than official duties.

There seems also to have grown up an impression among the county officials that they are entitled to de-

mand the advice of the Attorney General in local matters. While this impression is erroneous, often the questions submitted are so connected with State welfare, and always they are so presented, that no one filling this office can well avoid attention to them. Consequently, such matters consume more than an equal share of the time of this office. The number of such communications written to the various county officials during my term of office is fully 1,500.

From these considerations, it is apparent that there should be affixed to the office a salary commensurate with its importance and with its duties.

An appropriation was made for the purpose of hiring assistants during my term, and there should likewise be an appropriation for the succeeding two years.

I omit any detailed report of the various cases prosecuted or defended by this office during my term, with the general statement that the records and files of the various courts wherein such cases are or were pending, will show that all such matters have received my careful attention. Only cases of such import as may indicate the necessity for legislative action, will be herein adverted to. Of these, the first in importance are:

The Cases against the State Treasurers.

These cases were instituted for the purpose of recovering from the various treasurers who have held office since the admission of this State, and their sureties, all interest and other profits received by them upon public moneys loaned for their private benefit.

The present incumbent of the Treasurer's office was not included in these suits, because it was considered that a cause of action, if any exists, does not accrue against him until the expiration of his term of office.

To the complaints filed in these actions, demurrers were interposed by the defendants, and, upon the hearing of the issue thus made, the District Court of Arapa-

hoe county sustained the demurrers, holding that the State was not entitled to recover the interest or profit thus realized.

The cases were then taken to the Supreme Court of the State, where they are now pending. Briefs are filed therein by both plaintiff and defendants. A motion to advance them for speedy hearing has been submitted, and as speedily as it may be done, a decision will be had.

Indictments were also presented against certain of the Treasurers, based upon section 2948, G. S., for using public funds for private benefit. Ex-Treasurer Breene sued out of the Supreme Court a writ of *habeas corpus*, to test the efficiency of this section, and, upon the hearing, such section was held inoperative, and the petitioner was discharged. (24 Pac., 3.) While no criminal statute can be passed, which could affect any past transaction, safety for the future demands that the offenses denounced in our Constitution should have attached to them their appropriate penalties.

In view of the pendency of the civil actions in the Supreme Court, it is inadvisable to recommend changes in the present law in this report. A decision will doubtless be made in those cases, in time to suggest to the legislature whether, and wherein, the present laws are inefficient.

DISPUTED CLAIMS AGAINST THE TREASURY.

During the summer of 1889, you addressed to me a communication calling my attention to certain allegations of frauds said to have been committed against the State treasury, particularly as to the procurement of warrants for stationery, printing and supplies of various kinds for the legislative and executive departments.

My communications with you will appear in a subsequent part of this report, but it may be well to state in

compendious form, the result of my actions, as well as the present status of the matter.

Of course, neither myself nor the assistant counsel employed by you and by me to assist in these investigations, could tell, in advance of actual testimony produced upon a trial, whether frauds had been committed in the particulars referred to, or the extent thereof. As the warrants drawn in payment of vouchers for these articles have not been paid, I advised that no suits could be brought to recover from the contractors any excessive charges, but that the State could be fully protected by refusing payment of the warrants, and that in any proceeding to enforce the payment thereof, the fraud could be set up in defense. My letter to the Treasurer, which appears at page 49 post sets forth my action thereabout.

Since said time, a petition for *mandamus* has been filed in the District Court of Arapahoe County against the Treasurer, to compel payment of one of the disputed warrants. In that suit, a return has been filed, setting up the State's claim of fraud. Such suit is now pending, awaiting its turn in the business of that Court. This case may be considered a test of the right of the State Treasurer to resist the payment of the warrants similarly questioned. Warrants drawn on the Treasurer must be paid, if at all, *in toto*, and cannot be scaled down, as could be an ordinary account. Therefore, if it should be decided that these warrants are of such a fraudulent character as justifies the State in refusing their payment, then the State will have received labor and supplies for which it will have paid nothing. These warrants appear to be in the hands of assignees. The Treasurer and Auditor have no right or power to cancel them, except by payment. Although it may be shown that these particular warrants are excessive, still it is evident that ordinary honesty, equally binding upon the State as upon an individual, demands that the fair

and reasonable, and, in proper cases, the contract price should be paid. I therefore recommend that legislation be passed authorizing and directing the Treasurer and Auditor to cancel such warrants, upon their surrender by the payees therein, should the case be decided in favor of the State, and that bills for such articles and labor be re-audited and new warrants drawn for proper amounts.

OVER-ISSUE OF WARRANTS.

The agitation arising out of the foregoing matters suggested a general inquiry into the management of the fiscal affairs of the State. Accordingly, I advised your Excellency that inquiries should be presented to the Supreme Court asking an opinion as to the constitutional powers and limitations in the matter of appropriations, and of the issuance of warrants on the general revenue of the State. Having assisted your Excellency in preparing such inquiries, (Post p. 32), I was requested by the Supreme Court to assist the court in arriving at a correct conclusion, and felt it my duty so to do. The subject was a vast and comprehensive one, affecting to the last degree the entire financial operations of the State, as well as the correctness of all past legislative and departmental action.

I submitted to the court a brief from this office, covering, as I believe, the entire subject. Such brief appears hereafter. (P 34).

The opinion of the court, reported in 13 Colo., 316, is in entire accord with the views expressed in the brief. The importance of that opinion, both upon future legislative and executive action, and upon past transactions, as well as upon the present financial condition of the State, cannot be fully appreciated without a review of the practices heretofore obtaining.

According to past practices, the legislatures made such appropriations as they desired, without reference to

whether the annual income was sufficient to meet these appropriations. Warrants were drawn on such appropriations, and were registered in their proper order. As revenue was collected in succeeding years, the warrants were called in and paid, in the order of their registration. Inasmuch as appropriations and warrants drawn thereon always exceeded the amount of revenue of each year, a constantly increasing accumulation of warrants was the result, so that this accumulation at the end of the fiscal year, 1888, amounted to something over $600,000. These warrants bear date not earlier than about three years before the end of said fiscal year, but nevertheless, they properly represent the accumulated over-issue of all past administrations, because the revenue of the years wherein these warrants were issued was used, according to custom, in paying past warrants.

The last legislature followed in the line of its predecessors in the matter of appropriations, and, in the earlier part of the present administration, the Executive officers did likewise. The investigations into the Constitutional restrictions as to such matters, made upon the questions submitted to the Supreme Court as aforesaid, showed that what had been the uniform actions of all the administrations from the start, was based either upon a misconception of, or inattention to, the theory of our Constitution. For the first time, as the result of these investigations, the Supreme Court in the opinion above referred to, held that no warrant could be drawn, in any year, in excess of the revenues of that year, however great might be the amount of appropriations, and that warrants drawn against the revenues of any particular year constitute no valid claim against the revenues of any other year, and create no binding legal obligation against the State. In short, that each year must provide for itself. As a sequence of this decision, all appropriations made by the last General Assembly upon which warrants had not then been drawn, were held

invalid by the Auditor and Treasurer, and no warrants were, I believe, thereafter drawn in excess of revenues. Still we are met with the fact that there exists the above referred to accumulation of about $600,000, and all, or nearly all, of them are in the school or other investment funds of the State, and the question is what can be done as to them? The payment of such warrants must be provided for, if possible, because:

First—The warrants are already paid from the school and other investment funds and these funds must be reimbursed, otherwise the State, or rather these special funds, and not the payees of the warrants, must bear the loss.

Second—"Common error makes right," is an old and a just maxim, and specially applicable to this emergency. Therefore, where the warrants have been issued under a misapprehension participated in by all administrations, no special blame for the error can attach to any particular administration.

Warrants may be unconstitutional in an absolute sense, as where the subject matter of the appropriation is not within the legislative power, or they may be unconstitutional in a special sense, as where the subject matter is within the legislative power, but the amount issued in a particular year exceeds the revenues of that year. In fact, the latter class can in no just sense be denominated *unconstitutional*, but they are rather to be considered as *inoperative*, because of lack of available funds to pay them. To this latter class belong the excess warrants under consideration, or at least nearly all of them. It is perfectly competent for legislative action to vivify these inoperative warrants by an express sanction of their validity and by providing the means and machinery for their payment. As the law now stands, there is no power in the Treasurer to pay these warrants out of future revenues, however much surplus he might have, because, as we have seen, they are claims against

the revenues of their appropriate year only. It is likewise obvious that a mere recognition of their validity without provision for their payment, would be only a "barren ideality." I therefore recommend that legislation be had; first, expressly recognizing the validity of these warrants; second, directing the Treasurer to call and pay the same out of the surplus of any year after the appropriations of that year are paid; third, that the appropriations for succeeding years be kept within such safe limits within the expected revenues, as would leave a margin for this purpose. This last suggestion is, of course, the very basic proposition rendering their payment possible.

I have discussed this matter at length, because of its intrinsic importance, and because of a misapprehension as to the exact status of the question, and from a desire to aid in the solution of the difficulty. Such written communications as I have had with the various officers, bearing upon this question, appear in a subsequent part hereof.

STATE CAPITOL BUILDING.

Diffidence seems to be felt by our citizens towards voting additional money for building the State Capitol. It is obvious that, for many years to come, our School and other permanent funds will continue to grow larger, and will seek investment, that the income may be used for the appropriate purpose. Our present law directs the State Treasurer to buy the bonds and warrants of the State, but prohibits his paying more than par. When the Board of State Debt are offered a premium, they naturally feel doubtful of their right to sell Capitol bonds to the Treasurer at par. This law should be amended, at least as to Capitol building bonds, so as to make it mandatory on the Treasurer to buy these bonds at par, whatever rate of interest is fixed therein, and compelling the Board of State Debt to sell them to the Treasurer at par.

If this question were properly understood, no hesitancy could be felt in voting money to complete the Capitol, because the whole money therefor could be advanced from the School and other permanent funds of the State, interest would be paid on the bonds for the the benefit of the schools, and direct taxes to pay interest on the bonds would decrease to that extent direct taxes for the support of the schools themselves, thus furnishing a safe investment for school funds, paying for the Capitol with the State's own money, paying interest, not to a stranger, but to another fund of the State itself, and saving the payments of rent.

It will also be observed that under this arrangement, where the State is in reality both creditor and debtor, payment of these bonds could be postponed in perpetuity, is necessary, or deferred from time to time to suit convenience of payment. In fact, the bonds need never be paid if that course were desired, so long as interest was paid to the School or other funds. By this plan, also, no additional burden of taxation is imposed on the citizens. These suggestions are the embodiment of the advice heretofore given the Board of State Debt, regarding the $300,000 of bonds lately issued.

PUBLIC LANDS.

Our present laws regarding the disposition of public lands are very defective. Doubtless from in advertance, the law authorizing the issuance of patents and certificates of purchase was repealed by the last legislature. Immediate legislation should be had authorizing the issuance of patents to parties entitled thereto, and such law should also authorize the cancellation of patents issued intermediate between the date of repeal of the old law and the taking effect of the proposed law, and authorizing other patents to be issued in lieu thereof.

This last suggestion is rendered necessary because of the doubtful validity of all patents issued since the law

of 1889 went into effect. It is the duty of the State, when it attempts to confer title, to make one not subject to dispute or doubt.

An old statute of the State authorized the State Board of Land Commissioners to sell the alternate quarter sections of the public lands, except school lands, to any responsible person or company, who would dig an irrigation ditch in such location, of sufficient capacity to water the entire tract, and who would enter into a contract, secured by sufficient bond, to furnish water for the State's remaining half at a rate not greater than was fixed by the board. (G. S. 1883, p. 794, Sec. 2724.) This act was passed at a time when the prevailing theory was that the owners of a ditch owned the waters running in the ditch, and that the mere diversion of water by the ditch from the natural stream, was an appropriation of the water. Under that theory it is manifest that the ditch owners could comply with such a contract.

This act was repealed in 1887, and no similar provision to the one cited was enacted at that time. Since said time, the courts have decided that a ditch owner did not own the water in the ditch, but was a mere carrier to those who demanded it for actual application to the land. The last assembly, apparently without attending to the changed theory, enacted substantially the old law in this regard, except that the State was authorized to sell the alternate half sections; conditions as to contract to furnish water to the State's remaining half being substantially the same as in the old law. 1889, p. 381.

It is manifest to any one at all acquainted with the State's lands, that there are large tracts entirely worthless unless irrigated, remote from water, and so situated as that small purchasers could not afford to build irrigation ditches to them, but so situated as to require a large aggregation of capital to do this work. The waters of our streams are being fast appropriated, and if any water is to be secured for the State lands, expedi-

tion should be made towards that end. The State could not afford itself to farm these lands, or to actually apply water thereof so as to secure a water right. In fact, there is a serious doubt of the power so to do. Upon the other hand, ditch owners could not comply with a contract to furnish water for the State lands and hold the same for an indefinite time, till it should be demanded by some future purchaser, but are compellable by law to deliver water not actually appropriated, to the first demandant. Hence, the problem was presented how to encourage the building of these great ditches, so as to make these arid lands valuable, and at the same time secure a water right to the State's lands. Upon my advice the Land Board adopted the plan of selling the alternate half sections of lands so situated, to individuals or companies who would comply with this law, *requiring as a condition precedent*, that such person or company would enter into a valid contract to lease the half sections remaining in the State, for the term of five years, and that there should be applied to such lands for beneficial purpose the water contracted to be furnished, so as to secure a water right to such lands, reserving to the State the option of cancelling the lease upon giving notice in writing thirty days previous to the first of any January. By this means, lands otherwise entirely worthless become valuable, building up the agricultural interests of the State, securing to purchasers of the State's remaining part a sure water-right, and making such remaining half much more valuable than the whole had been. I believe this to be the only sure way of preserving for the arid lands the necessary water to make them at all valuable, and lest these precautions be forgotten or neglected hereafter, I earnestly recommend that a statute be passed making the principles of these suggestions necessary conditions to the sale of such lands to ditch builders.

I further believe that the State should not be last in encouraging the building up of its own material welfare, and I believe that policy to be wrong, which would withhold the public lands from sale, refuse access thereto from actual *bona fide* settlers and builders up of homes, while selfishly the State looks on, expecting the value of its own lands to be increased by the private enterprise of individuals upon neighboring lands. I believe the State should be the first in affording to *bona fide* settlers an opportunity of procuring a home, adding thus to the population, augmenting the number of those who pay taxes, and increasing the taxable resources of the State. It is true that to secure these benefits, care should be taken lest the lands fall into the hands of mere speculators, intent for no public good, but adhering to the selfish policy just deprecated for the State. I recommend, therefore, that laws be passed authorizing the sale of limited areas of the public lands to actual settlers; that the purchaser be not allowed to complete payment therefor or obtain his title for a minimum term of years; that before the title is passed from the State, there should be conclusive proof made of actual residence upon, and cultivation of, said lands for this time; that the details for carrying out these provisions be fully provided in the act, and that penalties be affixed for false action thereabout.

Unless express statutory safeguards render frauds next to impossible, and unless effective power is given to the Land Board to enforce obligations of good faith against applicants to purchase, the utmost vigilance, compatible with the discharge of the other duties imposed upon the officers constituting that board, can not in all cases prevent imposition.

The many fruitless proceedings instituted by the United States and by individual States, under laws much more stringent than our own, to set aside titles to lands procured by fraud, attest that it is next to impos-

sible to successfully combat fraudulent practices in procuring public lands, secure, as frauds generally are, in the mazes of their own secrecy. Much less, therefore, can success be expected where power is withheld when most needed, and where no evidence of fraud is procurable, save from the parties most interested to prevent the evidence forthcoming. Some of the dangers to be guarded against will be apparent from reading an opinion from this office, at page 73.

SUPREME COURT.

Measures to relieve this tribunal from the pressure of business before it, are among the most important to be considered. Expedition in securing the settlement of controversies, both civil and criminal, is well nigh as important as that justice itself be administered. For the last four years a Supreme Court Commission has been provided to expedite the business of that court. Though our act in that regard is similar to those of several other States, and though it was hoped that their efforts united with the courts would so rapidly dispose of the business as to soon relieve the pressure, and though the commission has at all times been composed of worthy and able lawyers, well fitted to discharge their duties, the expectations felt at the enactment of the law establishing this department have not been realized. Great delay still attends the disposition of cases in that court, and the constant increase of the number of cases brought there, presents no very hopeful anticipations of bettering the situation. The difficulty resides in the fact that the decisions of the commission are not final, but require the after consideration of the court.

I recommend the establishment of an intermediate court, to be denominated the Court of Appeals, with final jurisdiction in all civil cases, either on writ of error or appeal, where the amount in controversy does not exceed one thousand dollars, nor relate to a franchise or

freehold; that this court may have jurisdiction, not final, in all criminal cases not capital, and in all civil cases whatsoever, but that writ of error from, or appeal to, the Supreme Court lay to the final judgments of the Court of Appeals where the controversy is not within the final jurisdiction of the Court of Appeals; that the Court of Appeals shall be a Court of Record, with power to make rules for practice before it; that writs of error from, or appeals to it, shall lie as may be provided by law regarding appeals to, and writs of error from, the Supreme Court; that the appellate jurisdiction of the Supreme Court, as to amount, be limited to cases where the amount in controversy exceeds one thousand dollars; that the opinions of the Court of Appeals be prepared and published in a separate volume, the same as the opinions of the Supreme Court are so required; that the Clerk of the Supreme Court be Clerk of the Court of Appeals, with like compensation and with power to appoint necessary deputies; that upon the taking effect of this act, the act creating the commission, be repealed. The act should be made to take effect at the expiration of term of service of the present commission.

It is doubtful whether writ of error to the final judgments of County Courts could be limited to the Court of Appeals, but this class of cases are not so numerous as to materially interfere.

I also advise the repeal of all acts requiring the opinions of the Supreme Court to be made in writing, and the enactment in lieu thereof, that written opinions shall be delivered whenever a majority of the Judges may direct that the same be done.

I also recommend that a majority of the Judges be empowered to withhold from publication in the Colorado Reports any written opinion not in their judgment of sufficient general importance to be published.

In my opinion, all laws regulating the manner in which the judgments of a court shall be delivered, are

not obligatory on the court, nevertheless, the court doubtless feels morally bound to conform to the statutory requirements, when it can be done, but it is certainly as safe to leave to the court, as far as possible, the determination of the exact manner in which its opinions should be delivered, as to leave to them the fortunes of the case itself. I also recommend the passage of an express statute authorizing the State, or any of its officers acting officially, to prosecute or defend any civil action in any court, without the payment of fees to the officers; also, that an appeal may be prosecuted and a writ of error may be a *supersedeas* in favor of the State, or any of its officers acting officially, without giving a bond.

EXTRADITION.

I recommend that an act be passed authorizing and directing the Secretary of State to charge no fee or cost of any kind, where requisitions are made by this State for the extradition of fugitives from justice. Also, that an appropriation be made to pay the costs of extradition in such cases. It is absurd that our laws should impose the costs of enforcing its criminal laws in such cases upon private parties or officers.

Many other suggestions arising out of matters coming before me could be made, but I content myself with such as imperatively demand immediate consideration.

I take this opportunity of publicly extending my thanks to yourself and to my fellow-officers in the various departments for uniform courtesy and kindness.

Hereto is appended such of my written opinions as may be of assistance hereafter.

Very truly yours,

S. W. JONES,
Attorney General.

H. RIDDELL,
Of Counsel.

OPINIONS

DELIVERED

During the Years 1889-90.

Votes on the election of a brigadier-general cannot be cast by proxy.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 6, 1889.

GEN. GEO. WEST,
Adjutant-General,
Denver, Colorado:

SIR: — Answering your inquiry of the 4th inst, whether commissioned officers of the Colorado National Guard, staff and line, can vote by *proxy* at an election of a brigadier-general, I reply that the duty of electing a brigadier-general is devolved upon such commissioned officers as part of their official duties, and probably also because it is supposed that their connection with the militia in a peculiar way fits them to make a wise selection. Such being the duty reposed in them *personally*, such power cannot be delegated. Hence they can not vote at such election by *proxy.*

The law regarding such election (section 3, Article I. of the Militia Laws) is not very full or specific, but it seems to be contemplated that those entitled to vote at such an election may cast their votes wherever they may be located in the State, and should make certificate or return thereof to the commander-in-chief, by whom the returns are laid before the Military Board.

It therefore seems that the personal presence of the electors before the Military Board is not required and would be of no avail.

Very truly yours,

SAM W. JONES,
Attorney General.

House Bill No. 28, entitled "An act to provide for the inspection, before slaughter, of certain animals, the meat of which is intended to be sold, or offered for sale, as human food, and to prescribe penalties for the violations of the provisions of this act," is unconstitutional.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFFCE,
DENVER, COLO., March 13, 1889.

