REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF COLORADO,

FOR THE

YEARS 1893 AND 1894.

EUGENE ENGLEY,
ATTORNEY GENERAL.

DENVER, COLORADO:
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REPORT

OF THE

ATTORNEY GENERAL OF COLORADO.

STATE OF COLORADO,
ATTORNEY GENERAL'S OFFICE,
DENVER, COLO., December 10, 1894.

To His Excellency,
DAVIS H. WAITE,
Governor of Colorado.

Sir—In compliance with law, I beg leave to submit herewith my official report for the years 1893 and 1894, together with such recommendations as have been suggested by observation, upon various matters during my term of office.

It may not be out of place at this time to enumerate briefly some of the duties imposed upon the attorney general.

He is an officer of the executive department; member of board of land commissioners; member of state board of equalization; member state board of education; judge-advocate-general in the militia; member of several boards of construction; member of commission for publication of supreme court records;

gives his opinion in writing upon all questions submitted to him by the General Assembly, or either house thereof, governor, lieutenant governor, auditor, secretary of state, treasurer, and superintendent of public instruction; prepares drafts for contracts, forms and other writings which may be required for the use of the state; has charge of all criminal cases on the part of the state, going to the court of appeals or supreme court, on appeal or writ of error, from all the district or county courts of the state, and makes or assists in making all briefs and oral arguments therein; prosecutes or defends, as the case may be, all civil cases in which the state is a party or interested; has charge of and prosecutes or defends, as the case may be, all cases in the different land offices, where the lands of the state are involved or litigated; prosecutes or defends, as the case may be, all suits relating to matters connected with the departments of the governor, secretary of state, treasurer or auditor; attends to all requisitions for fugitives from justice; prosecutes all quo warranto proceedings against ditch companies on request of county commissioners; member of military board and reviews court martial proceedings; prosecutes or defends all suits wherein the state university or similar institutions are parties, besides many other duties fixed by statute.

An investigation will show these conditions to exist, viz: That the criminal cases in the court of appeals and supreme court, from the district and county courts of the fifty-six counties in the state, together with the civil cases in which the state is interested in the trial courts, state cases in land offices, and written opinions required by the several state officers, are sufficient to employ two assistants in the attorney general's office to properly prepare briefs, make oral arguments and render opinions, to say nothing of the various other duties of the attorney general's office. In no other state of the Union are so many duties placed upon the attorney general. In most states there are two or more assistants, and

the duties of the attorney general are to advise state officers and prosecute or defend state cases, and no more.

The practice which has obtained under the administrations of my predecessors, of rendering opinions to county officials, and which cannot well be avoided, has been aggravated during my incumbency of the office, occasioned, no doubt, by the unparalleled conditions of the past two years. Many counties of the state during that period have, for the sake of economy, dispensed with the services of a county attorney, and, as a result, this office has been deluged with inquiries from this source. So far as my duties would permit, I have endeavored to adjust myself to these conditions, as evidenced by the opinions subjoined herewith; but, as a rule, and in view of the other multitudinous duties imposed upon the attorney general, I believe the practice to be better honored by its breach than in the observance.

It will be seen by the foregoing that the office of the attorney general, in this state, is no sinecure, and should be provided for by sufficient means commensurate with the onerous character of its duties. I, therefore, suggest the necessity of an appropriation for the ensuing two years, equal to that granted me, in order that my successor may properly transact the business of the office.

In compliance with the suggestion of the special committee of the Ninth General Assembly, I caused researches to be made in the office of the state treasurer, during the past year, for the purpose of ascertaining the excess warrants that had been issued by former state auditors—the numbers, payees, and funds drawn upon, as shown by the same, and which of the same had been invested in the school and other funds. The purpose of the investigation was to lay the foundation for an action to be brought against ex-auditors and ex-treasurers, to recover back into the sev-

eral funds, the moneys that had been unlawfully invested in such warrants. But, after a protracted examination, I became convinced that the work could not be accomplished with the time and means at my disposal.