To His Excellency,
JOB A. COOPER,
Governor of Colorado:

SIR:—I have had under consideration House Bill No. 28, entitled "An act to provide for the inspection, before slaughter, of certain animals, the meat of which is intended to be sold, or offered for sale, as human food, and to prescribe penalties for the violation of the provisions of this act," which was referred to me from your office. The act provides that no fresh meat of any neat cattle, swine or sheep of any description shall be sold, or offered for sale, as human food, unless such animal shall have been inspected alive, on foot, in this State, within forty-eight hours before the same is slaughtered. The act provides the machinery for carrying out, and attaches penalties for the violation of, its provisions. Certain exceptions from the operations of the act are contained therein, but such exceptions do not affect the question to be considered. That question is whether this act is obnoxious to the Constitution of the United States empowering Congress to have exclusive right to regulate commerce between the States. It is, of course, axiomatic that it is immaterial by what name the act is called or under what guises it assumes to proceed; the crucial test is what practical result does it accomplish? "It (the State) may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter state commerce." R. R. Co. *vs.* Husen, 95 U. S., 465 (472). Subjected to this test, the act is the same as if it had provided that hereafter no person shall ship any dressed fresh meat of the prohibited kinds into this State; because a power to prohibit the sale of an article is the same thing as the power to prohibit its introduction; one implies the other. "In any and all

cases, the power to deny sale includes the power to prohibit importation;" Webster and Choate, Arguendo, License Cases, 5th How., 504 (515) and Marshall, C. J., in Brown *vs.* State of Maryland, 12 Wheat., 419 (439). Therefore I am decidedly of the opinion that this act contravenes the Constitution of the United States in the particular mentioned, unless it can be justified under the police power. Such is the uniform holding of numerous adjudicated cases, though I have attempted no elaborate collocation of them. The police power has never been accurately defined, the courts expressing themselves as preferring to decide questions as they rise, without attempting a definite limit which prescribes the rule to be applied in all cases. But, as concerns the question before us, the police power includes the right of a State to pass laws to preserve the health, comfort and safety of its inhabitants; and as a branch of these health laws they have a right to pass inspection laws. Health laws, generally, may prohibit the introduction of dangerous agencies, such as gunpowder, into dense communities, oils or other inflammable material below a certain test, the carrying on of certain business near populous places, when such business is likely to produce disease or is noxious to the sight or smell; and they also include the right to prohibit the sale or introduction of food material which is likely to affect the health or safety of its citizens. In aid of this power inspection laws may be passed under which the quality and measure of the material sought to be introduced may be ascertained and may be marked on the material or otherwise indicated, and the appropriate means to such ascertainment may be used. In certain extreme cases the inferior or injurious merchandise may even be destroyed. Certain articles of merchandise in their very nature and constitution are such that they are inherently dangerous and clearly fall within the right of a State to regulate, such as gunpowder, nitro-glycerine and many other substances that will readily suggest themselves to the mind. Other articles are objectionable not in themselves, but only because of being in some objectionable and inferior condition dangerous to the health or safety of the citizens, as likely to produce disease, etc., and among such articles fall food material of common use, such as meats specified in the bill. The utmost, therefore, that an

inspection act can do is to provide the means of ascertaining whether such articles of food are in such objectionable condition as to fall within the prohibited degree. "Health laws may exclude all such portions or cargoes of an article of commerce as are infectious; but they can not exclude a whole class of imported merchandise, on the ground that infectious portions or cargoes of it have been, or may be, imported," Webster and Choate, Arguendo, license cases, 5 How., 504 (516). "The police power of a State can not obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise." R. R. Co. *vs.* Husen, 95 U. S , 465 (473). It is competent for the State under its police power to pass laws, even the most stringent, to exclude diseased dressed fresh meat from its markets or borders, but it is not competent to exclude all dressed fresh meat bcause some has been or may be diseased. Hence, I am of the opinion that this act is unconstitutional. Laws providing that intoxicating liquors shall be excluded from a State stand on special and peculiar reasons, not similar to the reasons in question here.

While my conclusions on this bill are to me satisfactory, I am aware that considerable diversity of opinion exists on this subject, and as it seems that neighboring States have enacted laws similar to this in order to provide against certain conditions affecting their local interests, I hesitate to advise that this bill should fail to become a law by your Exellency withholding your approval on this ground alone, but should it occur to you as a proper measure, aside from the question of its constitutionality, its becoming a law would enable the matter to be settled by a more satisfactory and authoritative tribunal than would be a settlement by the law officer of the Executive Department of the State.

I have the honor to subscribe myself, your most obedient servant,

S. W. JONES,
Attorney General.

Not necessary that Senate confirm the appointment of additional judges in the Second Judicial District, though the act may provide for such confirmation:

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 18, 1889.

HON. JOB A. COOPER,
Governor:

SIR:—Senate Bill No. 53, entitled "An act to increase the number of District Judges for the Second Judicial District, etc.," is before me for consideration. In the matter of increasing the number of judges, the act is certainly constitutional. Constitution, Art. VI., Sec. 12, as amended and printed in acts 1887, page 483.

The second section of the act provides that the two additional judges shall be nominated by the Governor, by and with the advice and consent of the Senate, as in case of a vacancy.

I am of the opinion that the legislature has no power to compel the Governor to ask the advice and consent of the Senate in this appointment, but that the Constitution (Art. VI., Sec. 29,) vests the absolute power of appointment, in such cases, with the Governor alone. That there is no difference between the creation of these additional officers, and a vacancy occurring in offices established by previous acts of the legislature, is established by People *ex rel.*, Tucker *vs.* Rucker, 5 Colo., 455. In either case, the power of filling a vacancy is with the Governor.

The act may be operative as to all its provisions, notwithstanding this part may be a nullity.

Very truly yours,

S. W. JONES,
Attorney General.

While it is competent for the legislature to provide for the removal of devices for trapping, netting and ensnaring wild ducks and geese, such devices cannot be destroyed without a judicial hearing.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 21, 1889.

HON. JOB. A. COOPER,
Governor:

SIR:—I have had before me for consideration House Bill No. 346, entitled "An act to provide for the punishment of persons guilty of trapping, netting and ensnaring wild ducks and geese, and for destroying the devices used therefor." Sections 1 and 2 of this act are constitutional, but I doubt the constitutionality of section 3, so far as it seems to allow the Justice of the Peace to destroy the devices used in trapping and ensnaring said fowls, and for assessing the cost thereof against the owner thereof, if he can be ascertained. While it is legitimate to provide for the destruction, after a proper hearing, of such property, I do not believe any constitutional goverment will allow any person's property to be destroyed except after a solemn trial, whereto he has been duly summoned and has had a full and fair opportunity to defend as he may desire, while this bill seems to attempt to confer absolute power in the justice to destroy, without givng the owner or claimant any opportunity to be heard. I am clearly of the opinion that so much of this section as allows the costs of the proceeding to be taxed against the owner, if he is discovered by any evidence before the justice, can not be sustained. It is not heard of under our government that a judgment may be given against anyone who has by no process had his day in court. But inasmuch as it is possible for the justices to proceed under this act agreeably to the forms of law, notwithstanding the arbitrary power attempted to be conferred by this act, the bill can be allowed to operate in all its terms, if we assume the justices will so proceed. So far as this section allows sheriffs and other officers to remove such devices, I think the bill is constitutional; but so far as it allows the justices, without a formal and legal trial, after summons or other process is served

upon defendant, to destroy property and assess costs, I think the bill is unconstitutional.

Very truly yours,

S. W. JONES,
Attorney-General.

The repeal of the act entitled "An act concerning the commutation of life sentences," approved March 15, 1887, will be *ex post facto*, as to certain cases unless a saving clause is attached.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 26, 1889.

HON. JOB A. COOPER,
Governor.

SIR:—Senate Bill No. 22, entitled "An act to repeal an act entitled 'An act concerning the commutation of life sentences,' approved March 15, 1887," is constitutional in title, form and substance, but under its provisions there may exist or arise a class of crimes which will go unpunished. As the law now stands, every person who commits a crime, the punishment for which is imprisonment for life, can be sentenced for no longer a term than twenty-five years. Every law that changes the nature of a crime or punishes it in a manner more disadvantageous to the criminal than was the case when the crime was committed, is an *ex post facto* law, and is unconstitutional. Hence, if a crime is committed, punishable by the act of 1887, at the time it was committed, the legislature cannot repeal that law so as to make the same act punishable in a greater degree. It will result, therefore, as to crimes committed while the act of 1887 is in force, and punishable under that act, there can be no conviction on a trial had after the act is repealed, because the old law is not in force and the new law is unconstitutional, as was described in Garvey's case, 6 Colo., 559.

This act saves from its effect all persons *sentenced* for life while the act of 1887 is in force, but it does not save such crimes as may be *committed* while the act of 1887 is in force, though not tried till afterwards. Whether

any such crimes have been or will be committed is of course unknown, but should it happen as above suggested, then the criminal would go unpunished.

Very truly yours,

S. W. JONES,
Attorney General.

Expenditure of public money can only be made for a public purpose, affecting the interest of the State.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 29, 1889.

HON. JOB A. COOPER,
Governor:

SIR:—Senate Bill No. 187, appropriating $2,500 for certain expenses of the committees, from Colorado to the Deep Water Convention in August, 1888, belongs to that class of cases which are near the line dividing the powers in the legislature from the powers which are not in the legislature. Expenditure of public money can only be made for a public purpose, affecting the interest of the State. While no definite rule can be laid down as to what is a public purpose, and while the decision of this question is in the law making power, except where there is a clear abuse of that power, I can only suggest that this measure is among the doubtful cases.

Very truly yours,

S. W. JONES,
Attorney General.

Criticisms on act providing for the infliction of the death penalty within the Penitentiary.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 30, 1889.

HON. JOB A. COOPER,
Governor.

SIR:—Senate Bill No. 81, providing for the infliction of the death penalty within the walls of the State Peni-

tentiary, is before me. Its general features, so far as it provides for executions in private, seem commendable, but its details are subject to criticism which appears to me serious.

After providing (section 2) that the court shall adjudge that the execution shall take place at some time within a designated week, it provides that the condemned shall by the warden be kept in solitary confinement, and that no person shall be allowed access to said prisoner except such persons as are described therein, "and then only in accordance with prison regulations." While, doubtless, this provision will be construed humanely by the warden, still the act should say by express and positive words that such persons shall be admitted under proper regulations. This right should not rest on any implication contained in negative words, but it should be expressed affirmatively.

Section 3 provides the warden may fix the particular day and hour within the week when the execution shall take place. Should a particular case present any features probably calling for Executive clemency or interference, the Governor—the only power that can delay execution after sentence by the courts — can in no case, except through a violation of the injunction of secrecy placed around the persons invited to be present at the execution, and through a violation of law, know certainly when such execution is to take place. Hence, the Governor would in no case be safe in delaying such action as he desires to take beyond the first day of the designated week, and to prevent a miscarriage of justice, might feel himself bound to reprieve all these cases to a day certain. The act should at least provide that the Governor should be advised of the day and hour.

Section 3 provides that "no account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the State Penitentiary, shall in any manner be published in this State." So far as this is intended to restrict the publication of such matters as are calculated to gratify a merely morbid curiosity of the circumstances of the execution, or the details of the sufferings, agonies and revelations of the condemned,

this is unobjectionable, but to the extent that it may attempt to restrain the free publication of whatever is known regarding a public or legal transaction, by newspaper comment, or other means of intelligence, it appears to me an unwarranted restriction of the liberty of the press and of the freedom of speech, and so far as it prohibits the revelation of such circumstances attending the execution as may indicate depravity, inhumanity, cruelty and unfitness by the public officers conducting the execution, matters proper to be known, discussed and punished by public sentiment and legal measures, this language seems too restrictive.

I have only briefly outlined the basis of my criticism, which reflection will enable one to amplify.

Very truly yours,

S. W. JONES,
Attorney General.

Act concerning wearing of badges of certain organizations not in the line of proper legislation.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., March 31, 1889.

HON. JOB A. COOPER,
Governor:

SIR:—House Bill No. 10, concerning the wearing of the badges of certain organizations, does not appear to be in the line of any legislation or concerning the subject matter of anything that concerns the public welfare of the State, or the exercise of its rightful powers.

Very truly yours,

S. W. JONES,
Attorney General.

Surety companies as official security.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 6, 1889.

HON. JOB A. COOPER,
Governor:

SIR:—House Bill No. 281, concerning surety companies, seems to be a good measure, except as to the fourth subdivision of section 4. It is, in my judgment, bad policy to have such organizations sureties for official action, particularly where the law is so mandatory as it is in this act.

Very truly yours,
S. W. JONES,
Attorney General.

Lien law.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 6, 1889.

HON. JOB A. COOPER,
Governor:

SIR:—House Bill No. 61, concerning liens, consists, in the main, in improvements on the old law, both in methods of enforcement and in the security of the lien.

The only *radical* change is in section 2 of this act, amending section 7 of the act of 1883, wherein it provides that mines worked under lease shall be subject to liens. This provision would seem to be all right, if the proviso regarding the posting of a notice on the property by the lessee is considered merely directory, and as merely imposing a penalty on the lessee for its violation, and not as essential to enable the owner to obviate the effect of a lien. To me the language seems to impose a mere duty on the lessee, the violation of which is visited by no penalty against the owner.

Very truly yours,
S. W. JONES,
Attorney General.

Who exempt from payment of military poll tax.

DENVER, April 8, 1889.

R. B. NEWITT, ESQ.

DEAR SIR:—Your letter of the 5th inst. received. The following persons are exempt from payment of a military poll tax: Members of the Colorado National Guard (Acts 1885, p. 269), ex-United States soldiers, sailors and marines (Acts 1887, p. 410), and such firemen as are described in section 1899 of the General Statutes, as modified by Acts of 1887 on page 268.

I have not the opportunity to make a very extended investigation of this subject, but have found no other exemptions from a military poll tax.

Exemption from enrollment and exemption from poll tax are not the same thing, and while section 2284 provides who shall be subject to enrollment (see also section 2289 and Acts 1887, page 410), yet there seems to be no such exemption from the payment of a military poll tax under section 2325 and Acts 1887, page 410.

Very truly yours,

S. W. JONES,

Attorney General.

Board of Capitol Managers have the right to modify the contract with Geddis & Seerie, so as to require building to be constructed out of granite instead of sandstone, without re-advertisement.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., May 13, 1889.

To the Honorable

THE BOARD OF CAPITOL MANAGERS:

GENTLEMEN:—On the 8th inst. I received from the clerk of your board a resolution, of which the following is a copy:

"*Resolved*, That the contract of the Board of Capitol Managers, with Messrs. Geddis & Seerie, to supply the stone and stonework, and brick and brickwork on the

superstructure of the Capitol building, be referred to the Attorney General, with a request for his written opinion as to whether, under the terms of the contract, it is competent for the board to change the material from Gunnison sandstone to granite, arranging with the present contractors, by private agreement, for the difference in price of the material, or whether, in his opinion, it is necessary for the board to advertise for bids for the supply of the granite work.

The Attorney General being authorized to employ such competent assistance as he may require, at reasonable compensation."

I have employed Mr. H. Riddell as assistant counsel in such matters as may be referred to me by the board. Your board, being created by special statute, is required to proceed, and has a right to proceed in such manner as by law directed. It is at once the measure of your power and procedure, and it is only necessary that the board should advertise for bids in such cases as the law directs. It is likewise the duty of the board to erect the Capitol out of such material as the law directs. Hence, since the enactment of the law of April 6, 1889, the board must erect the building out of granite.

Your reports to the legislature having shown the existence of the contract with Geddis and Seerie, dated June 5, 1888, the legislature were called upon not only to empower and direct the change of material out of which the Capitol should be built, but also to dispose of the question of existing contracts. Having these objects in view, by section 2, of act of April 6, 1889, it is provided that "the Board of Capitol Managers are authorized to make such changes in existing contracts as may be required by the proposed change of material, and to make such other and additional contracts as may be necessary to complete said building." Here is an express recognition of existing contracts, together with full power in the Board to adapt the same to the changed material. To advertise for bids because of the change in material would not only not be the natural and proper way to modify such contracts, but might even result in the vacation of them, when it was the clear intent to recognize them as valid and subsisting.

Possibly, too, it might have been the judgment of the legislature that they could not set aside these contracts without violating not only the written laws of the land, but likewise to do violence to every moral obligation to which States are peculiarly subjected in dealing with private citizens.

It is true that section six of the act approved April 1, 1889, provides that "all letting of the work exceeding in amount the sum of five hundred dollars shall be advertised in two daily newspapers of general circulation for not less than ten days," but, following a familiar principle that all statutes regarding the same subject shall be so construed as to enable every part to be operative, section six may be easily construed to provide for the advertisement for "all such other and additional contracts as may be necessary to complete said building." Certainly the general language of section six of the act, of April 1, 1889, should not prevail against the express and particular language of section two of the act of April 6, 1889. The dates of these respectives acts also aid in this construction. Besides, the only provision in the Geddis and Seerie contract regarding the quality of the stone, is the provision that it shall be from the Gunnison quarry, and this section provides that the quarry may be changed if not found satisfactory. While this provision was doubtless framed, having in view a change to another quarry to the same general class, yet its language is broad enough to allow a change to any other quarry. This contract does not provide that the Board shall pay any additional costs incurred by a change of quarry, but it should be so construed as to allow the contractors additional expenses.

We are, therefore, of the opinion that it is in the power of the board to arrange by private agreement for a change of the material from Gunnison sand stone to granite without advertising for bids.

We desire to suggest that should the board effect a change of their contract with Geddis & Seerie in so material a matter as the change from sandstone to granite, they should require from them a new bond for the fulfillment of the contract; because, while the present contract provides that the board may make "such alterations, omissions, or additions, or either, as in the

opinion of the party of the first part may be proper, either in work or material;" and that such change should not release the sureties on the bond, we are of opinion that such "alterations, omissions or additions" do not, in this particular, refer to such radical changes as the one contemplated.

We are likewise of the opinion that it is competent for the board, both under the contract and by virtue of the law, to cancel and re-let this entire contract if they should deem best, a legislative direction to change the material to this extent being "good cause" within the meaning of the contract and of the law.

Very respectfully,

S. W. JONES,
Attorney General.

H. RIDDELL,
Of Counsel.

State Veterinary Sanitary Board may make appropriate regulations to prevent the spread of contagious diseases.

DENVER, COLO., May 31, 1889.

STATE VETERINARY SANITARY BOARD,
Denver, Colo.:

GENTLEMEN—Answering your enquiries as to your duties and powers in the matter of inspection and quarantine regulations, under "an act to prevent and suppress infectious and contagious diseases among domestic animals of this State, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation," I have to say:

The title to said act plainly enough expresses the general purport and intent thereof.

Under section 9 you have power "to adopt such quarantine regulations as are deemed necessary to prevent the introduction or spread" of certain diseases mentioned in the section, "under such regulations as shall be prescribed by law."

No regulations, to my knowledge, have been prescribed by law, except the very general ones mentioned in the act. Therefore, I take it, this latter phrase means "under reasonable and fair regulations."

Nor does the word "necessary" have any absolute signification in this connection. It simply means "expedient" or "calculated to produce this result." Therefore, section 9 empowers the board to make reasonable and expedient regulations to prevent the introduction and spread of these diseases.

While the law does not distinguish the extent to which cattle of one destination shall be inspected in mattres of thoroughness, from the inspection to which cattle of another destination, for instance, to some final point within the State, shall be inspected; yet in matter of practice and fact, it is well known that the classes of cattle which you may be called upon to inspect can be divided into two general classes, to wit: Cattle destined to points within the State, and cattle merely passing through the State, destined to points without.

It is likewise true that the dangers intended to be guarded against by the act are more imminent in cases of cattle of the first named class, inasmuch as any possible oversight or omission to discover disease among them may be fraught with greater danger to domestic cattle, by turning such first class upon the ranges and thereby contaminating the whole State; while cattle in certain stages of disease could safely be allowed to pass through the State, even though their presence here on the ranges might not be allowable.

Applying the law and your duties to these various conditions, it is evident to me you have the right to adopt such reasonable regulations, applicable to the appropriate danger intended to be guarded against, as may be expedient. Therefore, in the case of cattle destined to points without the State, in my judgment you have a right to adopt such general regulations as would require all stock yards, where such cattle are unloaded, to erect their yards on such plans, and have such equipments, as would effectually prevent the spread of disease of such cattle; that is to say, you have the right to require stock yards where such cattle are to be unloaded, to keep apartments or divisions for the use of

such cattle only, and other apartments for the sole use of cattle to be landed within the State.

I do not undertake to fix a precise limit to your rights and duties, for it is easier to say whether a certain act is within your duties, than to lay down exact limitations, but in my opinion you would comply with the law and with your duties should you lay down general rules in this particular to which all such yards should conform, and refuse to allow cattle to be unloaded at any such yards as did not conform. The converse of this proposition is, in my judgment, also true, that you would fulfill your duties to allow such cattle to be unloaded to all such stock yards as do comply with your reasonable regulations.

You might be within the limits of your duties and rights were you to be more restrictive than this, but on that point I express no opinion.

I say you have the right to make such regulations as I have indicated, and would be within proper limits if such regulations were general.

Very truly yours,

S. W. JONES,
Attorney General.
H. RIDDELL,
Of Counsel.

Board of Capitol Managers have the right to build the Capitol out of granite from another quarry than that whence the present base course was taken.

The words in the act approved April 6, 1889, "Granite of equal quality, texture and crushing strength," indicate the *general* quality of the stone, and not the *particular* qualities.

The word "equal," in the act, has no reference to mathematical precision, but means merely "like."

The whole act taken together empowers the board to build the Capitol out of any granite like, in its general properties to the present base course, if amply sufficient to the purpose.

DENVER, COLO., May 29, 1889.

The Honorable

BOARD OF CAPITOL MANAGERS.

GENTLEMEN:—You submit to us a question involving the construction of section 1 of the act approved April 6, 1889, entitled "An act relating to the construction of the State Capitol building, and appropriating funds therefor," and particularly this language in the section, "granite of equal quality, texture and crushing strength of the present base course of the said Capitol building."

The necessity for the construction of this language implies that possibly the board may find it advisable to erect the Capitol out of stone from another quarry than the one from which the stone in the base course was taken. We answer the inquiry with reference to this possible action.

In our judgment, "the quality, texture and crushing strength" are designed merely to indicate and limit the *general* quality of the stone and are not intended to have reference to any *particular* quality of the stone in the base course, nor does the word "equal" have reference to any mathematical precision. It means no more than if the word "like" were written in its place. Nor can it be supposed that the legislature, in passing this act, had before it any very close or scientific estimate of the exact qualities specified, but rather that they had in view the *general* qualities of the stone mentioned. It is permissible and demanded that legislatures as well as courts and juries shall use their common experience regarding the nature of any subject about which they are treating, and the legislature must therefore have known that it is next to impossible to obtain granite of the identical qualities of the present base course without obtaining the stone from the same quarry as the one from which the base course was taken, and they must also have known that even in the same quarry the qualities of the stone may vary in different parts thereof, as being nearer the surface, more subject to the action of water, air and other modifying elements. Had it been intended that stone from identically the same quarry should be used,

a more appropriate way to indicate such an intent would have been to specify, by name or location, or other appropriate description, the exact quarry from which the stone must be taken, and not to have used a paraphrase to have accomplished the result of identifying the exact stone. The limitation of amount devoted to the purpose of erecting the building is also an indication that the board have some discretion as to the exact stone out of which the Capitol shall be built. Because, no contract or definite arrangement having been made as to the cost of securing any special stone, might entail such additional expenses more than was contemplated as would practically render the limit of cost in legislation thereabout nugatory. We are, therefore, decidedly of the opinion that by this language the legislature meant no more than that the granite should be of such efficient qualities as to answer the purpose for which it was intended, and that it should be of the general efficiency and quality of the present base course. It might very well happen that the granite might be slightly inferior in any one of the specific qualities mentioned, and superior in the other qualities mentioned, so that the general quality of the new granite would be superior to the granite of the base course, and amply sufficient for all purposes intended. So that, in our view, the legislature meant no more by the language used than that quality out of which the building should be erected should be of good quality, and similar to the general qualities of the present base course. The board will do its duty if, having in view the best interests of the State, economically and otherwise, it erects the Capitol out of granite of the general properties of the present base course, though such granite may differ from the base course and, in some particulars, be even inferior, provided the general properties are amply sufficient for the purpose.

Very respectfully,

S. W. JONES,
Attorney General.
H. RIDDELL,
Of Counsel.

The Board of Capitol Managers have power to discharge the supervising architect of the Capitol building.

DENVER, COLO., June 6, 1889.

THE BOARD OF CAPITOL MANAGERS,

Denver, Colorado:

GENTLEMEN :—You submit to us an inquiry whether you have authority under the law to discharge E. E. Myers, Supervising Architect of the State Capitol.

Section 4 of the act approved April 1, 1885, under which said Myers was employed, provides that the "Board of Managers shall have full power to appoint or employ, and discharge at their discretion, an architect and a superintendent, whose duties shall be prescribed by the Board, and such other artisans or laborers that may be required under the prosecution of the work, and allow such compensation for such services as they shall deem just and reasonable."

By contract dated April 2, 1886, it is provided that "this contract is made in pursuance of and under the provisions of a public law of the State of Colorado, which is hereby made the paramount agreement or contract in this matter, and made the controlling part of this agreement, wherein, in any respect, there might be any conflict or omission in this agreement." It is further provided by the contract that the Board of Capitol Managers "reserves the right, for good cause shown, to discharge the party of the second part and annul this contract," and providing the amount of compensation which shall be paid. Independent of the consideration whether this board, as public functionaries, could by contract divest themselves of the power to discharge any employé under the provisions of section 4, both the contract and the law has given to the board ample power to discharge Myers. The "good cause" mentioned in the contract is, in our judgment, identical with the "discretion" mentioned under the law, and means no more in either case than that the board shall do for the State, under the discharge of their duties, what to them appears for the best interest of the State. What compensation Myers shall be entitled to, under the various laws and the contract relating to this matter, is

a separate question from your right to discharge him. We advise that you have the right to discharge him. Section 4, approved April 1, 1889, also empowers you to remove any employé.

Very respectfully yours,

S. W. JONES,
Attorney General.
H. RIDDELL,
Of Counsel.

State Reformatory is designed to be a branch of the Penitentiary.

Fixed salaries and mileage provided for in section 37 of the Reformatory act can be paid from appropriations for the maintenance of the Penitentiary.

Expenses of erection include not only direct work upon the building, but also work incidental thereto.

ATTORNEY GENERAL'S OFFICE, June 14, 1889.

HON. L. B. SCHWANBECK,
Auditor of State:

SIR:—You refer to me certain vouchers for claims on account of the location and erection of the State Reformatory to be built in Chaffee county. The vouchers presented do not stand upon the same basis, nor present the same question. I will therefore give such general views as will enable you to understand my ideas of the principles that should govern you, not only as to these bills, but likewise to any others that may hereafter be presented on this subject.

An examination of the provisions of the Reformatory bill will show that this institution is designed to be a branch of the Penitentiary, and, in its general features, to be similarly governed.

The provisions of section 46 show that even the earnings of this institution belong to the Penitentiary fund. Therefore, the fixed salaries and mileage provided for in section 37 are doubtless intended to be paid from the appropriation for the maintenance of the Penitentiary.

Such bills therefore for, by this section, can, in my judgment, be paid from the Penitentiary fund.

. The $100,000 appropriated by section 5 can be used for such purposes towards the erection of the building as arise subsequent to the selection of the site. The expense of erection includes not only direct work upon the buildings, but work incidental thereto, as services of an architect, selection of stone, plans, specifications, etc. All such bills may be paid from this appropriation, but to be paid require the approval of the Governor. These considerations will probably enable you to decide your proper course upon each voucher as presented.

Very truly yours,

S. W. JONES,

Attorney General.

Basis of settlement with supervising Architect Myers of the Capitol building.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., June 20, 1889.

BOARD OF CAPITOL MANAGERS,

GENTLEMEN:—We have had referred to us the statement made by your secretary as to the condition and status of the account between the board and E. E. Myers, with the request that we report what, in our judgment, is the proper basis of settlement with said Myers under his contract.

The contract with Myers provides that he has been appointed "supervising architect of the State Capitol building, to be erected by and under a certain contract made and entered into by and between the party of the first part, and Mr. William D. Richardson, dated April 1, A. D. 1886." It is also provided that Myers is to be paid two and one-half per cent of the costs of the building. These considerations make us of the opinion that the compensation of Myers was based upon the Richardson estimates, it being doubtless considered that this percentage upon that estimate was sufficient consideration for his services.

But inasmuch as the operation under the Richardson contract has been delayed for many reasons, more time has been consumed than was probably contemplated when Myers entered into his contract. Therefore it would seem only fair and just that he should be allowed such other compensation for this loss as may be reasonable, though such additional compensation is not necessarily a percentage upon the new contract. It may also be true that a change in the material to be used has necessitated such additional consumption of time by Myers as entitles him to some equitable settlement.

Very truly yours,

S. W. JONES,
Attorney General.
H. RIDDELL,
Of Counsel.

Duties of Governor and Attorney General in the matter of investigating charges of fraud in certain public contracts.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., July 18, 1889.

SIR:—Under date of 16th inst., this office had the honor to receive from you an official communication, requesting information as to your rights and duties, and the rights and duties of the Attorney General, in the matter of the charges made by the public press regarding certain labor and supplies furnished the various departments of the State.

I understand your communication to mean that you desire to be advised as to your whole duty in the premises, for nothing short of a full and fair investigation of each and every person implicated by these public suspicions would accord with the high expressions of your desire to discharge your whole duty, or allay the public suspicions a less thorough investigation would beget.

Your Excellency is fully aware that no prosecution or action can be based on public suspicion and general accusation. Law requires something definite and explicit,

though such general accusation would be sufficient to warrant a careful investigation on your part.

It is not necessary to remind you that no public moneys can be expended, or obligations incurred, except in pursuance of an express authority, and the official records and files of each public functionary should furnish the evidence on which their actions are based. Whether the laws have been complied with, is a matter of easy ascertainment.

To the general duty imposed upon you to "take care that the laws be faithfully executed," is added the specific power to "require information, in writing, from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath, whenever so required" (Cons., Art. IV., Sec. 8), and, conversely, it is your duty to require such information whenever the circumstances seem to you to demand such requisition.

Following article V., section 29, of the Constitution, certain sections of the General Statutes, beginning at section 1338, plainly lay down the specific mode by which supplies for the State should be obtained. Though the sections from the General Statutes above referred to do not specifically provide that the contract shall be in writing, yet the whole context, as well as the law found at page 49 of the Acts of 1885, plainly shows that such contracts should be in writing. I may say, however, that the mere circumstance that all such contracts are not found in writing will not necessarily imply either guilt on the part of any officer, or impair the right of the contractor to recover the reasonable value of the goods or labor received by the State.

Section 1378 makes it the duty of the Auditor to preserve all documents necessary to a full ascertainment of the facts regarding these accusations, and section 1385 fully empowers you to have free access to the offices and documents in the custody of the Treasurer and Auditor.

Hence you have full access to such evidences as will make the truth appear, and it as important to public confidence that the innocent should be freed from the

imputation of guilt or official negligence as that the guilty should be punished.

The duties of the Attorney General are not very accurately defined, but section 1344 is ample authority for me to proceed with such prosecutions or actions as your Excellency may direct to be taken. Having full power and authority to lay before me and before the public a full and explicit statement of the truth surrounding these matters, your own judgment will prompt you to make such investigations as may seem advisable, and you may extend your researches into every avenue likely to afford aid to a correct conclusion.

Should you desire me to institute legal proceedings, I cannot advise what form such proceedings should assume, until you have placed before me the facts upon which I must proceed, but when your Excellency has enabled me to know these facts, I shall not hesitate to take such action as is warranted.

In this matter, as in every other where my official duties lay, I shall lend every assistance in my power, and upon your report to me of the facts and your requirement to proceed, I will endeavor to redeem my obligation to faithfully discharge the duties of the office to which the people have elected me.

I have the honor to subscribe myself,

Your most obedient servant,

S. W. JONES,

Attorney General.

To His Excellency,

JOB. A. COOPER,

Governor.

The Insurance Department is authorized to make its own contracts for printing. Such contracts should be made, as near as may be, as contracts for printing in the other departments are required to be made.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., August 2, 1889.

HON. LOUIS B. SCHWANBECK,
Superintendent of Insurance:

DEAR SIR:—On the first instant you submitted to me for an official opinion the question whether the printing for the Insurance Department of this State comes under the contract made with the Collier & Cleaveland Lithographing Company by the Secretary of State. I reply that section 1338 and following of G. S. 1883 makes it the duty of the Secretary of State to arrange for the printing for the Executive and Legislative Departments and for the Supreme Court.

Section 1 of the Insurance Law, being section 1675 of the G. S., makes the Insurance Department separate and distinct, intending thereby to disconnect this Department from any inclusion within the general terms of the Executive and Legislative Department. This would probably be sufficient to show that it was not the duty of the Secretary of State to provide printing for the Insurance Department, but in addition to this, section 7 of the Insurance Law, being section 1681, G. S., 1883, provides that the Superintendent of Insurance shall procure printing for this Department. This implies that he may make his own arrangements or contracts for such printing, without reference to contracts made by the Secretary of State. I may suggest, however, that Acts 1885, page 49, so far as it can be applied to your Department, and, also, chapter XCI. of the G. S., 1883, are obligatory on you in making contracts for printing, because your Department is a part of the State Government, and moneys paid are in effect paid by the State.

Very truly yours,

S. W. JONES,
Attorney General.

The word "bridge" is not confined to structures over a water course, and includes necessary, that is, convenient and safe approaches.

The Glenwood Springs bridge.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., August 29, 1889.

HON. J. P. MAXWELL,
State Engineer:

DEAR SIR:—Your letter of August 17, 1889, presents to me the question of proper construction to House Bill No. 50, found in the Session Laws of 1889, page 349, relating to the construction of the bridge across Grand river, on Grand avenue, in the town of Glenwood Springs. Your letter can be answered by giving the proper interpretation to the word "bridge" and the words "across the Grand river." The word "bridge" is defined to be "a structure which affords to travelers and others a safe and complete passage way over a river or stream, or over a ditch or other place or obstruction," and the term is not confined to such structures as are erected over a water course only. Hence the definition of this term alone will afford no exact criterion as to the extent of the powers and duties of the commission. The word "across" means "from one side to the other," and the words "across the Grand river" means simply "from one side to the other of the Grand river." The word "bridge" by its terminal force, includes necessary, that is, safe and convenient, approaches. Therefore, the commission have power to build a bridge from one side to the other of Grand river with all necessary and convenient approaches, though such approaches may extend to considerable length.

Whether the plans submitted with your letter to this office include a greater work than is contemplated by the act, as interpreted above, is a matter, which the commission to locate and construct the bridge, must decide from the inspection and survey, and from such other means of information as they may deem appropriate. This office is unable to decide whether the exact plan submitted is more extensive than your authority,

but the foregoing considerations will probably enable you to arrive at a correct conclusion.

Yours very truly,

S. W. JONES,

Attorney General.

Uniforms obtained from the General Government, under Acts Second Session of XLIX. Congress, belong to the United States, and Governor must account for same to the Secretary of War.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Sept. 3, 1889.

BENJAMIN F. KLEE,

Adjutant General.

SIR:—Your communication regarding certain uniforms obtained from the General Government, and offered as prizes in the competition drill of the State militia, in accordance with the circular dated Decempber 16, 1887, enclosed therewith, is at hand.

I am of the opinion that under section 3, Chap. XXIX. (found on page 401 of the acts of the United States, passed at the second session of the XLIX. Congress, 1886 and 1887), such uniforms belong to the United States.

Nor does the circular above referred to, when read closely, and in the light of the aforesaid act, mean anything than, as it was impossible that uniforms could be given to all the State militia from the appropriation by the General Government, that it should be devoted to such companies as showed the greatest skill in competitive drill, leaving the property where it would have been had they not been thus offered.

The section above referred to compels the Governor to account for the same to the Secretary of War.

Very truly yours,

S. W. JONES,

Attorney General.

Pay of officers detailed on Court of Inquiry.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Sept. 9, 1889.

BENJAMIN F. KLEE,
Adjutant General:

DEAR SIR:—Your communication of August 28, inquires as to the rate of pay for officers recently detailed by the Governor as a Court of Inquiry.

In reply I would say that section 16, article VIII. of the Militia Act of 1889, provides that such officers shall be entitled to pay according to section 12, of article V. of said act.

Very truly yours,
SAM. W. JONES,
Attorney General.

There can be no valid floating debt under our Constitution. No warrants can be drawn on appropriations, in any year, in excess of the revenues of that year. Warrants drawn against the revenue of any year constitute no claim against the revenue of any other year.

The Auditor's estimate of the revenue for any year is not conclusive, but only advisory. The legislative power must form its own conclusion as to the amount.

Fixed salaries and certain other sums are guaranteed by the Constitution, and are to be paid without reference to the date of acts of appropriation. All appropriations, except for sums pledged by the Constitution, are to be paid in the order of the taking effect of the acts of appropriation.

When warrants have been drawn, in their proper order, up to the amount of the probable revenue, it is the duty of the Auditor to refuse to draw any other warrant, and of the Treasurer to refuse to pay the same.

Appropriations made without designating the exact year from the revenues of which they are to be paid, are of doubtful constitutionality.

DENVER, COLO., Sept. 25, 1889.

To the Honorable,
THE SUPREME COURT,
Of the State of Colorado:

SIRS:—Doubts have been suggested both among the members of the executive department of this State, whose duty it is to act in relation to the matters hereinafter mentioned, and among many citizens and taxpayers of the State, whether the aggregate of the appropriations made by the Seventh General Assembly is in excess of the limitation fixed by the Constitution of the State, particularly Article X., section 16. The Auditor of State is in doubt whether any warrants should be drawn on the Treasurer of State for the payment of any of such appropriations, because it appears that the aggregate of such appropriations is in excess of the probable total tax provided by law and applicable for such appropriations, taking the Auditor's estimate of the revenue for the present and succeeding fiscal years as the basis, and though it might be legal to draw warrants on the treasury up to the point where the Auditor's estimate fixes the amount of revenue available for this purpose, it is still a question of what, if any, specific appropriations should not be recognized as valid, and where the line between the valid and the invalid appropriations should be drawn. Some of the acts appropriating money from the general revenue of the State require that the Executive shall approve vouchers presented to the Auditor as the basis of a warrant, before the Auditor shall draw such warrant. I certify, therefore, that the questions hereinafter submitted are important and arise upon a solemn occasion, wherein the Executive of this State requires the opinion of the Supreme Court in order to properly discharge his duties.

I beg, therefore, to request the opinion of the honorable court in answer to the following questions:

First—What legal criterion is fixed by which it can be known at the date of an act of the legislature appropriating or authorizing the expenditure of money, whether such appropriation or expenditure during any fiscal year will exceed the total tax then provided for by law and applicable for such appropriation or expenditure?

Second—What is the duty and what the right of the Auditor in respect to refusing to issue warrants, when in his judgment the constitutional limit has been reached; and in this connection, what is the effect of an emergency clause attached to a bill making appropriation of moneys, when the question arises between appropriations made on the same fund, the one being covered by an emergency clause, and the other taking effect only in accordance with the general rule governing statutes? Is the former, at the time of the passage of the act, such an appropriation of the moneys in such fund as will operate to render the appropriation made by the latter act good only in case the appropriation of such fund has not exhausted the same, or brought it up to the point where it is subject to the constitutional limitation?

Third—What legal effect has the Auditor's estimate of the revenue for certain fiscal years, in fixing the limit of appropriations that may be made for those fiscal years?

Fourth—Do the appropriations made by the Seventh General Assembly exceed the limit prescribed by the Constitution?

Fifth—If such limit has been exceeded, what appropriations are invalid, and for the payment of which, if any, will the Auditor be justified in refusing to draw a warrant on the Treasurer?

I transmit herewith an itemized statement of the appropriations above referred to, and also the Auditor's estimate of the probable revenues for the years 1889 and 1890.

I have the honor to be very respectfully,
Your obedient servant,
JOB A. COOPER,
Governor.

IN THE SUPREME COURT OF THE STATE OF COLORADO.

In the matter of certain questions submitted to said Court by the Governor, under date September 25, 1889, regarding the appropriations made by the Seventh General Assembly:

Concerning the duty, and therefore the jurisdiction, of the court to answer the questions submmitted as above, we present no argument, but proceed upon the assumption that such duty and, therefore, such jurisdiction exists. A clear and exact idea of the principles underlying our constitutional limitations in this behalf should first be arrived at, and proper answers to the several questions will easily result.

It is settled that the words, "debt by loan," in section 6, Art. XI., of the Constitution of this State, referring to *county indebtedness*, are not limited to *bonded debts*, but include debts of any kind. People *vs.* May, 9 Colo., 80 and 404; and Lake county *vs.* Rollins, 9 Sup. Ct. Rep., 651.