Upon due consideration of the importance of the matters involved, I would recommend that a special commission be constituted by the Tenth General Assembly, for the purpose of making the necessary investigation; that said commission be given full power to send for persons and papers; to administer oaths; to classify the warrants so as to distinguish the valid from the invalid. It will require at least six months' work by the commission, with abundant clerical aid, to complete the investigation. An appropriation of not less than six thousand dollars will be necessary to carry out the purpose of the commission, and, in my opinion, the expenditure will be fully warranted by the results. The great difficulty encountered in the partial investigation made by this office lay in the fact that prior to the term of office of ex-Treasurer Carlile, warrants were drawn on the state treasury regardless of fiscal years and the revenues of fiscal years. In a proper investigation it would be necessary for clerical experts to trace every warrant issued since 1876, and the fund upon which it was or ought to have been drawn, and the fund out of which it was paid with reference to fiscal years. I am of the opinion if this course should be pursued, unaffected by political considerations, the state will be able to recover back into the treasury several hundred thousand dollars, by judgments against certain ex-treasurers and their sureties. No statute of limitation runs against the state in this matter. While the state should seek redress through the medium of suits against ex-treasurers and their sureties, I do not believe it a just policy for the state to repudiate the warrants issued, and now held by innocent purchasers in fact. Invest-

ors purchased these warrants in good faith, paying a substantial consideration therefor. The state received some consideration for which the warants were issued, even if there was great extravagance in the purchase of legislative supplies at times. The state auditor acted in a quasi-judicial capacity in issuing these warrants, and the purchasers were warranted in believing that the seal of the state represented the financial honor of its people. I do not mean to say that the warrant investors were innocent purchasers in law, but in fact. There is a hundred and sixty odd thousand dollars in the state treasury, subject, under legislative action, to the payment of these warrants. I believe it would be for the best interests of the state to pay these warrants.

It will be impossible here to elaborate upon the work of the office in conection with cases in the supreme court and court of appeals. A large number of briefs have been filed and oral arguments made in both of these courts. Many of the most important cases have been decided during the past year, and will become landmarks in the jurisprudence of the state on account of establishing precedents upon important points of law and practice. Others are still pending, waiting the decision of the court.

The work in the district court has been confined principally to the defense of suits brought against the state treasurer in mandamus proceedings, to compel the payment of warrants issued in former years for expenses of the seventh general assembly, in the matter of stationery, supplies and printing, and also upon what are commonly known as the "excess warrants." The suits upon the latter class of warrants were not pushed, for the reason, no doubt, of the then pending bond issue, but since that question has been decided adversely to the interests of the warrant holders, renewed interest will again be manifested in them, unless the tenth general assembly shall take some step looking to their ultimate redemption. The class of warrants first

mentioned have been a bone of contention in state affairs, ever since the extravagance of the seventh general assembly was first revealed. The question first arose in connection with certain allegations of frauds said to have been committed against the state treasury, particularly in the matter of warrants issued for stationery, printing and supplies furnished to the state. These are matters that should have been adjusted and settled long since, as it becomes more difficult for the state to procure the evidence required in these cases as the years elapse. The position of the state in the matter will not be further discussed here, as the cases are all now awaiting final settlement in the supreme court, upon briefs duly filed. My immediate predecessor in office, in his biennial report, pages 8-9, mentioned two important cases to which the state was a party and which were not disposed of at the expiration of his term of office, both of which were pending in the Pueblo land office and both involving the state's title to valuable mineral lands.

The land involved in the case of the Colorado Alabaster Company vs. The State, etc., is in Fremont county, and its value is due to a thick ledge of alabaster of a superior quality, which extends nearly across two quarter sections of said land. The case was duly set for trial shortly after the commencement of my term of office and the state, by its counsel, was present with its witnesses and ready for trial. The adverse party, however, did not appear, and the cause was dismissed on motion by the state; a victory, the importance of which was greatly out of proportion to the ease with which it was won.

The other case was Benjamin F. Free et al. vs. The State, etc., and involved the title to a section of coal land in Las Animas county. After several continuances, the trial of the case on its merit was finally commenced on June 4, 1894, and was concluded on the 12th day of the same month. On the 31st day of October, 1894, the register and receiver

rendered their opinion, in which they decided all the issues involved in favor of the state and denied the application of contestants. Since then, and within the time allowed by rules of practice, the contestants appealed to the land commissioner at Washington. In connection with these cases, great credit is due the energy and ability displayed by Mr. H. B. Babb, formerly the assistant under ex-Attorney General Maupin and under whose administration the cases were commenced, who represented the state throughout the course of the trials.