Whether the same words in section 3, of the same article, referring to a *State debt*, have a more technical and restricted meaning, was expressly left undecided in People *vs.* May, *supra.* We will consider their meaning in section 3. Doubtless, where words used in one place have had a certain meaning attached to them they will, *prima facie*, have the same meaning when used in another place in the same instrument, but, as was suggested in Nougues *vs.* Douglas, 7 Cal., 76, there is no exclusive property in words, so that when they have at one time been appropriated for the conveyance of a particular idea, they cannot be afterwards separated from such idea, even at the will of the party employing them. The context always affixes the specific meaning, as abundant authorities show. That these words in section 3 refer to a *bonded debt* clearly appears, to our minds, from section 4 of same article, which last section specially refers to section 3, because the provisions of section 4, as to the manner of the creation of the debt, payment of the interest thereon, limitations of time when same shall become absolutely due and payable, etc., are consistent only with a bonded debt, and are entirely inapplicable to the

existence of a floating debt. There is no pretense, either in legislative enactments or the public history of the situation of affairs, that the necessity for a debt under section 3 arises out of any cause other than "to provide casual deficiencies of revenue," because none of the appropriation bills are to "erect public buildings," this matter being otherwise provided for, nor to "suppress insurrection," or "defend the State," except a certain comparatively small amount heretofore appropriated on account of the Ute war, and for this appropriation section 16, Article IV., is ample authority, without reference to the condition of the revenue, and arises out of overwhelming necessity. It may not be inapt here to refer to adjudications defining the words "casual deficiencies of revenue." "The deficit must have been casual in the sense that it must not have been designedly brought about by making extraordinary appropriations for purposes other than those above named, with a view to evade the constitutional inhibition and to authorize the contracting of a debt on behalf of the State in disregard of its terms. It must have resulted from those casual or occasional discrepencies between the revenue received and the amounts required to provide for the general welfare, and carry on the State Government, in the ordinary way, which could not be foreseen and provided for without the accumulation of an unnecessary surplus in the Treasury." Hovey *vs.* Foster, 21 N. E. (Ind.), 39; State *vs.* School Fund, 4 Kansas, 261. If these considerations are correct, it is the duty of the legislature to provide for funding the debt arising out of the Ute war, because it is notorious that the ordinary revenues of the State are not, and for years, will not, be sufficient to provide for its payment.

But whether the words "debt by loan" in this third section refer to a *bonded debt* or not, certain it is that there has been no legislative act or effort, placing or attempting to place, the outstanding State debt under the conditions of sections 3 and 4. Hence, as affects the questions now before the Court, a consideration of the exact limitations of these sections is excluded from consideration, and the question is narrowed to whether there can be valid issues of warrants on appropriations made without regard to the actual receipt of revenue, these warrants accumulating from year to year, constituting a floating debt, and constantly being enlarged.

It may be assumed that, except in so far as limitations are prescribed in the Constitution, the power of the legislature is plenary, with perhaps the additional restriction that its acts shall not violate natural justice and right, above and beyond all Constitutions, and subject to the observation of the Supreme Court of the U. S., that there is no such thing as absolute power under our system of government.

The provisions of the Consititution pertaining to the further consideration of these questions, are those found in Article X.; title, Revenue.

"SECTION 1. The fiscal year shall commence on the first day of October in each year, unless otherwise provided by law.

"SEC. 2. The General Assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the State government for each fiscal year."

Section 11 provides for limit of rate of taxation for State purposes.

"SEC. 16. No appropriation shall be made nor any expenditure authorized by the General Assembly whereby the expenditure of the State during any fiscal year shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax not exceeding the rates allowed in section 11 of this article, to pay such appropriation within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the State, or assist in defending the United States in time of war."

We may observe in passing that sections 1, 2 and 16 provide that the periods of appropriation shall be identical with the fiscal years, which, by statute, page 468, section 1403, begin on the first day of December and end on November 30 each year, whereas the appropriations are made for the calendar years.

These sections plainly provide that this State, so far as constitutional provisions can do so, has adopted the "pay as you go" plan, and no appropriation or

expenditure beyond actual receipts is constitutional, except the "casual deficiencies" as above defined, and the other unusual and necessary exceptions. With the aforesaid exceptions every debt and every act authorizing any expenditure, beyond the total tax raised within the year is unconstitutional, null and void. So plainly do these provisions absolutely prohibit the creation of any debt by the legislature, that no language short of plain and express negation could more readily express the will of the people. Construing a similar provision in their constitution, the Supreme Court of New York, in People *vs.* Board Supervisors Kings Co , 52 N. Y., 556, says, at page 563, "Any attempt to create such debt, or incur such liability, is a nullity. There can be no floating debt under the present Constitution; neither can a debt be created by making appropriations, and directing expenditures in excess of taxes levied and means provided. Could the Constitution and the intent of the people, in adopting it, be thus easily circumvented and frustrated, that instrument would be of little value. The fallacy that there is, or can be, a floating debt created in the discretion of the legislature, by excessive appropriations, and scanty tax levies, lies at the foundation of the act, and all the kindred schemes for borrowing money under pretense of relieving the treasury and preserving the credit of the State. Neither the legislature nor the officers and agents of the State, or all combined, can create a debt or incur an obligation for or in behalf of the State, except to the amount and in the manner provided for in the Constitution. The objects and purposes to which the money in the treasury shall be appropriated, or for which taxes shall be levied, are very much, if not entirely, in the discretion of the legislature. The legislature has entire control over the revenues of the State, whether derived from annual taxation or other sources, except as such moneys are pledged or appropriated by the Constitution. Such control is exercised by means of statutes making annual appropriations, that is, by acts declaring to what purposes and in what amounts the moneys of the State shall be applied. The acts of the legislature in making these appropriations are supreme to the limit of the funds and moneys at their disposal, but nullities in excess of that amount. The credit of the State is beyond its control. A pauper dying may, in form,

bequeath millions, but his legates will be none the richer, and those who come after him will be under no obligation to make good his bequests from their earnings. So the legislature can effectually dispose of the moneys of the State from year to year, but appropriations in excess of such moneys impose no liability upon the people or obligations upon successive legislatures to provide the means for their payment. The administrative officers of the State can not give effect to them either by borrowing money or incurring liabilities in other forms, for the reason that the Constitution stands as an insuperable barrier to any debt to be created by such means. The sinking funds of the State are carefully and effectually preserved by the Constitution, and can not be diverted from the purposes to which they are pledged. Precedent has sanctioned annual temporary loans from these funds in anticipation of taxes actually levied and in process of collection, to be repaid with interest when the taxes for the fiscal year shall be paid into the treasury. No harm or loss has or can come from this practice, and it is authorized from year to year by statute. This is the extent to which these funds can be used for the payment of the ordinary appropiations by the legislature. Without the sanction and the action of subsequent legislatures, appropriations in excess of means provided will be harmless, as they can only be effectual as drafts upon the treasury to the extent of the funds with the Treasurer applicable to their payment, and can only burden the people to the extent of the taxes actually imposed." To the same effect is People *vs.* Johnson, 6 Cal., 499; Nougues *vs.* Douglass, 7 Cal., 65; State *vs.* McCauley, 15 Cal., 429; State *vs.* School Funds, 4 Kansas, 261; State *vs.* Medberry, 7 Ohio, St. 522; Williams *vs.* Louisiana, 103 U. S., 637.

Now, since it can not be known with absolute certainty what will be the amount of revenue during each fiscal year, it necessarily results that the legislature must judge for itself, and make such estimate as the facts and means of information will justify. To this end, among others, reports of various State officers are transmitted to that body, and among these is the Auditor's estimates of the probable revenue and expenditure for the two succeeding fiscal years. (Secs. 1373 and 1328.) These estimates have no special importance,

except that coming from an officer having all the necessary data before him, extending through a long series of years, it may be considered more nearly correct and a safer guide than would be the estimate of less experienced persons or bodies, but the legislature itself has before it, or can easily obtain, the same data, and can make its own estimate. This estimate is not made, or required to be made, in or by any express figures or acts, but is evidenced by the various acts making appropriations and authorizing expenditures to the extent of the funds available for that purpose. All beyond this are simple nullities. Nor does it follow that only excessive and extravagant appropriations are forbidden, for casualties of all kinds, defalcation, inefficiency of collecting and assessing officers may disappoint the most just and reasonable expectation, but from whatsoever reason sufficient revenue fails to come to meet appropriations, the excess of appropriations is null and void. Hence the taking effect or not of a particular appropriation often depends upon conditions subsequent, and no standard is or can be provided by which it can be determined, at the time the act is passed, whether or not it will take effect. Section 16, therefore, while it directs its inhibition against appropiations and expenditures, really and necessarily means that no *debts* shall be incurred, but that the revenues of each fiscal year shall pay the expenses of that year. Let us enquire whether an act making an appropriation or authorizing an expenditure creates a debt. A debt is "a sum of money due by certain and express agreement." Bouvier's Law Dic. Or as was said in Williams *vs.* Louisiana, 103, U. S. 637 (645), in treating of the difference between a contingent and a fixed liability: "There was no debt before this. There was no fixed obligation; no certain liability; no strong reason to believe that her (the State's) promise would ripen into any absolute debt on her part." To the same extent are State *vs.* McCauley; State *vs.* Medberry, *supra*; City *vs.* Dissaint, 9 S. W., 593; Corpus Christi *vs.* Woessner, 58 Tex., 462. But when acts are done under a law authorizing an expenditure of money, where there is no money to meet the payment, they become debts and such debts are prohibited. People *vs.* Johnson, 6 Cal., 499. No very satisfactory adjudication is found, the courts varying in their language with reference to the case before them.

See City *vs.* Edwards, 84 Ill., 626; Culbertson *vs.* Fulton, 18 N. E., 781; Law *vs.* People, 87 Ill., 385. But obviously, it is not the authorization in itself that is prohibited, but the authorization beyond cash in the treasury, or in process of collection. The amount of cash collected varying with many circumstances, it necessarily follows that some appropriations or acts authorizing expenditures become operative or not, depending upon conditions subsequent. An appropriation is "the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued." State *vs.* Medberry, *supra* (at page 528); Stratten *vs.* Green, 45 Cal., 149; State *vs.* Bordelon, 6 La., Ann. 68; Ristine *vs.* State, 20 Ind., 328 and 345.

If it be true that the Constitution inhibits the creation of a floating debt or any debt, except the one provided for in section 3, Article XI., and if the legislature may dispose of the entire revenue as they please, except such part as may be specifically pledged by the Constitution, and if the legislature must estimate the probable revenue for itself, and if an appropriation is not in itself the creation of a debt, what becomes of all appropriations in excess of the revenue actually received in each fiscal year? The answer will depend upon the importance to be attached to the period of taking effect of the various acts. Formerly all acts took effect as of the first day of the session—Potter's Dwarris on Statutes, page 169—and enactments of the same date take effect together. Terr. *vs.* Wingfield, 15 Pac., 139. Sometimes when it becomes important, the exact precedence of various acts will be enquired into. See whole subject ably examined in Salmon *vs.* Burgess, 1 Hughes, C. C. 356, affirmed 97 U. S., 381; Garden *vs.* Collector, 6 Wall., 499. Did the old rule now apply, these questions would be much more difficult; but the above authorities and innumerable others, as well as our constitutional provision (Article V., section 19) render the subject plain.

Now the legislature, having the absolute disposition of the revenues, except such part as is specifically pledged by the Constitution, may dispose of it for the purposes and in the order they desire.

To illustrate. There is $1,000,000 revenue to be disposed of. By act taking effect March 1, the Auditor and Treasurer are directed to set aside $100,000 for a certain purpose. On March 2, they are directed to set aside $100,000, not heretofore appropriated, for a certain other purpose, and so on. Each prior appropriation lessens the amount that may be disposed of by subsequent acts, and, the acts following each other in proper sequence, it is exactly the same as if the legislature had specifically directed that there should be first set aside $100,000 for a certain purpose, and next that $100,000 be set aside for a certain other purpose, if so much funds there be, and so on, each appropriation having attached to it the condition that such sum is set aside, if so much funds there be, not therefore appropriated.

The theoretical working of the system under this construction is that the Auditor and Treasurer shall credit each appropriation on their books in the order of its priority, and no subsequent appropriations can be paid till prior ones are fully paid in and the cash is ready. Practically, however, these officers can rely upon about a certain amount of revenue, and all appropriations coming clearly within the limit of this certain revenue can and will be paid concurrently, without its being strictly insisted that the prior ones shall first be filled. This is allowable, even under the theory of cash payments, as is also the issuance of warrants against current revenues then being collected, and in neither case is a debt created within the meaning of the inhibition. City *vs.* Dissant, 9 S. W., 593; Corpus Christi *vs.* Woessner, 58 Tex., 462; People *vs.* B'd Sup. Kings Co., 52 N. Y., 556, wherein it is said that precedent has justified temporary loans from permanent funds pending the collection of the taxes. See, also, the other cases above cited and see our Constitution, Art. IX., Sec. 3, and laws passed in pursuance thereof. So that any valid issue of warrants can be invested in school and other permanent funds pending collection of current revenue, but no warrants can be drawn to meet appropriations in excess of actual revenue.

Hereinbefore we have said that the legislature may dispose as they will of all revenues not specifically pledged by the Constitution. What is thus pledged by that in-

strument? Art. V., Sec. 30, says: "Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment," and proceeds to fix the salary of certain officers. Under this provision the legislature cannot divert the revenues of any fiscal year from the purpose of paying fixed salaries, for we have seen that the expenses of each fiscal year must be met by the resources of that year, and that there can be no claim or debt against the State, payable out of the resources of any other year, though subsequent legislatures might provide for the payment of so just a claim. It would, for these reasons, be diminishing compensation of officers, by diverting the revenue to other purposes, and leaving no funds for fixed salaries. And so this point was adjudicated in State *vs.* Burke, 32 La., Ann. 1213, and though this case seems to distinguish between officers established by the Constitution and those established by law, yet the terms of our Constitution include "any public officer," whether mentioned in the Constitution or not, because, extending the idea underlying People *vs.* May, 9 Colo., at p. 407, no office can be created which is not under the Constitution in its broad sense. At any rate, the office being established by the Constitution, it makes no difference whether the salary is established by the Constitution or by the law. In either case, it is protected. Rucker *vs.* Supervisors, 7 W. Va., 661, and see Embry *vs.* U. S. 100 U. S. 680. We use the term, "officer," here in its broadest sense, as including every public servant whose compensation is drawn from the public treasury, and which is required to be fixed by law. Whether there are public funds pledged by the Constitution to other purposes than those above mentioned, is probably not necessary to be here determined, but if there be such pledge, the funds are equally protected for their proper purpose.

What, then, becomes of any appropriations falling beyond the revenues received? If there is such "casual deficiencies" as are provided for in Art. XI., Sec. 3, the legislature may provide for such a contingency according to that section and section 4, State *vs.* Medberry, *supra*. If they are so excessive as to materially exceed the revenues, they are simply null and void.

The court cannot determine that the acts themselves are unconstitutional, for they are, or would be, valid if the revenue was forthcoming.

Or, as it is expressed in People *vs.* Supervisors, 52 N. Y., 556 (at p. 565): "The acts will remain upon the statute books, but will only serve as monuments of the extravagance, recklessness or folly of those by whom they were enacted. Subsequent legislatures can, if the objects of the appropriations are deemed worthy, give effect to them by providing the means and directing their payment, but the discretion and responsibility is with them as if no former appropriations had been made. No duty or obligation is devolved upon them by the acts of their predecessors."

Should it unhappily occur that successive legislatures pass acts of appropriation and authorize expenditures in excess of the funds at their disposal, and so thereby involve innocent or ignorant persons where there is no means of payment, the relief is not with the courts, but a healthy public sentiment must right the wrong.

If we are not mistaken in the conclusions at which we have arrived, answers to the questions submitted are easy and obvious.

First—It is for the legislature and Governor, that is, for the enacting power, to determine by their best judgment whether an authorized expenditure will exceed the total tax. If it turns out that it does not so exceed the tax, it is valid. If not, it is invalid. No other criterion is fixed by the law.

Second—It is the right and duty of the Auditor to refuse to issue, and of the Treasurer to refuse to pay, any warrant unless there is cash in the treasury appropriated to pay the same, except that warrants may be issued where the funds are in process of collection, care being taken to issue none not clearly and safely within this limit, and pending the collection of the revenues, warrants can be paid out of the School and other permanent funds in manner provided by law; these funds to be re-imbursed when the revenues of that fiscal year are collected.

Laws appropriating money and authorizing expenditures set aside and dedicated to the purposes of the appropriation or expenditure, public funds, and are operative in the order of their taking effect, except as modified in the fifth answer hereto. The effect of an emergency clause is merely to make an act take effect sooner than it otherwise would.

Third—The Auditor's estimate of the revenues of certain fiscal years has no other office or effect than to aid the law making powers in forming a correct conclusion on the same subject.

Fourth—None of the appropriations made by the Seventh General Assembly can be declared unconstitutional, merely because they may exceed the limit of the revenue which may be received, but all appropriations to pay which cash is not, and will not, be received into the treasury, are inoperative, null and void, having in mind the suggestions contained in the second answer, as to temporary advances from permanent funds.

Fifth—The Auditor will pay all fixed salaries at all events, if sufficient funds are received. (We have not, as above suggested, examined into the question whether other pledges of funds have been made by the Constitution.) All other appropriations are to be paid in the order of the taking effect of the act making the appropriation. All appropriations beyond this limit are to be treated as null and void. We may add that a certificate of indebtedness is a debt. Law vs. People, *supra.*

The court will probably not feel itself bound to arrange by name the various acts of appropriation in the order of their priority, or to do more than lay down the general principles which should govern the officers in making payment. We do not, therefore, feel called upon to do more than present our views of such general considerations, but we desire to add further that possibly some of the appropriations contained in the acts of 1889 are inoperative, not because they fall beyond the limit of revenue received, or to be received, but because of the lack of definite direction as to the fiscal year within which, or from the revenues of which, they should be paid. For, clearly, if the foregoing views are correct, some subsequent appropriations become operative, or not, depending on whether prior appropriations are paid.

Now, if any act does not specify when the appropriation shall be paid, and the Auditor and Treasurer pay the same from the revenues of 1889 or 1890, as they desire, or as the same may be demanded by the parties for whose benefit the appropriation was made, then, practically, the question whether these subsequent appropriations become valid or not, will depend upon the merely ministerial acts of the Auditor and Treasurer, or on the acts of parties interested in the appropriation, thus placing these mere agents and private parties in the position of deciding the fate of subsequent appropriations, a position pertaining exclusively to the legislature.

Acts thus written would seem to fail for indefiniteness.

Respectfully submitted,

SAM. W. JONES,
Attorney General.

H. RIDDELL,
Of Counsel.

(Note.—See 13 Colo., 316.)

Where an order of the State Board of Land Commissioners has been properly made, granting a lease of public lands according to the terms and conditions established by long usage and custom of the board, the right of the lessee to the use and occupation of the premises is complete.

A lease signed by the Governor is merely evidence of the order of the board; and in signing the same the Governor acts ministerially.

It is his duty to carry out the orders of the board, aside from his private opinion on the subject, where there are no circumstances of fraud or imposition.

Where a former board has granted a lease, the present board cannot review such action, except where the former board could have done so, as the matter has become a contract.

DENVER, COLO., February 13, 1889:

To the

STATE BOARD OF LAND COMMISSIONERS.

GENTLEMEN:—I have had under consideration the matters concerning the claim of S. W. Cantril, J. V. Dexter, and others, for a lease, or a right to a lease on Sec. 36, Tp. 31, S. R. 65., W. 6th Prin. Mer., and also the question as to the duty of this board, under all the surroundings of this case, and beg leave to report as follows:

It appears that at a meeting of the Land Board, held on Oct. 22, 1888, several applications for leases on said land were pending before the board for its consideration. These applications varied greatly in their terms, and it may be considered that there might be a serious question whether Cantril's application, as finally accepted, was in fact the most advantageous to the State. But in my view of this case, such a question is not material now, and has no bearing on the duties of this board. Cantril's application did not contain any specific proposition as to the royalty he would pay on coal extracted, while some of the other applications, notably Dexter's, did. Therefore, it might be well doubted whether Cantril could have compelled the board, by a legal proceeding, to have granted him a lease, containing in it any special conditions as to royalties to be paid, etc., or, in other words, whether he could have compelled the board to grant him any lease at all on his application. I speak now of such matters as appear from record evidence simply, and were it not for other considerations, I would hesitate before adopting the conclusion I have arrived at in this case. The other considerations are these:

It appears to have been the habit and custom of the board, as is evidenced by entries entered upon the record of their meetings, to merely direct the issuance of leases to a certain applicant, leaving the drawing up of the lease and the insertion therein of specific terms, to the Register of the board, such terms being also settled and fixed by the uniform practice and consent of the board, and to be applied in all cases where no other specific terms were imposed. This course of action, to wit, not to enter the exact terms of a lease in the order

of the board granting the lease, in every case, but to leave it to the Register to insert the usual and customary terms, was adopted doubtless and followed, because of the impracticability of extending in every such order the full terms, knowing that the great number of such leases would make such work out of all proportion to the necessities of the case. It was also the custom of the board to have the Register draw up duplicate leases, embodying these usual conditions, and to send one copy to the lessee, to be signed by him and returned to the board, and the other copy to be executed by the board and sent to the lessee. Such duplicate copies were prepared in this case, according to the custom, and one was signed by Cantril and returned to the board, and is now in the custody thereof. Governor Adams refused to deliver the other copy to the lessee. Now, it appears to me that the duties of the Governor in signing and executing leases *granted by the board*, is a purely ministerial one, and that he should sign the same in all cases where the board has so directed, and this aside from his own private views as to whether such lease should have been granted. Hence it results that in this case, it was the duty of the Governor, as a member of the board, *to have carried out the directions of the board* in the matter of this lease. Now, from these considerations, it may well be seen that Cantril's applica- was made in view of these customs of the board; at any rate, he has signed and bound himself to perform such conditions as the board put around such leases. Besides these considerations, the board, as now organized, has by law no right of review or right to set aside the action of any prior board, *fairly and after due consideration entered into*, because this board is not superior to, but is co-ordinate with, its predecessor. Hence this board should in no case refuse to carry out the declarations and contracts of any previous board, except in such cases as such previous board would have been justified in receding from their contracts, namely, *in such cases as fraud and imposition.* It suffices to say that no evidences of such fraud or imposition appear in this case.

It is also due not only to all persons dealing with the board, but it is likewise due to the dignity and honor of the board itself, that light and trivial reasons, or techni-

cal distinctions, should not be efficient in persuading the board to refuse to carry out their solemn contracts, but rather that such difficulties should be additional reasons for persuading the board to see that no injustice is done. Certain other, and probably more advantageous, propositions were, as a matter of fact, submitted to the board, for a lease on this same land, but such propositions were made long after Cantril had been granted the lease, and are not considered here, because Cantril's rights date from the action of the board in granting the lease, and no developments after his rights had attached, showing a more advantageous state of facts, should urge the board to refuse to carry out its original agreement. In other words, the matter should be decided as of the date of the action of the previous board.

These considerations, and the due courtesy that officers owe to the acts of their predecessors in the same office, should be sufficient to urge this board to do that which was not fully carried out in the matter of this lease. My opinion is, that the steps already taken do constitute and make a lease to Cantril for this land, and the action I recommend this board to take will be merely to furnish him with certain evidences of his lease, so as that he may not be unfairly subjected to trouble, should it be necessary for him to maintain the same.

I recommend, therefore, that this board execute to Cantril a lease of said land, dated as of the date when he should have been granted the same by the previous board, and that the said lease recite, in appropriate words, that this board executes the same merely as successors in office of the previous board, and not as in cases of original applications before this board.

Respectfully submitted.

SAM. W. JONES,
Attorney General.

Powers of School Boards in Districts of the third class in establishing union high school buildings.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., July 29, 1889.

HON. FRED DICK,
Superintendent of Public Instruction:

DEAR SIR:—Answering your communication of the twenty-sixth instant, I reply that the proper construction of section 33 is that two or more districts of any of the classes may establish a union high school. That the construction of section 52 is, that the boards in first and second class districts may establish separate high schools. A union high school is the result of co-operation by two or more districts, while a separate high school is established within and by one district. Hence, there is no conflict between these two sections. One section does not modify or conflict with the other.

The circumstance that union high schools have been established does not increase the powers of boards of the third class districts in the matter of erecting high school buildings, but their powers of erecting such buildings must be derived from the electors as in other cases.

Very truly yours,
SAM. W. JONES,
Attorney General.

Advising the State Treasurer as to his duty in refusing payment of certain disputed warrants.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Nov. 20, 1889.

HON. W. H. BRISBANE,
State Treasurer,
Denver, Colo.:

DEAR SIR:—By a communication of this date, we have advised his Excellency, Job A. Cooper, Governor of this State, that no suits will or can be brought against either Messrs. Webber & Graham, Messrs. Col-

lier & Cleaveland, Messrs. Lawrence & Co., the Hon. James Rice, Secretary of State, or any State officer, on account of alleged over-charges made by any of these parties and allowed by any officer on certain contracts and arrangements under which supplies, as furniture, printing, stationery, etc., have been furnished the State, for the reason that the warrants issued therefor have not yet been paid from the State treasury.

We also advised his Excellency that we would notify the Treasurer that the warrants above referred to are of questionable validity and that the same should not be paid except after payment is compelled by the courts.

In order to protect the State from any possible over-charges, or wrongs committed by said contractors in the matters above referred to, we advise that you refuse to pay any warrants issued to the above named parties under their alleged contracts previous to this date, in order that the State may be protected against any wrong done thereabout, as is alleged.

Very respectfully,

S. W. JONES,

Attorney General.

No suit can be maintained to recover overcharges in the accounts for goods furnished the State, unless the warrants for such accounts have been paid.

DENVER, COLO., Nov. 20, 1889.

HON. JOB A. COOPER,

Governor:

SIR:—On the twenty-eight day of September last, you addressed to me a communication, accompanied by certain exhibits and reports, relating to charges made that certain contractors, and others, had wrongfully received from the public treasury sums of money largely in excess of any amount to which they could be justly entitled under the law. You also suggested that you had retained Judge E. T. Wells and Judge L. S. Dixon as special counsel to assist therein; you likewise requested that if, upon an examination of the law, I should be of

the opinion that suits would lie to recover from any or all of the contractors, the amount received by them in excess of the sum they were legally entitled to claim, I would, with all convenient speed, proceed to institute such suits.

In my reply thereto, of same date, I stated that I would "at the earliest opportunity, take such steps as will protect the interests of the State."

In conformity with the above suggestions, and in conjunction with the assistant counsel employed by you, and of the assistant counsel employed by myself, Mr. H. Riddell, I have devoted to the subject that consideration which so grave an affair demanded. I now report to you my conclusions in the matter.

No suits will be, or can be, brought on account of these transactions against either Messrs. Webber & Graham, Messrs. Collier & Cleaveland, Messrs. Lawrence & Co., Hon. James Rice, or any State officer, for the plain and simple reason that not a dollar has been drawn from the public treasury by any person on account thereof.

Warrants have been issued to the above named contractors for the amounts of their respective claims, but these warrants have never been paid. This fact appears in the answer of Hon. W. H. Brisbane, State Treasurer, to your Excellency, in the following language: "The above warrants are all drawn against appropriation funds, none of which have been paid, as all State warrants drawn against appropriations run about two years before being called for payment." This also appears from a recent inspection of the Treasurer's books.

State warrants are not negotiable, and consequently the State may interpose its defenses or objections to them in whosever hands the same may be. Hence, all that is required to be done to absolutely protect the State from any loss by reason of any overcharge or fraud by the contractors, is for the Treasurer to refuse payment of the warrants issued to the above parties, and thereby compel a *mandamus* proceeding by the holder; and in this proceeding the State may interpose its defenses.

The recent decision of the Supreme Court in answer to questions from your Excellency, shows that every Treasurer must be responsible on his bond, for erroneous payments of the public moneys; hence the Treasurer's interest would compel him to be careful about the payment of any warrant of doubtful validity. I will immediately notify the present Treasurer, by official communication, that the warrants above referred to are of questionable validity, and that the same shall not be paid except after payment is compelled by the courts, and to make such entries on his books as will preserve this notification. Nor could suits be maintained if brought, for such suits would necessarily be for money had and obtained wrongfully, and in these instances, none has been obtained.

So far, therefore, as the present attitude of the affair is concerned, the State has received furniture, stationery, printing and other supplies for which it has, as yet, paid nothing, and is not, therefore, in a position to sue. The issuance of warrants to Messrs. Bush & Morse is in the same condition.

The other matter referred to me regarding interest alleged to have been received on public moneys, is under consideration.

I return herewith the papers and exhibits transmitted to me. They should be preserved in your office for use in any suit brought to compel payment of the above described warrants.

Respectfully,

SAM W. JONES,
Attorney General.

We approve the foregoing conclusions.

(Signed) L. S. DIXON,
E. T. WELLS,
H. RIDDELL.

Penitentiary Commissioners can not hire out convicts to be employed in any industry coming into competition with "free labor."

The Commissioners themselves may employ convicts in any industry.

The appropriation of 1889, for support and maintenance of the Penitentiary can be used for procuring supplies for utilizing the labor of convicts.

DENVER, COLO., Nov. 30, 1889.

HON. CHARLES BOETTCHER,
President of the Board of
Penitentiary Commissioners.

DEAR SIR:—You submit to me the following questions for my official opinion:

First—Can the Penitentiary Commissioners hire the labor of the convict to an outside party to manufacture any kind of goods, provided it is not in competition with any present industry in the State?

Second—Have the Commissioners the right to use convict labor to manufacture *any* kind of goods, whether in competition with any present industry in the State, or not?

Third—If so, have the Commissioners the right to contract for the raw materials, at fixed figures, and also to contract with the parties furnishing the raw materials, for the sale of the goods manufactured therefrom, the price paid for the raw materials to be deducted from the sale price of the manufactured goods, and the difference to be paid to the Penitentiary?

It is unnecessary to quote at length the various provisions of the statutes bearing upon this matter, as such provisions may be found in compact form in the General Statutes of 1883, beginning at section 2543 and including the entire chapter on "Penitentiary," together with amendments and modifications of the provisions of that chapter by subsequent legislative acts, which will appear below.

It will be observed from the law found in that chapter, excepting section 2577, that there was no limit to the power of the Penitentiary Commissioners to hire out convicts anywhere and for any purpose.

Section 2577, enacted in 1883, limits this broad right of hiring out the convicts to the grounds belonging to the Penitentiary. There was no limit to the occupations or industries in which they might be employed. Thus the law stood till 1887, when, by Acts of that year, page 232, the hiring or letting out of convicts for any purpose was absolutely prohibited. This act of 1887 was in turn amended by the Acts of 1889, page 91, so as to allow convicts to be hired out to perform labor of any kind within "the prison walls or grounds owned or leased by the State of Colorado in the vicinity of such Penitentiary or prison;" and except that it was further provided "that said Board of Penitentiary Commissioners shall not hire out any convicts for the purpose of carrying on an industry that comes in competition with free labor in the State of Colorado," under the penalties prescribed by the act of 1887. Thus it appears that this last act re-established the position that the labor may be hired out as was provided by section 2577, except that the limit where they might be employed was possibly more restricted, and except that the convicts should not be so hired out as to come into competition with free labor in this State.

The language of your first question is whether such convict labor can be hired out "provided it is not in competition with any present industry in the State?" The language of the law of 1889 differs from this and provides that such labor shall not be employed in "carrying on an industry that comes in competition with free labor." You are not, therefore, authorized to extend the purport of this law, by giving to the words "present industry" in your question, any definition that may mean a large or pretentious establishment employing workmen in numbers more or less considerable. You are not to hire them out to carry on any industry coming into competition with "free labor," however unpretentiously such "free labor" may utilize its efforts.

With these restrictions and modifications, I answer your first question that you have the authority to hire out the convicts within the limits prescribed in the act of 1889.

Answering your second question, I reply that no restrictions are placed upon the Commissioners as to the industries in which they themselves may employ the convicts.

Answering your third question, I reply that section 2568 provides the manner in which supplies shall be obtained, with provision in section 2570, as to your rights when the semi-annual estimates prove insufficient. Section 2572 provides that claims against the State for supplies furnished the Penitentiary, shall be passed regularly through the auditing department of the State, as other claims must pass, and shall be paid by a warrant of the Auditor, on the treasury. Section 2546 makes the State Treasurer *ex-officio* treasurer of the Penitentiary, and section 2559 and other sections, provide that all receipts from convict labor shall be paid to the State Treasurer.

These considerations compel an answer to your third question, that you have not the power referred to in the question, but that the proceeds from the sale of goods produced by convict labor, must be paid into the treasury in gross, to be drawn out on proper vouchers in the regular way.

I answer, further, however, that the appropriation made for 1889-1890, found in Acts of 1889, page 240, is as much available for the purpose of utilizing the labor of the convicts, as for any other purpose connected with the maintenance and support of the Penitentiary.

This appropriation is made in the same manner and according to the same conditions, substantially, as every other act of appropriation I have examined, as far back as to the Acts of 1879, which shows how successive legislatures have understood the language to be employed.

These considerations seem to answer your enquiries fully. I discharge my duties by declaring the law as I

find it, independently of my own judgment, whether the law be wise or not.

Very truly yours,

S. W. JONES,
Attorney General.

The State Treasurer should pay warrants issued in past years, in the order of their registration, out of the revenues of that year only, against which such warrants are drawn.

Warrants issued against revenues of past years cannot be paid from the revenues of succeeding years, without further legislative authority, and then only after the necessary expenses of the subsequent years are paid.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Dec. 10, 1889.

HON. W. H. BRISBANE,
State Treasurer,
Denver, Colo.

DEAR SIR:—You submit to me questions for my official opinion as to your duties in calling warrants heretofore issued for years prior to 1889.

Section 1358, General Statutes, 1883, provides that "every fund in the hands of the State Treasurer for disbursement shall be paid out in the order in which the warrants drawn thereon and payable out of the same, are presented for payment."

Section 1360, of the same statutes, as amended in 1885, page 204, section 1, provides: "It shall be the duty of the State Treasurer, on or before the tenth day of every month, to cause to be published in some one daily newspaper, published in the capital of the State, a notice containing a list of the numbers of the State warrants, * * * which he shall have sufficient funds to redeem, as provided by law, at the time of said publication."

All such outstanding warrants have been heretofore presented to you for payment and marked "No Funds," as provided in section 1368, G. S., 1883, amended in 1885, p. 204, section 3. In the opinion of the judges, in answer to questions of the Governor regarding appropriations of the General Assembly, filed October 25, 1889, the court used the following language: "Chief among the necessary appropriations are such as are sufficient to defray the estimated expenses of the State government for each fiscal year. This is the primary purpose for which an annual tax is required. It is made the imperative duty of the General Assembly, by the express terms of the Constitution, to provide by law for such a tax. * * * Having provided a revenue for a specific purpose, in obedience to the constitutional mandate, it is manifest that the fund cannot be diverted to other objects until the primary purpose of its creation is satisfied. It would be trifling with a serious provision of the Constitution to hold that the obligation to provide a tax for a given purpose is imperative, but that the appropriation of the fund arising from such a tax is optional."

This language was used with reference to priorities of certain classes of appropriations out of the revenues of the same fiscal year, but its spirit as well as the spirit of the whole opinion, together with the language of the Constitution, shows that warrants issued in the past in excess of the revenues of those years, have no funds available for their payment. In fact, I seriously doubt whether such warrants could be paid, even if the funds were available, without express legislative sanction for such a course, after express legislative approval and ratification of the validity thereof. At any rate, the appropriations made by the Seventh General Assembly have the first claim to be satisfied out of the revenues of 1889 and 1890, and such revenues cannot be diverted to other purposes or to the payment of warrants issued in other years at the option of the legislature or the Treasurer. You will, out of the revenues of these years, pay the appropriations made by the last Assembly and, as it is manifest that such appropriations exceed any possible income for these years, the question suggested above as to your right to pay warrants previously issued, becomes unimportant.

It is a familiar principle in the construction of Statutes and Constitutions that every act and every part shall be so construed, if possible, as that every part may stand and have some operation. The sections of the G. S. 1883, above referred to, and amendments thereof, should therefore be interpreted to mean that you are to call outstanding warrants whenever you have in your hands funds for the payment of those identical warrants; that is, whenever you have funds arising out of the revenues of those years wherein those warrants were issued in settlement of appropriations made for those years, or whenever you have surplus funds in your hands, arising after all appropriations against the funds of the year wherein the revenue of that year have been paid, and whenever the legislature has directed such payment out of such surplus. The first alternative is all that need be considered so far as revenues received for this year is concerned. It results from these considerations, that you cannot call warrants issued in past years with revenues received for this year, without rendering yourself liable on your official bond for such misappropriation.

If the moneys in your hands are of the revenues of past years, then warrants issued in those past years may be paid from such funds.

Very truly yours,

S. W. JONES,
Attorney General.

Appropriations should be made for fiscal years, but if made for calendar years, are valid.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Jan. 9, 1890.

HON. W. H. BRISBANE,
State Treasurer,
Denver, Colo.

DEAR SIR:—While the law requires that you shall keep your books so as to correspond with the fiscal years, appropriations have been made for calendar years. It has been held that appropriations should be made for the fiscal years instead of for the calendar years, but it

has not been decided that appropriations made for calendar years are therefore illegal, and my own opinion is that such appropriations are valid. Inasmuch, therefore, as the appropriations have been so made, I advise that you should call warrants beginning at any date on or after the first day of January, 1889, whenever you have funds available for that purpose.

Respectfully,

S. W. JONES,
Attorney General.

All fines, penalties and forfeitures belong to the school fund (section 3064 G. S.) unless the act fixing the same otherwise expressly provides.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Jan. 27, 1890.

HON. FRED. DICK,
Superintendent of Public Instruction,
Denver, Colo.

DEAR SIR:—You inquire of me what fines, penalties and forfeitures should be paid into the school fund where no special provision is contained in the law imposing the fine, as to where it shall be paid.

Section 3064 of the General Statutes of 1883 is particular and comprehensive, and includes every conceivable case where fines or penalties are imposed under the general laws. That section will therefore include all fines of every kind collected, except where a special act may otherwise provide. There are special provisions affecting this question, as sections 880, 1279, 2500 and 2797. There are still other provisions that divide the fines between the school fund and informers, as sections 848 and 1544.

But a safe guide is that under the general provisions of sections 3064, *all fines, penalties and forfeitures*

belong to the school fund, except where an act imposing a fine otherwise expressly directs.

Yours, etc.

SAM. W. JONES,
Attorney General.

Fixed salaries, for which no legislative appropriation has been made, should be paid from the same fund and in the same manner as other fixed salaries are paid.

The Constitution guarantees the payment of fixed salaries, and a legislative appropriation to pay the same is not necessary. An appropriation does not require any particular set form of words to be valid, but it is, in general, sufficient to the amount to be paid, the person to whom payable, the time of payment and the fund from which payable, with a general direction to pay, are found in the law.

No money can be paid out of the treasury without an appropriation, but the Constitution itself appropriates money for payment of fixed salaries.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Jan. 31, 1890.

HON. LOUIS B. SCHWANBECK,
Auditor of State.

DEAR SIR:—You submit to me for my official opinion, the inquiries whether there is any provision of law by which the salary of the Adjutant General can be paid, and if so, from what fund and how shall the same be paid.

An examination of the Statutes shows that prior to the acts of 1889, the Adjutant General's salary was payable quarterly out of the military fund of the State and no special appropriation seems to have been considered necessary, but the salary was paid out of said fund as other charges against the funds were payable. (Sec. 2323, G. S.)

By an act approved April 2, 1889, and found on page 383 of the acts of that year, the salary of the Adjutant General was fixed at $1,800 per year and the same was payable to him monthly, instead of quarterly, as theretofore, and it was provided that the salary should be paid from the general fund instead of the military fund as theretofore. (Acts of 1889, p. 395, Art. IV., Sec. 10).

Inasmuch as it was doubtless a well known fact to the legislature that the Auditor and Treasurer are required to keep an account of the separate funds, and that they are specifically designated as "general fund," "military fund," "school fund," etc., we must presume that in changing the fund from which the salary of the Adjutant General should be paid, from the military fund to the general fund, they intended a radical change as to the source whence the salary should be paid, and intended that under this last act the salary of the Adjutant General shall be paid from the same general fund as the salaries of other State officers were paid, viz: from the general revenue.

The question as to whether there are any provisions of law by which the salary of the Adjutant General can be paid, presents more difficulty, but upon close examination, a satisfactory answer can be made to this.

The provisions of our law, pertinent to this inquiry, are as follows:

"No money shall be paid out of the treasury, except on appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof." (Art. V., Sec. 33, Constitution).

"Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment, etc." (Art. V., Sec. 30, Const.)

"In all cases of accounts audited and allowed against the State, and in all cases of grants, salaries, pay and expense allowed by law, the Auditor shall draw a warrant on the Treasurer for the amount due, in the form required by law; *Provided*, An appropriation has

been previously made for such purpose. (Section 1379, G. S.)

"No warrant shall be drawn by the Auditor, or paid by the Treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid under one head, exceed the amount appropriated by law for that purpose. (Section 1380, G. S.)

"The annual compensation in time of peace of the Adjutant General, shall be $1,800; of the Inspector General, $500; and shall be payable monthly out of the general fund." (Article IV., section 10, page 395, Acts 1889.)

The section of the statute applying to salaries of the other State officers reads as follows: "The salaries aforesaid shall be payable in monthly installments at the end of each and every month from the date of the qualification of said officers, respectively, for their respective offices; and upon request, the Auditor shall draw warrants upon the State Treasurer in favor of the several officers aforesaid." (Section 2994, G. S.)

The question is therefore presented, whether these various provisions constitute an "appropriation" in the sense of the Constitution and laws. The authorities which maintain the various propositions contained in this communication, are cited below. It has been held many times that an appropriation, to be valid, does not require any particular set form of words, but that it is, in general, sufficient that the amount to be paid, the person to whom payable, the time of payment, and the fund from which to be paid, with a general direction to pay, is all that is required. All of these necessary matters appear in this instance. It seems that the salary of the Adjutant General has been placed upon exactly the same basis as the salary of any other State officer, and the arguments applying to these other State officers are entirely applicable to the Adjutant General.

By virtue of the provisions of Article V., section 30, of the Constitution, above quoted, it has been held by our Supreme Court that the Constitution makes it a mandatory duty of the legislature to provide by taxation for the necessary expenses of the State government, and that such necessary expenses have preference over any other appropriations or claims against the

State, and that the fund thus created by the Constitution "cannot be diverted to other objects until the primary purpose of its creation is satisfied. It would be trifling with a serious provision of the Constitution to hold that the obligation to provide a tax for a given purpose is imperative, but that the appropriation of the fund arising from such tax is optional." (Opinions of Judges, 22 Pac. Rep., 464.)

Inasmuch as this same opinion, together with the authorities therein cited, show that the expenses of the State for any year must be met by the revenues of that year, and that there is no obligation upon the future legislatures to provide for the payment of claims in excess of the revenues of any past year, it necessarily follows that the salaries of all officers present valid claims against the revenues of that year only wherein their services were rendered, and by virtue of the provision of the Constitution last above cited, there is a guarantee that the revenues shall be devoted first to the payment of such salaries and expenses.

Our Constitution, in common with the Constitutions of probably all the other States of the Union, has divided the functions of the Government into three branches: Executive, Legislative and Judicial, and has rendered each department absolutely independent of the other. This division would be of little avail if it were put in the power of the legislature or of the Governor to coerce either department by refusing to enact proper provisions for the payment of salaries.

It was the intention that the means of carrying on the functions of each department should not rest within the discretion of another.

The general object of the provisions of our various Constitutions, prohibiting the payment of public moneys except in pursuance of an appropriation, arose at a time when it was necessary, in view of the then history of the world, to prohibit expenditures of public moneys at the mere whim and caprice of those in power without accounting for the purposes for which the money was withdrawn, and without its appearing that the purposes to which the money was devoted were in accord with the legitimate functions of the government, and with popular judgment.

No such diversion of public moneys can be feared where the salary has been fixed by a provision of the law, where directions have been given for its payment, and where its payment is guaranteed in the fundamental law itself. I therefore advise you that, in every case where a salary of a State officer has been fixed by a provision of law, you have a right, and it is your duty, to set aside from the general revenues of this State sufficient funds to pay such salaries, and that it is your duty to draw warrants upon such funds to the proper officer whether such specific appropriation has been made for any particular year or not; that this setting aside of funds upon your books should be done exactly in the same manner as if you found a specific act for the particular year directing you so to do.

The case of People, *ex rel*, *vs.* Spruance, 8 Colo., 530, might appear, from a casual reading, to be opposed to the proposition above, but a careful reading of this decision shows that it does not apply to any case of fixed salaries, such salaries being guaranteed by the Constitution.

My conclusions are strongly supported by the following authorities, under similar constitutional provisions:

Thomas *vs.* Owens, 4 Md., 189; State *vs.* Bordelon, 6 La., An. 68; Lange *vs.* Stover, 19 Ind., 175; Ristine *vs.* State, 20 Ind., 328; State *vs.* Johnson, 105 Ind., 463; McConnell *vs.* Wilcox, 1 Scam. (Ills.) 359; Nichols *vs.* Comptroller, 4th S. & P. (Ala.) 154; Reynolds *vs.* Taylor, 43 Ala., 420; State *vs.* Weston, 4 Neb., 216.

I advise you therefore, that you have a right, and that it is your duty, to draw a warrant monthly against the general revenue in favor of the Adjutant General in payment of his salary for the preceeding month, exactly the same as if specific directions had been made, and exactly the same as in cases of other State officers.

It is not necessary to decide at this time, as to any other questions than those of fixed salaries, and I expressly limit my opinion thereto.

Very truly yours,

S. W. JONES,

Attorney General.

It is not necessary that a proviso nullifying the running of a statute of limitations should appear on the face of an indictment.

One who has departed from the State, for justifiable purposes, is not a "person fleeing from justice," in the sense that prevents the running of the statute of limitations.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Feb. 8, 1890.

HON. JOB A. COOPER,
Governor,
Denver, Colorado:

SIR:—On the eighteenth day of October, 1889, you referred to this office certain papers, constituting an application for a requisition upon the Governor of New Mexico for a warrant for the arrest of Percy H. Leese, charged with grand larceny in the county of Rio Grande, this State. It appears that said requisition was issued, dated October 28, 1889, and that the Governor of New Mexico refused to issue a warrant upon such a requisition, for the reason that it appears from the complaint against said Leese, that the crime with which he was charged was committed three years prior to the institution of criminal proceedings against him, that is to say, Leese was charged with grand larceny committed about December 1, 1882, and complaint was made against him on the thirteenth day of September, 1889. The communication of the Governor of New Mexico, setting forth these facts and asking for further information upon this subject, is before me for report.

Section 957 of the General Statutes provides: "No person or persons shall be prosecuted, tried or punished for any offense denominated by the common law felony, (murder, arson and forgery excepted), unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed, * * * *Provided*, That nothing herein contained shall extend to any person fleeing from justice. * * *"

Clearly, therefore, said Leese can not be convicted of the crime charged, unless he can be brought within the proviso of said section, and the question is presented whether an indictment should allege on its face such circumstances as make the particular case come within the terms of that proviso.

It has been held in many instances that an indictment should show upon its face that the act was performed within the limit of the statute, or within the exceptions of the statute. McLane *vs.* State, 4 Ga., 335; People *vs.* Miller, 12 Cala., 291; State *vs.* Joseph, 40 La. An. 5, (3 So., 405); Anthony *vs.* State, 4 Hump., (Tenn.), 83.

But the burden of authorities, as well as the better reason hold that it is not necessary that the indictment should show that it is brought within the limit of an exception in the statute, but that the defendant upon the trial must especially plead the statute of limitations and that the people may introduce evidence showing that his case comes within the exception; that an indictment can only be held bad where there is no possibility that the particular case could come within the terms of an exception, and, therefore, that an indictment can not be quashed, nor judgment thereon arrested, even though upon its face it may show that the proceeding is barred, because evidence may be introduced to bring it within the exception of the statute. State *vs.* Hobbs, 93 Me., 212; People *vs.* Santvoord, 9 Cow., 654; State *vs.* Bolling, 10 Hump., 52; People *vs.* Price, 41 N. W. (Mich.) 853; Blackman *vs.* Commonwealth, 17 Atl. (Pa. St.), 194.

And so, under a statute identical with ours, Johnson *vs.* U. S., 3 McLean, 89; State *vs.* Thrasher, 79 Me., 17 (7 Atl. 814); U. S. *vs.* Cook, 17 Wall., 168. In this last case the authorities are reviewed.

1 Bishop Cr. Pr. 405, holds that the latter view is the correct one. It is likewise held that defendant may avail himself of the statute of limitations on the plea of the general issue, and that all proofs by defendant and people, showing whether the case is within the exception, may be put in under that issue. Commonwealts *vs.* Ruffner, 4 Casey, 259 (28 Pa. St).

The filing of a complaint is the institution of proceedings under our statute.

I advise, therefore, that the Governor of New Mexico has no legal right to refuse to grant the requisition upon the mere ground that the indictment upon its face may show that the action is barred, inasmuch as the law is that evidence bringing Leese's case within the exception of the statute may be supplied.

However, whether you should insist further upon your requisition, will depend upon whether you feel reasonably satisfied that Leese has fled from justice, and I advise that no mere removal from the State for justifiable purposes, and not for the purpose of avoiding justice, is sufficient to constitute him a fugitive from justice within the sense of the proviso. The papers accompanying the application inform you somewhat as to this last fact, and from them you must draw you own conclusion. I adhere to my original letter of advice, that the papers are sufficient in form to justify the requisition.

Respectfully,

S. W. JONES,

Attorney General.

Military poll tax is not a lien upon either real or personal property.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., February 11, 1890.

ALBERT N. TURNEY, ESQ.,

Treasurer Yuma County,

Yuma, Colorado:

DEAR SIR:—Your letter inquiring whether a personal tax is a lien on land, and citing the instance of a military poll-tax, is at hand.

Taxes are not liens upon either real estate or personal property, except to the extent that the statutes have expressly made them so, and therefore it is not authorized

to extend the statute to include cases not expressly provided for in the law itself.

Section 2818, G. S., provides, that all taxes shall be a perpetual lien upon real estate subject to taxation, and section 2819, provides, that taxes upon personal property shall de a lien upon such personal property for the taxes due thereon, and other provisions of the chapter on "Revenue," provide for levy and distress upon personal property, and also for following the same even beyond the limits of the counties.

Section 2912, expressly provides, that real estate may be sold for taxes upon any property, real or personal, and so our Supreme Court in Larimer County *vs.* Bank, 11 Colo., 564, decided. Under the act of 1889, page 399, article VI., section 1, it is provided that a "military poll tax shall be assessed and collected in the same manner as is now or may be by law provided for the assessment and collection of other State poll-taxes." No lien is provided upon any property, real or personal, for the payment of this tax. Section 6 of the same article provides that the same shall be collected by civil action, under penalties.

These same principles were somewhat discussed in McKay *vs.* Batchellor, 2 Colo., 591. Under these principles, that no tax is a lien unless expressly made so by statute, I am of the opinion that a military poll-tax is not a lien upon either real or personal property. I am likewise of the opinion that taxes upon both real and personal property are a lien upon lands, under sections 2818 and 2912, and that taxes upon personal property are a lien upon personal property under section 2819.

You must distinguish between a tax upon *personalty* and a tax upon the person, or a capitation tax.

Very truly yours,

S. W. JONES,

Attorney General.

Act of 1889, p. 89, regarding Tickets-of-Leave, applies only to convicts whose sentence expires at a day certain, and not to those discharged immediately by the Governor.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Feb. 11, 1890.

JAMES A. LAMPING, ESQ.,
Warden State Penitentiary,
Conon City, Colo.:

DEAR SIR:—Your letter inquiring whether in my judgment the act of 1889, page 89, and particularly section 1 thereof, applies to convicts released from the Penitentiary by the Governor, or solely to convicts discharged by expiration of term of service, is at hand. I reply that in my judgment such section applies only to the latter class of cases, and not to those pardoned by Governor. My reasons are these: The act provides on its face, "that ten days prior to the day on which any convect * * * shall be entitled to be discharged from said Penitentiary, the warden thereof * * * shall give such convict a ticket-of-leave therefrom, which shall entitle him to depart from said prison. The warden shall at the same time furnish said convict with $5, a suit of clothes, as now provided by law, in the case of the discharge of a convict from the Penitentiary, and a non-transferable railroad ticket, at the expense of the State, from the place at which said Penitentiary is located, to any railroad station within the State, but without the county in which said Penitentiary is located, unless the convict was sentenced from such county." The act also provides penalties for failure of a convict to observe the terms and conditions under which these things were furnished him. This language contemplates some certain or fixed time ten days prior to which these things shall be furnished, and thereby implies that the warden shall be enabled to know on such prior tenth day when such convict will surely be released, a matter which could not be known in the case of a pardon extended by the Governor, or known, if at all, only in occasional instances, as where the pardon is

upon condition. The first section also says that the convict shall be furnished with a "suit of clothes, as now provided by law in the case of the discharge of a convict from the Penitentiary." This clearly pre-supposes the existence of some other law regulating this subject, and doubtless refers to section 2600 G. S., which provides, "When any convict is discharged from the Penitentiary he shall be furnished with the sum of $10; also, when the said convict is in need he shall be furnished with a new suit of common clothing, and all articles of personal property belonging to said convict that may have been turned over to the warden." For this reason, and upon the familiar principle that a subsequent act shall only repeal a prior act to the extent that such acts are irreconcilable, I am of the opinion that section 2600 is still in force.

From the impossibility of applying the act of 1889 to cases of pardon, and from the fact that section 2600 is still in force, my judgment is that the acts of 1889 apply only to convicts released by expiration of their term of service, and that section 2600 applies to convicts released under pardon by the Governor.

Very truly yours,

S. W. JONES,

Attorney General.

Warrants for the salary of the Adjutant General should be paid as warrants for the salaries of other State officers are paid.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Feb. 17, 1890.

HON. W. H. BRISBANE,
State Treasucer:

DEAR SIR:—Answering your inquiry of the fifteenth inst., whether warrant No. 25,246 in payment of the salary of the Adjutant General, is a valid and legal warrant, I reply that in any case where a warrant is drawn on the general revenue for the salary of the Adjutant

General, as the same is payable according to the act fixing such salary, you have a right, and it is your duty, to pay such warrant exactly as other warrants for other fixed salaries are paid.

I refer you to my letter of advice to the Auditor on this same subject, dated January 31, 1890.

Very truly yours,

SAM. W. JONES,

Attorney General.

Compulsory attendance law does not prohibit scholar being expelled from public schools, in proper cases.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., Feb. 25, 1890.

F. F. McLELLON, Esq.,
Secretary, School District No. 4,
Arlington, Colo.

DEAR SIR:—Your letter to me, attaching a previous letter to Professor Dick, is before me, for answer. Replying to your first question, I say, that it is in the power of a teacher, and has been since the earliest date, to inflict corporal punishment upon those in attendance at school. The limitations upon this right are, first, that the punishment must be reasonable; second, that it must be inflicted with a reasonable instrument; third, that it must not be with malice; fourth, that the offense for which the punishment is inflicted must be one that violates order, decorum, propriety, or some act against the efficacy and good government of the school, and such as interferes with its proper progress and end. Under our statutes, the directors of a district may doubtless provide such rules for the government of the school as would prohibit the infliction of corporal punishment by the teachers, but in the absence of such instructions by the directors, this right to inflict punishment in this state, is in full force. I also advise that neither the directors nor the teachers have any power to make rules out of mere whim or caprice, which do not have a direct relation to the

purposes for which the school was organized. Should an action be brought against a teacher inflicting punishment, such action would assume the form of one for assault and battery, and a perfect defense would be made, by setting up the matters hereinbefore referred to. Whether the punishment in this particular instance you refer to, was correct or incorrect, we have no means of knowing or deciding, inasmuch as your letter does not set forth the particular offense. You will be able to decide from the principles hereinbefore contained, whether this particular act was within the jurisdiction of the directors or the teachers.

Answering your second inquiry, I reply that the fact that there is a compulsory attendance law in this State, does not affect the right to expel a scholar whenever sufficient cause exists therefor. This right of expulsion is expressly given by the general statutes, 1883, section 3046, paragraph 7, referred to in your letter.

I am unable to find any adjudication in Iowa, holding that a scholar cannot be expelled from school, where such a law exists upon the books. Upon the contrary, an examination of the adjudications of Vermont and Massachusetts, where the law is similar to our own, regarding compulsory attendance, shows that they have expressly decided in these states, that the right of expulsion or suspension for sufficient cause, exists.

It is so expressed in Ferriter *vs.* Tyler, 48 Vt., 444: "The right to attend is not absolute, but one to be enjoyed by all on reasonable conditions." In that case it was suggested to the court that the law regarding compulsory attendance might effect the question, but the court paid no heed to such suggestion. This principle is also affirmed in Hodgkins *vs.* Rockport, 105 Mass., 475; Sherman *vs.* Inhabitants of Charlestown, 8 Cush., 160.

Section 669, R. L. Vermont; p. 228, R. S. Mass., correspond to our law regarding compulsory attendance. The Iowa cases upon this same subject, are quite numerous. I cite one or two of them. Murphy *vs.* Board of Directors, 30 Ia., 429; Burdick *vs.* Babcock, 31 Ia., 562. This last case holds that the rights conferred in this particular, come from the statute, and such power is expressly given by our Statute. The whole matter is sum-

marized in State *ex rel.* Bowe *vs.* Board of Education of the City of Fon du Lac, 63 Wis., 234 (23 N.W., 102): "The rules and regulations made, must be reasonable and proper * * for the government, good order and efficiency of the schools, such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare, but the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects, according to their humor or fancy, and make disobedience of such a rule by the pupil, cause for his suspension or expulsion." What are the merits of the particular case submitted to me, I cannot advise, but if you act within the principles laid down in this law, you have a right to inflict corporal punishment, or, in proper cases, to expel or suspend from school; and in this particular there is no difference between scholars of one age and another, as was expressly decided in State *vs.* Mizner, 45 Iowa, 248.

Whether it is expedient, in any case, to administer corporal punishment to scholars, is a question about which I entertain my own opinion, but I write you the law as I find it.

Very truly yours,

S. W. JONES,
Attorney General.

Since act of 1889, State Board of Land Commissioners have no power to issue patents or certificates of purchase.

Where land has been offered for sale by the Land Board, as provided by law, and has been struck off to the purchaser, who complies with conditions the law has imposed, such proceedings constitute a contract between the State and the purchaser.

The board has no power to set aside this contract. It has only the same rights as an individual would have, and if it would avoid them, a direct proceeding in court is required, and this, though there might be fraud be-

tween the purchaser and officers sufficient to justify a court in canceling the contract.

Should the board assume to cancel such contract, and grant the lands to a second purchaser, such second purchaser would hold the title in trust for the first.

It is the duty of the State to see that the title to lands which it grants to an individual is clear.

Duty of the board in conducting sales of public lands.

To the

STATE BOARD OF LAND COMMISSIONERS:

On the 5th day of March, 1890, certain resolutions were passed by the board, requesting me as Attorney-General to render my opinion as to the duties and powers of the board in conducting sales of State lands. These resolutions were somewhat specific, but as they embrace requests upon matters involving the entire duties of the board, I do not auswer them in detail, but make this report broad enough to cover the whole subject.

It is necessary at the out-set, to arrive at a correct understanding of the present state of the law on this subject.

By sections 7 to 11, inclusive, of an Act of Congress, commonly known as the "Enabling Act," and found in General Statutes of 1883, beginning at page 27, and by other acts of Congress, certain lands were granted by the General Government to this State for the purposes in the various acts specified.

By section 10, Article IX. of the Constitution of this State, it is provided, that,

"It shall be the duty of the State board to provide for the location, protection, sale or other disposition of all lands heretofore or which may hereafter be granted to the State by the General Government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor;"

And that such lands shall be,

"Carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made; and the General Assembly shall provide for the sale of said lands from time to time."

By section 9, Article IX. it is provided, that,

"The Governor, Superintendent of Public Instruction, Secretary of State and Attorney-General shall constitute the State Board of Land Commissioners, who shall have the direction, control and disposal of the public lands of the State, under such regulations as may be prescribed by law."

Accordingly, in 1877, the legislature prescribed the regulations for the sale thereof, which act is found in the general statutes of 1883, beginning at page 789. This act was elaborate in its details, but inasmuch as it has been repealed by the act of 1887, it will not be referred to herein, further than to suggest that according to its provisions, when a sale of land had been made, the purchaser thereafter dealt entirely with the Auditor and the Treasurer, as to lands generally, and with the County Superintendent of Schools, as to school lands, and that no further acts were required of the land board, prior to the issuance of patent, except to order or make the sale.

It may be well to observe that there is a radical difference between all the acts of our State and the acts of probably all the other States, and the general government. The theory underlying our laws, as is expressed in the part of the Constitution above quoted, is to so dispose of the lands "as will secure the maximum possible amount therefor;" while the theory underlying the statutes of the general government and of other States, such as California, Texas, Arkansas, Kansas, Wisconsin, Minnesota, and probably all of them, is, as was well expressed in Miller *vs.* Gibbons, 34 Ark., 212, "to encourage industrious men to open and cultivate these vacant lands as soon as possible, that the resources of the State might be early developed." Consequently we find this last class of statutes elaborate in machinery to enable all persons to secure lands upon

condition of actual settlement, and this without, and even against, the will of the land department, and without consulting the discretion of its officers, and with ample provisions to see that only actual settlers secured them, and providing appeals to the Courts in many cases for the adjudication of conflicting rights.

The proceedings to acquire these lands under these statutes, and the rights thereunder, are similar to the manner of acquiring lands from the general government, with which most persons are sufficiently acquainted. Under our laws however, and particularly the present ones, so far as they are specific at all, the whole attention has been directed to the financial side, and though some sections prescribe that they shall be sold "to actual settlers only, or to persons who shall improve the same," (Acts 1889, p. 33), yet no efficient powers have been granted the board to secure the observance of either of these conditions, and no penalties affixed to a false oath or statement thereabout.

Probably, under the law, the lands in a proper proceeding could be reverted to the State where these conditions have not been complied with, but provisions thereabout are very meager.

An inspection of the act of 1877, will show that its provisions entirely exclude the idea that as the law then stood, this board, after a sale, had any discretion or power to either ratify or reject the sale. Minor amendments, not of importance here, were made to this act, until by the Acts of 1887, p. 328, these laws were entirely repealed, and new provisions enacted in lieu thereof. By this act, section 4, the board is empowered to employ a Register, whose duties, among other things, are, "to make out and countersign all patents, * * * * issued by the President of the board to purchasers; * * * of State lands;" and, "to make and deliver to purchasers suitable certificates of purchase."

Section 14 provides that the board may at any time direct the sale at public auction of any State lands, except school lands, "in such parcels to actual settlers only, or to persons who shall improve the same as they shall deem for the best interest of the State, and the promotion of the settlement thereof," in legal subdivisions of not more than 160 acres, after advertising such

sale "in four consecutive issues of some weekly newspaper of the county in which such land is situated, if there be such paper; if not, then in some paper published in an adjoining county, and in such other papers as the board may direct."

Section 12 provides that school lands are "withdrawn from market, and the sale thereof prohibited; *Provided*, Any parcel of such land may be sold when the State Board is of the opinion that the best interests of the school fund will be served by offering such parcel for sale;" and this section further provides that such lands shall be sold for not less than the price therein fixed; and, "*Provided*, That school lands shall not be offered for sale except upon the conditions hereinafter provided for the sale of other State lands."

Since the sale of school lands rests entirely within the discretion of the board, to be exercised as they think proper, it is evident that the sale of all State lands, including school lands, are covered by exactly the same regulations.

Section 15 is the key to the whole act. In it are contained all the directions regarding the place of sale, terms of payment and evidence of title to be furnished the purchaser. That part of the section containing these last provisions is important, and as it is material to consider them hereafter, it will be inserted at length. After providing the terms of payment, the section proceeds:

"When the conditions hereinbefore prescribed have been complied with, the State board shall make and deliver to the purchaser a certificate of purchase, containing the name of the purchaser, a description of the land purchased, the sum paid, the amount remaining due, and the date at which each of the deferred payments falls due, and the amount thereof; such certificates shall be signed by the Governor, and countersigned by the Register, and a record of the same kept by him in a suitable book. Whenever a purchaser of any State land has complied with all of the conditions of the sale, and paid all purchase money, with the lawful interest thereon, he shall receive a patent for the land purchased; such patent shall be signed by the Governor and countersigned by the Register, attested with the seal of the

State Board of Land Commissioners, and when so signed such patent shall convey a good and sufficient title in fee simple."

It will be observed that the whole direction to, and authority of, the Land Board to issue certificates of purchase and patents, and the whole direction as to what such certificates and patents shall contain, rests entirely upon this section. Other sections of the act, as the 14th, 16th and 19th, assume that a certificate or patent shall issue according to the 15th section. Under the terms of the last mentioned section, as above quoted, a serious question arises, as to whether the issuance of a certificate of purchase was placed under the express control of the board; in other words, whether a sale shall be reported to the board for such further action in issuing or refusing a certificate, as to the board might seem proper. But in view of the act of 1889, repealing the part quoted, and hereinafter referred to, it is not demanded that I should consider the exact powers of the board in refusing or issuing a certificate, after sale, under this section.

By the act of 1889, page 33, the fourteenth section of the act of 1887 was amended in certain details not necessary to consider here; but by the same act of 1889 the fifteenth section was changed most materially. By section 2 of the act of 1889 it is provided, "That section 15 of said act (1887) be and the same is hereby amended to read as follows:" and it proceeds to set out the amount and times of payment on sales of State lands, but entirely omits all that part of section 15 which relates to certificates of purchase and to patents, which was quoted above. The authorities are uniform that where an act is passed, and a previous law is "amended so as to read as follows," and omits part of the section amended, this amounts to an absolute and entire abrogation of all that part of the section omitted, and only the part contained in the new act is in force.

Endlich, Interp. Stats. s. 196, p. 265.
State *vs.* Andrews, 20 Tex., 230.
State *vs.* Ingersoll, 17 Wis., 631.
Goodno *vs.* City of Oshkosh, 31 Wis., 127.
Ely *vs.* Holton, 15 N. Y., 595.
Moore *vs.* Mausert, 49 N. Y., 332.

People *vs.* Supervisors, 67 N. Y., 109.
Blackmar *vs.* Dolan, 50 Ind., 194.
Wilkinson *vs.* Ketler, 59 Ala., 306.

By the act of 1889, page 313, section 21 of the Land Act was amended in other particulars, so as to provide "that all lands sold under the provisions of this act, or any interest therein, shall be exempt from taxation for and during the period of time in which the title to said lands is vested in the State of Colorado."

In view of subsequent considerations, attention is here called to the fact that this last amendment, as well as the tenor of the whole Land Act, excludes the idea that the title to any land passes from the State by any proceeding or evidence of title issued by the board short of a patent or other conveyance in fee simple.

The statutory provisions regarding the sale of lands being thus ascertained, the next consideration is, what authority the board has under these acts. The authorities are uniform that this board, as well as perhaps any other board with statutory powers, has exactly the power, authority and discretion—no more, no less—that is expressly given by law; and any act done by them for which authority, either express or implied by necessary implication, is not found in the law, is null and void. As this proposition is the key to the proper construction of the entire act, authorities thereon will be cited at length.

McCaslin *vs.* State, 99 Ind., 428.
Parker *vs.* Duff, 47 Cal., 554.
McGarrahan *vs.* New Idria M. Co., 49 Cal., 331.
Easton *vs.* Salisbury, 21 How., 431.
U. S. *vs.* Stone, 2 Wall., 535.
Wall *vs.* Blasdell, 4 Nev., 241.
Att'y-Gen. *vs.* Thomas, 31 Mich., 365.
State *vs.* Com'rs Pub. Lands, 61 Wis., 274.
Gunderson *vs.* Cook, 33 Wis., 551.

And any party dealing with public officers must know at his peril the extent of their powers.

McCaslin *vs.* State, *supra.*
Hull *vs.* County, 12 Ia., 142.

Viewed in the light of these principles, the powers of the board regarding the alienation of lands are these:

The constitutional provisions above quoted; to direct the sale thereof "in such parcels to actual settlers only, or to persons who shall improve the same, as they shall deem for the best interest of the State and the promotion of the settlement thereof," after having given proper notice by publication, containing the matters specified by law, and after having fixed the minimum, below which no bid shall be received (sec. 14, as amended in 1889, page 33), to receive the purchase-money and to pay the same into State treasury (sec. 17), to require bond for payment of the balance of the purchase-money, after the first payment (sec. 18).

By necessary implication from these powers, the board probably has authority to give the bidder a receipt for moneys paid. The necessary steps to perfect a sale of the lands under these provisions are these: The board should make an order that the particular land be sold, fix the minimum price, below which no bid should be received.

"It is quite clear * * that in requiring the commissioner to fix the minimum price, it was designed that he should do so in some formal way, and that his mind should be turned towards the subject of selling at that price."

Potter *vs.* Land Commr., 55 Mich., 485.

And consequently there should be a formal order of the board, upon sufficient evidences before them, fixing this minimum price. An advertisement should be ordered inserted according to law "in four consecutive issues of some weekly newspaper of the county in which such land is situated, if there be such paper, if not, then in some other paper, published in an adjoining county, and in such other papers as the board may direct. The advertisement shall state the time, place and terms of sale, and the minimum price per acre fixed by the board of each parcel, below which no bids shall be received." The time fixed should be at such period as will allow the advertisement to be inserted in four consecutive issues of such paper. The place should be at the State capitol, unless the board should think proper to conduct the same at another place. The terms of sale are fixed by law, and with them the board has nothing to do, since they cannot super-add other conditions than those

imposed by the statute, because the purchaser relies upon the law and not upon the State Land Board.

Baty *vs.* Sale, 43 Ill., 351.

Probably the order of the board should designate the particular paper in which the advertisement should be inserted, but if this has been left, in any particular case, to the discretion of the register, and it was, as a matter of fact, advertised accordingly, the sale is nevertheless valid. It will be proper here to define what paper is sufficient under the law, it being assumed that the selection is made in fairness and good faith.

"It is not requisite that he should select the paper of the largest circulation, or of any particular class or character. A publication in a law and advertising journal, of limited circulation, has been held to be proper. No proof of the notoriety or extent of the circulation of a paper in which the notice was published, is required to sustain the sale under it."

2 Jones on Mtgs., s. 1835.
Kellogg *vs.* Carico, 47 Mo., 157.
Benkendorf *vs.* Vincenz, 52 Mo., 441.
Ingalls *vs.* Culbertson, 43 Iowa, 265.
St. J. M. Co. *vs.* Daggett, 84 Ill., 556.

"In order to fulfill the terms of the law, the notice must be directed * * * to be inserted, for the statutory time, in some newspaper printed and circulated for the dissemination of news; but it is not essential that, to answer the description, the paper should be devoted to the dissemination of news of a general character. It may, with equal propriety, be published in a paper devoted exclusively to the discussion of religious, legal, commercial or scientific topics, and a diffusion of the knowledge touching special matters within its limited sphere, as in a public journal, the columns of which are open to news of a general character. It may be a religious newspaper, a commercial newspaper, a legal newspaper, a scientific newspaper, or a political newspaper."

Wade on Notice, s. 11066.

Doubtless, in the absence of contrary provisions in the statute, it will be understood to mean a newspaper published in the English language.

Cincinnati *vs.* Bickett, 26 Oh. St., 49.

Where land is in outlying districts doubtless the provision of the law that the advertisement should be in a weekly newspaper is the most cautious and best provision that could be made for a complete notice of the sale, but where land is of great value, and adjacent to populous places, where newspapers of more general circulation are published and read, a proper exercise of the discretion of the board under the provision that the notice shall be published "in such other papers as the board may direct," requires that the advertisement should also be inserted in such paper as well as in any weekly newspaper published in that place. But whatever may or may not be the proper exercise of the discretion of the board in that particular, if the terms of the law have been complied with, and if they have not exercised their discretion of publication in other papers than a weekly one, the sale will nevertheless be valid as to this ground, because where a power is expressly given, which may be exercised in a particular way, and it is so exercised, the proceeding is regular and the title conferred is good.

State *vs.* Stringfellow, 2 Kans., 263.

When these preliminary matters, about which too much caution and circumspection can not be exercised, have been performed, the lands may be sold according to the terms of the advertisement; and in making the sale it is not necessary that the members of the board should actually conduct the sale in person, but they may employ therefor an auctioneer, who, according to the practice, has been, and properly is, the register, since the statute is that the board may "direct" the sale. The board may also, if they think proper, require of the purchaser a bond to secure payment of the deferred payments, provided by the statute. (Sec. 18.)

I have said above that the board can only exercise such powers as are expressly given by the statute; and inasmuch as the part of section 15, above quoted, has been abrogated,—which part of the section contains the entire power and authority of the board to issue patents

and certificates of purchase,—the board is without authority to issue either of these instruments. It is true that certain other sections of the statute refer to patents and certificates of purchase, but clearly they so refer upon the assumption that the 15th section was standing intact; and, therefore, when section 15 fails, the implications fail with it, and no authority or direction of the law remains for any officer of the State to issue a patent or a certificate of purchase, or what either of the instruments shall contain, or what shall be the legal effect thereof.

The act repealing these material parts of the 15th section, was approved April 17, 1889, and went into effect ninety days thereafter, or upon July 16, 1889. Consequently, all certificates of purchase issued before July 16 are valid; but inasmuch as payments are being made under such certificates, and patents are being applied for thereon, I will indulge at some length in expressing my views as to the legal situation and effect of such sales.

Under statutes like those of the United States, compliance with the statutes prescribing the conditions upon which private parties may acquire title to public lands, in equity divests the title of the Government. The land is thereafter not for disposal, and the Government holds the legal title in trust for him to whom it ought to have been granted. A right to a patent once vested, is equivalent, as respects the Government dealings with land, to a patent issued.

Stark *vs.* Starrs, 6 Wall., 402.
Hinckley *vs.* Fowler, 43 Cal., 56.
Waters *vs.* Bush. 42 Iowa, 255.

But this point is too well established to need an elaborate citation of authorities. Though a certificate of purchase does not itself convey the title, but is a mere contract to purchase,

McKinney *vs.* Bode, 33 Minn., 450.
Dodge *vs.* Silverthorn, 12 Wis., 644.
Lefferts *vs.* Supervisors, 21 Wis., 688.
Smith *vs.* Ewing, 23, Fed. Rep., 741.
Carrol *vs.* Safford, 3 How., 441.
Levi *vs.* Thompson, 4 How., 17.
Wirth *vs.* Branson, 98 U. S., 118.

Shelton *vs.* Keirn, 45 Miss., 106.
Astrom *vs.* Hammond, 3 McLean, 107.
Smith *vs.* Garbinder, 77 Pa. St., 127.
Smith *vs.* Clarke, 7 Wis., 468.
Whitney *vs.* St. Bk., 7 Wis., 520.
Smith *vs.* Mariner, 5 Wis., 551,

And though such a contract under our statute is one liable to be defeated by conditions subsequent, as for failure to pay the balance of purchase money, (as under certain statutes a contract for the sale of lands may be upon conditions precedent),

Montgomery *vs.* Kasson, 16 Cal., 189.
People *vs.* Center, 66 Cal., 551,

Yet, nevertheless, it is a contract for the conveyance of land, and is protected, as well against impairment by the State, as by any private party, or public officer, and though the legal title still remains in the State, in equity the title conveyed by a certificate of purchase, upon complying with the conditions of the statute, is as binding and available as though a patent had been issued. I use the term "certificate of purchase" in the generic sense, as including whatever provisions have been prescribed by law as means of alienating the State's title to public lands.

"It is entirely competent for the legislature to prescribe the mode by which the public domain shall be disposed of by the State, and if the law directs only a certificate issued to the purchaser, as evidence of his title, it is equally sacred as a grant" (patent).

Harris *vs.* Dyer, 27 Ga., 211.
Astrom *vs.* Hammond, 3 McLean, 107.

This unfortunate omission of a provision of a law, prescribing the terms upon which a patent shall issue, calls for legislative correction, but until such time as such legislation is made, parties holding evidences of title, or contracts from the State, have as binding and valid a right and title as if their patents were issued already.

Reverting to the necessary steps to complete a sale of the State lands, when at any sale the lands have been struck off to the highest bidder, it becomes the duty of the Register "to make and deliver to purchasers suita-

ble certificates of purchase. What this certificate shall contain is not specified with the same particularity as was specified in the repealing part of section 15, and the word "suitable" must furnish the clew as to its contents.

"Suitable, means simply 'fitting,' 'proper.'"—Webster.

And with this definition accord judicial decisions. As applied to the subject-matter of the statute in which it is contained, it means that the Register shall issue a certificate somewhat after the following:

"I hereby certify that at a public sale of _____ of the public lands, held by order of Board of Land Commissioners, on the _____ day of _____ 18____, _____ was the highest and best bidder therefor, and purchased said lands at the sum and price of _____ dollars per acre.

(Signed) _____

Register."

The provisions of the statute are that the money shall be paid to the board. It should, therefore, be the duty of the board, acting by and through its officers, to give to the purchaser a receipt for such moneys as the law provides shall be paid upon the day of the sale. If, however, the money is not actually paid to the board, but is paid to the register, acting for the board, with the knowledge and consent of the board, either expressly given in a particular case, or from the course of business, and is by the register put into the public treasury, in the manner provided by law, such payment is equally valid and binding as if paid actually to the board itself.

These formalities, being the only step provided by our statutes, as they now stand, constitute as binding contracts and obligations upon the State as if more formal proceedings were provided for, and are equally preserved from infringement.

Heretofore I have treated the subject as in a case where no question is made about the entire good faith of a transaction. But the question is presented as to what are the powers and duties of the board in case any

sale has been made where, for any reason, the board may desire to set it aside, or feels that it is justified in refusing to dispose of the land. Every Court has held that where a patent has been once issued by the proper department, in a case where such department had jurisdiction to act, such patent vests the title of the Government in the purchaser and cannot be attacked or disputed in any collateral proceeding by any one, and that the only way to attack its validity is by a direct proceeding by the Government issuing it to cancel it for some sufficient legal reason.

United States *vs.* Stone, 2 Wall., 525.
United States *vs.* Schurz, 102 U. S., 378.
Moore *vs.* Robbins, 96 U. S., 530.

And so every State authority which has passed upon the matter have held. It is only in those cases where a patent or certificate is issued against the law, and where the officers had no authority to issue it, and where the patent is therefore void, that its validity can be attacked in any action, except in a direct action by the government issuing it, to cancel the same.

Sherman *vs.* Buick, 93 U. S., 209.
Doolan *vs.* Carr, 125 U. S., 618.
Jones *vs.* McMasters, 20 How., 8.

So strong is this principle held that it was said in Marshell *vs.* McDaniel, 12 Bush., 378:

"The patent * * * cannot be treated as void on account of any frauds that may have been practiced by the patentees in procuring it. Even if it were shown that they and the register of the land office had combined to cheat the commonwealth, * * * these facts would avail nothing in a collateral proceeding like this. In order to avoid the patent the commonwealth must have it annulled in a direct proceeding."

And to the like effect are the United States authorities above quoted, and also Hartley *vs.* Hartley, 3 Metcalf, (Ky.) 56; Arnold *vs.* Grimes, 2 G. Greene, (Ia.) 77.

And where a certificate of purchase, or any other writing or thing provided by statute, as evidence that a sale has been made of the State lands, is outstanding, issued or done by the proper officers, in a case where they had authority to act, in every collateral proceeding,

and in every proceeding except in a direct one brought by the government, such certificate, writing or other evidence is conclusive upon both the government and upon private parties dealing with the same land, and certificates or other evidences can no more be questioned except in a direct proceeding, than could be a patent.

Merriweather *vs.* Kennard, 41 Tex., 273.
Walters' Heirs *vs.* Jewett, 28 Tex., 192.

Before a sale becomes binding upon the State, every preliminary step provided by law, particularly payment, must be complied with. Till then, the law is a mere offer, but when compliance is made it becomes a contract.

Campbell *vs.* Wade, 10 Sup. Ct. Rep., 9.

Being contracts, they cannot be avoided, in any case where the preliminary forms of law have been complied with, except in such a case as they could be avoided were they contracts between private parties.

"Such a contract (certificate of purchase) will not be held void, unless, under similar circumstances, a contract between two private parties will be so held."

Combs *vs.* Jelly, 28 Cal., 498.

"There are only two ways in which a contract can be rescinded. One is by mutual consent; and the other, by decree of a competent court."

Cochran *vs.* Cobb, Land Commr., 43 Ark., 180.

"Until the sale shall be adjudged void, for one of the reasons mentioned in the statute (or for reasons held sufficient by the courts) the Commissioner has no power to declare it so, and to sell the lands to another purchaser. * * * It is not the policy of the State to create conflicting titles, and no more mischievous policy can be pursued than the issuing of certificates of purchase for the same lands to different persons."

People *vs.* State Treas., 7 Mich., 366.

Where under the statute of Wisconsin it was provided that where sales were made by mistake and not in accordance with law, or obtained by fraud, that such sale, and the patent or certificate issued thereon, shall be void, and the Commissioner should annul and cancel,—it was held that if this was a statutory attempt to

put it in the power of the land department to decide finally when cancellation should be had, that such statute was unconstitutional, as it conferred judicial powers upon a board, and that the question as to whether the case was proper one for cancellation, was one for the courts.

Gough *vs.* Dorsey, 27 Wis., 119.

"But it is evident, if the commissioners attempted to annul certificates in a case where they had no legal power or right to annul them, that their acts were void, and the certificates are still in force."

Gunderson *vs.* Cook, 33 Wis., 551.

In short, an investigation of the adjudications of the various States shows that the State stands upon exactly the same position as a private party. It has no power to cancel its contracts any more than an individual would have power to cancel his contracts; but it has power, like an individual, to refuse to carry out its contracts, or to sue for the cancellation of them, whenever the circumstances of a particular case justify such a proceeding. This board is a trustee of an express trust, bound to follow out the directions of the statute, and bound to manage the trust for the best interest of the beneficiary, and, not only has a right, but it is a duty, to direct suits for the cancellation of any contracts or certificates of purchase, where the trustees have been imposed upon by fraud, misrepresentation or collusion.

Should this board attempt to cancel certificates of purchase, or contracts of sale, or proceedings to maintain contracts of sale under the statute, and should they, at any future time, convey the same lands to another, equity will make the patentee hold said lands in trust for the person whose certificate had been erroneously cancelled.

Shepley *vs.* Cowan, 91 U. S., 330.

And every authority has so held. This is because a compliance with the statute prescribing the conditions upon which private parties may acquire public lands, in equity, divests the title of the government.

No court and no text-writer has attempted to lay down exact limitations or definitions to include all species of frauds, but I will suggest some of the grounds

upon which a sale may be vitiated. Inadequacy of price alone is not sufficient to vitiate a sale.

Slater *vs.* Maxwell, 6 Wall., 268.

But gross inadequacy is evidence of fraud. Combination among bidders to prevent competition is also a fraud which will vitiate a sale.

See cases collected in 1, A. & E. Ency. Law, 997.

Piatt *vs.* Oliver, 1 McLean, 295, holds that this ordinary rule is not applicable to sales of public lands where a price has been fixed, below which no bids will be received. Carrington *vs.* Caller, 2 Stew., (Ala.) 175, holds the other way as does Potter *vs.* Land Commr., 55 Mich., 485. The law upon this subject is ably reviewed in James *vs.* Fulcrod, 5 Tex., 512, where it is said:

"They cannot be permitted to enter into combinations to stifle competition with the design to purchase property at less than its fair value, but they may unite in any such numbers as may be necessary to make the purchase advantageous to themselves; *provided*, this junction of interest be without any 'dishonest motives' or injurious consequences; * * * And while the rights of the vendor are to be regarded, yet the vendees have the right to consult and promote their own interest, but without resort to any fraudulent artifice for that purpose. * * * The corporation (State) had guarded against the sacrifice of her lands by fixing a minimum price, below which they could not be sold, and the petition shows that many of the lots were sold at that price. * * * * Had it been shown that the lots generally sold at the rates higher than the fixed limits, and that the effect of this agreement prevented the property from obtaining its full price, and this could have been affirmatively proven, the transaction would have been repugnant to public policy, and consequently null and void."

In National Bank *vs.* Sprague, 20 N. J. Eq., 159, it was said that:

"To make such agreement illegal, it is necessary that there should be an agreement not to compete, and that the object of making the agreement should be to avoid competition; it is not sufficient that such is the effect of the agreement."

And this last case also holds that it is not unlawful for a combination to agree that one should bid for the benefit of all; and a contract to convey part of the land to another is not illegal.

Thompson *vs.* Hancock, 51 Cal., 110.

Conspiracy with the officers is also a fraud, for which the patent can be set aside.

U. S. *vs.* Marshall S. M. Co., 17 Fed. Rep., 108.

And so, likewise, is any conspiracy by which probable bidders are deterred or pursuaded from attending a sale or from bidding thereat.

Frauds sufficient to vitiate a sale are multifarious in their forms, and no statement can be made which could include all the possible forms in which it may act, but, generally, all proceedings which have a tendency to, and do, prevent a fair, honest and open transaction, are sufficient to vitiate a sale.

It must be remembered, however, as has been above said, that this board has no power in canceling its contracts, other than a private individual has. The title of the purchaser comes from a compliance with the statute. A patent, certificate or purchase, or other thing provided by the statute as means of alienating the land, is only an evidence of his title, and destroying or withholding that evidence by the board will not defeat the title.

Bicknell *vs.* Comstock, 113 U. S., 149.
U. S. *vs.* Shurz, 102 U. S., 378.
McGarrahan *vs.* M. Co., 96 U. S., 313.

Having in mind, therefore, the suggestions contained in People *vs.* State Treasurer, 7 Mich., 366, "that it is not the policy of the State to create conflicting titles, and that no more mischievous policy could be pursued than the issuing of certificates of purchase for the same lands to different persons," this board should not content itself in any case by simply refusing to proceed, and leaving the contract or evidence of title outstanding, but in any case where they are of opinion that such frauds are practiced at the sale as would vitiate the contract between the State and the purchaser, they should proceed affirmatively in the Courts to annul such contract,

and not leave it to private individuals to contest at their own expense the title to lands purchased from the State.

Though the questions submitted to me are general in their nature, it is considered that the principal occasion for the reference to me are allegations of fraud made with reference to the sale of the school lands near Argo, and the questions were framed with direct reference to that sale. While neither myself nor the board have power by law to arrive at the facts regarding that sale, in any other way than a private individual would have in arriving at the facts of any transaction in which he was engaged, I have attempted in the above report to lay down the rules which will guide the board in arriving at a correct conclusion as to their course of procedure in that case; but in concluding as to the course which they will take regarding the sale, the board should remember that general suspicions of fraud, or allegations thereof, will not be sufficient to set aside a sale. The very facts constituting the fraud, upon which the board rely for the cancellation of a sale, must be specifically alleged and proven.

State *vs.* Dennis, 39 Kan., 509.
U. S. *vs.* Atherton, 102 U. S., 372.

" * * * A very strong case, indeed, should be presented, to authorize this court * * * to hold void contracts executed in good faith, within the exact terms of its provisions. Therefore, if Cross in good faith purchased the land from the agent of the Board of Regents, duly authorized, in strict conformity with the statutes and regulations of the board, paid part of the purchase money in cash, received his contract, and has since continued to pay as therein required, the contract cannot be canceled or set aside."

State *vs.* Cross, 38 Kans., 696.

"Whatever may be the power of any of the public officers in the (land) department, to decline acting where they suspect fraud, there is no principle which can justify the assumption that their decision can divest private rights, or dispose of them finally, by assuming to rescind the instruments under which these are asserted. A court of justice is not bound by such *ex parte* and

extra-judicial proceedings, and must entirely disregard them."

Merrill *vs.* Hartwell, 11 Mich., 200.
Hanrick *vs.* Cavanaugh, 60 Tex., 1.

It has been held that where the government proceeds to cancel a patent or certificate of purchase, it is subject to the same rule as a private party, and must tender re-payment of the purchase money.

U. S. *vs.* White, 17 Fed. Rep., 561.
State *vs.* Dennis, 39 Kan., 509.
State *vs.* Williams, 39 Kan., 517.

Particularly where the cancellation is asked for on account of an innocent mistake in the procedure. But this rule does not apply where cancellation is asked, where corruption was imputed to either the purchaser or the officers.

State *vs.* Cross, 38 Kan., 696.

Now, perhaps, to cases where the ground alleged was fraud.

People *vs.* Morris, 77 Cal., 204.

Considering the fact that there are no provisions of our law by which money can be drawn from the public treasury without an appropriation, or without specific directions therefor, it is evident that the State might be disabled from cancelling a contract procured by the grossest fraud, were the law of tender of re-payment held applicable to the State.

State *vs.* Snyder, 66 Tex., 697.
State *vs.* Rhomberg, 69 Tex., 212.
Randolph *vs.* State, 73 Tex., 485.

Probably, therefore, the correct rule to be adduced from the authorities is, that where cancellation is sought upon a ground, or for a wrong in which the purchaser did not participate, tender of re-payment must be made; but in the case of fraud in which he was an active participant, it is not necessary that such tender should be made, but the courts will leave him where his own wrong has placed him.

I have investigated these matters to the fullest extent, and have collected numerous authorities upon the vari-

ous points, as well as upon such collateral questions as might arise herein, but think it inexpedient to report them here at length. I trust that I have been sufficiently plain and explicit in all the material matters which are necessary for the guidance of the board in the cases before them. It is evident that our laws upon the subject of State lands are so defective as to demand the most thorough and careful revision; but not being authorized to proceed upon what the law ought to be, but only upon what it is, I have endeavored to discharge my duties in the foregoing report.

Respectfully submitted,

SAM W. JONES,
Attorney General.

Expenses and salary of Superintendents of Irrigation, how paid.

"*Pro rata*," found in the act on this subject, defined.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 16, 1890.

HON. JAMES P. MAXWELL,
State Engineer,
Denver, Colo.

DEAR SIR:—You called my attention to section 11, page 299, Acts of 1887, regarding the pay of the Superintendents of Irrigation, and requested my construction as to the amount which each county should pay in cases where a water division lies in more than one county.

The part of the section material to this inquiry, reads as follows: "The expenses and salaries of the Superintendents of Irrigation, shall be paid *pro rata* by counties interested, in the same manner as the fees of Water Commissioners are paid."

The part quoted that the fee shall be paid in the same manner as the fees of Water Commissioners are paid, refers only to the manner of making out and pre-

senting the bills to the various counties. The question, therefore, must be answered upon the proper construc- of the words "*pro rata.*" These words vary greatly, having reference to the character of the instrument wherein they are contained. The general rule as to their construction is well stated in Rosenberg *vs.* Frank, 58 California, 387, (406) wherein it is stated, "It is well understood by persons of ordinary intelligence, to denote a disposition of the fund or sum indicated, in proportion to some rate or standard fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made, must be indicated by the words spoken or written by the speaker or writer." In other words, the interpretation must be according to some fixed standard definitely ascertained, contained in the instrument wherein the words are found. Whatever may be the equitable considerations underlying the proper basis upon which counties should pay, it is certain that in the section above quoted, and in the act above quoted, no definite basis is laid down, other than the number of interested counties contained in the district, that is, the number of counties wherein business is done. Therefore, it necessarily follows that the words "*pro rata*" in this section, must be construed exactly the same as if they were written "equally."

Whatever other considerations present themselves as to the just division of expense among the counties, appeals to the legislature, and has nothing to do with the proper construction of the act as it appears.

Very truly yours,

S. W. JONES,

Attorney General.

MUTE AND BLIND.

The *proviso* to section 16, chapter LXXVI., page 734 of the General Statutes, 1883, is no longer operative.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., April 18, 1890.

HON. W. H. BRISBANE,
State Treasurer,
Denver, Colorado.

DEAR SIR:—Your communication of the sixteenth instant, states, "There is in the mute and blind fund, $15,764.92. Under section 16, chapter LXXVI., page 734 of the General Statutes, what disposition shall be made of this revenue?"

The section referred to provides for the levy of one-fifth of one mill on each and every dollar valuation in the State, for the support of the Mute and Blind Institute, and the section contains this proviso, "*Provided*, That all revenue over and above seven thousand dollars annually derived from said one-fifth of a mill, shall be paid into the State treasury to the credit of the general fund, until such excess amounts to seven thousand dollars without interest." The difficulty arises as to the meaning of this proviso. In the Session Laws of 1876, page 64, section 2, seven thousand dollars is appropriated for the purposes in said section specified. By section 3, it is provided that the amount appropriated in the act, "shall be held to be a loan to said institute, and all moneys received by said institute from the deaf-mute tax, exceeding seven thousand dollars per annum, shall be paid back into the treasury of the territory, until such a sum as is provided for in section 2 of this act, is returned."

Previous to 1877, the institute now known as the Mute and Blind Institute, was known as the Institution for the Education of Mutes, but in the year last referred to was changed to the name as it is now called. Section 16, together with the proviso above quoted, was merely a continuation of the provisions of the act of 1876, though not so clearly stated as in the prior act, but the

proviso to the act of 1876 both clearly refer to and mean the same thing.

An inspection of your books, as you inform me, shows that during the years since 1876 there has been turned back into the general revenue the excess of each year over the seven thousand dollars, until the seven thousand dollars specified in the act of 1876, and in the proviso of section 16, has been exactly paid into the general revenue, the payments being completed in the year 1881. There can be no question, therefore, that both by the terms of the acts referred to, and by the construction which has since been placed upon the acts, that the revenue now in your hands arising from the one-fifth mill levy is devoted to the Mute and Blind Institute, and no part of the same is to be turned into the general revenue. You will, therefore, pay the amount in your hands as provided by law, without reference to the proviso contained in section 16.

Very truly yours,

SAM. W. JONES,

Attorney General.

Conspiracy to defraud is not punishable by confinement in the Penitentiary.

Recommending pardon of Sarah J. and B. Herbert Brooks.

ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., May 10, 1890.

HON. JOB A. COOPER,

Governor.

SIR:—There is pending upon writ of error, in the Supreme Court of this State, the case of The People of the State of Colorado *vs.* Sarah J. Brooks and B. Herbert Brooks. This is a case wherein the defendants were, upon the 27th day of June, 1889, in the criminal court of Pueblo county, convicted of the crime of conspiracy to defraud the Washington Life Insurance Company; and the defendants were, upon such conviction, sentenced to two years in the penitentiary. The atten-

tion of the court, in passing sentence upon these defendants, seems not to have been called to the nature of the offense, and the manner of its punishment, under our law. Since said sentence, the district court of Arapahoe county, in the case of The People against Connors *et al.*, has held that conspiracy of this kind is punishable, not by confinement in the Penitentiary, but only in the common jail.

It seems that the legal profession, generally, are of opinion that conspiracy is not punishable by confinement in the Penitentiary. The Supreme Court, in the case now before it, have likewise granted a *supercedeas*, doubtless upon the same ground.

While the judgment against these defendants would no doubt be reversed, such action would necessitate the sending back of the case to Pueblo county for trial. Inasmuch, therefore, as these defendants have been punished to a much greater degree than is allowable by law, and since they have, for so long a time, suffered an onerous and degrading punishment, I respectfully recommend that the above named Sarah J. Brooks and B. Herbert Brooks, be pardoned, and relieved from further confinement in the Penitentiary.

Very truly yours,

SAM. W. JONES,

Attorney General.

Military Poll Fund can not be used to pay special counsel for prosecuting officers against the Military Law.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., August 15, 1890.

Adjutant General

BENJAMIN F. KLEE.

DEAR SIR:—Answering your communication of the sixth inst., relative to your right to pay the bill of Mr. Ira. J. Bloomfield, out of the Military Poll Fund, for his services in prosecuting certain members of the Colorado

National Guard for being absent from drill, contrary to law, I reply that the Military Poll Fund is subject to exactly the same rules as other funds and can not be paid out for any purpose except such purpose as is expressly authorized by law.

I find no provision authorizing the employment of attorneys and paying for their services out of this fund. I reply that it is the duty of the District Attorney to prosecute these suits in any court where they may be instituted.

Yours, etc.,
SAM. W. JONES,
Attorney General.

Where certificates of indebtedness have been erroneously issued instead of a warrant, they should be cancelled and appropriate entries made, showing the disposition of the same.

Warrant issued for the salary of Adjutant General for month for which certificate of indebtedness had been issued and cancelled, is valid for all purposes.

Appropriation, what is.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., August 28, 1890.

HON. W. H. BRISBANE,
State Treasurer,
Denver, Colo.

DEAR SIR:—You submit to me the following letter: "The Auditor of State has drawn a state warrant to the order of Benjamin F. Klee, as Adjutant General, for the month of October, 1889, for which a certificate of indebtedness had been previously issued. Is the warrant of such validity as I would be safe in purchasing it for the investment funds of the State? And what disposition shall be made as to the showing on the books

of this office, as to what became of said certificate of indebtedness?"

I reply that on January 31, 1890, in a letter to the Honorable Louis B. Schwanbeck, Auditor of State, I expressed the opinion that inasmuch as our Constitution requires all expenses of the State government within any year, to be met by the revenues of that year, and that claims for services rendered in any one year do not constitute a claim against the revenues of any other year, and that as it is provided in article V., section 30 of the Constitution, "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment, etc.," and that as "the amount to be paid, the person to whom payable, the time of payment and the fund from which to be paid, with a general direction to pay," constitutes a valid appropriation of money within that clause of our Constitution which provides, "No money shall be paid out of the treasury, except on appropriations made by law, and on warrants drawn by the proper officer, in pursuance thereof," article V., section 33, the Adjutant General was entitled to receive, the Auditor was authorized and directed to draw, and the Treasurer was authorized and directed to pay a warrant for the salary of the Adjutant General, upon exactly the same terms and against exactly the same funds as the salaries of other State officers. I refer you to that opinion, upon file in the office of the Auditor and in this office, for the reasons at large, upon which that opinion was based.

Since rendering such opinion, I find that the Supreme Court of California in Humbert *vs.* Dunn, 24 Pac., 111, decided exactly the same proposition, upon the same course of reasoning, and under a similar constitution. Also, that the Supreme Court of the State of Montana, in the case of State *vs.* Hickman, 23 Pac., 740, adopted the same course of reasoning and came to the same conclusion, though in that case the decision was put upon the ground that the Constitution itself fixed the salaries of the officers involved in that litigation. However, the question as to the salary of a legislative office did not arise and was not decided in that case.

The only case I have been able to find, apparently holding to the contrary of my conclusion, is State *vs.* Weston, 6 Neb., 16, where the right to obtain a warrant in such cases was limited to the officers and salaries, fixed by the Constitution, but the reasons upon which the contrary conclusion was reached by other courts, were not adverted to. I am, therefore, persuaded of the correctness of my first opinion.

The gist of the whole matter is, that such provisions of our Constitution and law as I have referred to, do constitute an appropriation. Section 1382, General Statutes, provides that certificates of indebtedness may be issued in cases where a valid claim exists against the State, "and no appropriation shall have been made by law to pay the same." Therefore, if the views herein expressed are correct, no certificate of indebtedness could have been legal for the salary of the Adjutant General, because an appropriation had been made therefor. It is true, that as a matter of fact, certain certificates of indebtedness have heretofore been issued for such salary, as well as for certain other claims against the State, but such certificates were issued previous to the rendition of the opinion of our Supreme Court construing our Constitution, and previous to any investigation of the matter, following what had been, since 1879, the practice of this State. It results from this, that all such certificates as apply to fixed salaries, saying nothing of other claims, were improperly issued, and that where the mistake can be corrected, it should be done. I say nothing here of the constitutionality of certificates of indebtedness generally, concerning which there is in my mind, some doubt.

Therefore, the Adjutant General was and is entitled to a warrant for his salary for the month of October, 1889, and such warrant now issued is a valid warrant and may be paid, or purchased for the investment fund, with exactly the same safety, and under exactly the same circumstances, as a warrant for the salary of any other State officer.

Concerning the second question embraced in your letter, I reply, that I am not familiar with the exact manner in which the books and accounts of the Treasurer's department are kept, but having ascertained that

the certificate of indebtedness referred to was improperly issued and was a mistake, there is certainly some means for the correction of the error. It would be strange in any system of book keeping, that an entry, inadvertently or by mistake made, should forever afterwards be incapable of correction. Just what, and how the entry should be made, your own familiarity with the system of keeping your books, should enable you to decide. I suggest generally, that where an erroneous credit or charge has been made in a specific account, a counter entry, stating the circumstances and the reasons therefor, would restore such account to its proper status.

Very truly yours,

S. W. JONES,

Attorney General.

Incorporated towns may become cities when certified copies of census returns show the existence of the requisite population.

DENVER, COLO., Dec. 15, 1890.

HON. JOB A. COOPER,

Governor of Colorado:

SIR:—You submit to me the inquiry, as to what is your duty when incorporated towns desire to become cities of the second class, having attained, as they believe, sufficient population.

Section 3363, G. S., being the same as section 2700, G. L., provides:

"The Governor, Auditor of State and Secretary of State, or any two of them, within six months after the returns of any census have been filed in the office of the Secretary of State, shall ascertain what cities of the second class are entitled to become cities of the first class, and what incorporated towns are entitled to become cities of their proper class. And the Governor shall cause a statement thereof to be prepared by the Secretary of State, which statement he shall cause to be published in some newspaper published in the State Capitol,

and also in some newspaper, if there be such, printed in each of the cities and incorporated towns entitled to such advancement in grade, and a copy of said statement shall also be transmitted by the Secretary of State to the Mayor of such city or town."

This section was in an act approved April 4, 1877. The law of the United States provided that the Marshal of each district should take the census; and it provided that when the corrected returns shall be prepared, he, the Marshal, should "transmit one copy forthwith to the census office and the other to the office of the Secretary of the State or Territory to which his district belongs." (Section 2194, R. S. U. S., 1878.) Doubtless, therefore, Section 3363 of our General Statutes refers to the filing of this copy by the Marshal.

By act of the third session, XLV. Congress, page 473 (1878–1879), the machinery for taking the census was changed, and thereafter a census bureau was established within the Interior Department. This act contained no similar provision to that contained in the Revised Statutes, 1878, in this particular. By act approved March 1, 1889, found in the statutes of the United States, second session, L. Congress, page 760 (1888–1889), provision was made for taking the 11th census, and repealing the act of 1879, or other inconsistent laws. Section 23 of this act provides:

"That upon the request of any municipal government, meaning thereby the incorporated government of any town, village, township or city or kindred municipality, the Superintendent of Census shall furnish such government with a copy of the names, with age, sex, birthplace and color or race, of all persons enumerated within the territory or jurisdiction of such municipality, and such copies shall be paid for by such municipal government, at the rate of twenty-five cents for each hundred names."

So, that as the law now stands, there is no provision for filing census returns in the office of the Secretary of State, and therefore, no fixed period within which you are required to publish the notices, is provided by law. I advise you, however, that it is the *fact* of the existence of the requisite population which entitles municipalities, under our law, to be incorporated in their appropriate

classes, and that the section from our General Statute above quoted, merely provides what shall be the *evidence* of that fact; and where this class of evidence is rendered impossible, the ascertainment of the fact in any other competent way, should entitle these municipalities to proceed to their proper class.

I advise, therefore, that when any municipality shall furnish to you certified lists from the returns of the Eleventh Census, as provided in section 23 above quoted, that yourself, the Auditor and Secretary of State, should make the proclamations provided in section 3363.

Very truly yours,

S. W. JONES,
Attorney General.
H. RIDDELL,
Of Counsel.