The importance of the last mentioned case to the state school fund can hardly be overestimated. The facts which probably will most aid in an appreciation of the value of the land are—the royalties from the mines operated in one quarter section since it was leased in 1889 have yielded the school fund about $23,000; the Union Pacific railroad has built a track to the mines, and has provided ample switches and side-tracks for the accommodation of the large industry just mentioned, and, as might be supposed, the the plant of the lessees and other improvements are commensurate with the provisions made by the R. R. Co., and greatly enhance the value of the property.

Besides the large number of civil and criminal cases disposed of, in which the state was interested, brief mention may be made of the following:

The tenure of office of the board of capitol managers was determined by the supreme court, the decision of the court sustaining the opinion previously rendered by the attorney general.

In the matter of leasehold estates in the mineral lands of the state, the opinion of this office was sustained by the supreme court.

In the case of Jerome vs. The Regents of the State University, the district court decided in favor of the defendants, thereby sustaining this office. The case is now pending in the supreme court. In this case, and sheltered behind the name of Jerome, a denomin-

ational medical school of Denver is seeking to prevent the classes of the medical school of the state university from obtaining practical instruction in clinics, in the hospitals of Denver. It is the fight of a sectarian school against a free school maintained by the state. If the medical school of the state university is to die in the clutches of a school fostered by religion, there will subsequently be a great many voters at a funeral where the state will not be the corpse. I have something to say in the latter part of this report concerning sectarian schools.

In the fire and police board cases, the chief executive was sustained by the supreme court on all legal questions directly involving the power of removal of members of that board.

In the penitentiary affair, the governor is correct in his construction of the statutory law concerning the parolment of prisoners sentenced to the penitentiary and transferred to the reformatory. As to the methods pursued by the chief executive in the attempted removal of the commissioners and warden of that institution, I shall have nothing to say in this report, as I understand the matter is now pending in the courts.

I consider the governor's official course in what is known as the Cripple Creek war, as wise and patriotic. It is not too much to say that in that unfortunate imbroglio, the sheriff of El Paso county levied war against the state of Colorado. The sheriff of El Paso county had no authority in law to open recruiting stations and organize an army in Arapahoe county, to be transported and used in El Paso county, under the specious plea that such force, armed with Winchesters and cannon, were special deputy sheriffs of El Paso county. The assertion that he did have such authority is nothing but irridescent poppycock. The status of the sheriff's office and his power to appoint deputies and bailiffs, in the absence of statutory regulations, has been settled under

the common law since the creation of the *comes* in England, centuries ago, and it is too late now to enlarge powers by assumption to meet the El Paso county case. Neither by the statute law nor the common law did the sheriff of El Paso county have the right, either by himself or agents, to organize such army in Arapahoe county. The statute plead in his defense relates to a totally different matter, and the legislative intention cannot be juggled so as to meet the exigencies of the case. In case of the necessity existing, it was the duty of the sheriff to organize a posse comitatus from the body of his county, and if unable then to serve his writs and preserve the peace, it was his further duty to call upon the chief executive for the militia. The refusal of the governor to place the militia under the command of the sheriff as an auxiliary force to the predatory army organized in Arapahoe county, was justifiable under the circumstances. The army organized in Arapahoe county, including those who organized it, and the miners who destroyed property and prevented owners from working their mines at Bull Hill, were violators of law and order. I refer to these matters specially as I was connected with legal questions involved therein.

In addition to the foregoing, I have entered a large number of protests in the different land offices of the state in the matter of applications for patents by lode claimants, upon ground situated wholly or partially upon school sections, but in many of these, after investigation, I find that the particular land claimed was known to contain certain valuable deposits of mineral prior to the survey and selection by the state, and was, therefore, excepted by the terms of the grant by the government to the state.

There have been, during my term of office, sixty-six requisitions from the governor of this state upon the governors of other states and territories, for the extradition of fugitives from justice of this state, and sixty-five requisitions upon the governor of this state

from the governors of other states and territories, for the extradition of fugitives from their respective jurisdictions, found in this state. All matters of this kind are referred to the attorney general, who passes upon the formal sufficiency of the applications, before the governor grants or refuses to grant the necessary process. Much difficulty has been experienced in many cases, and delays caused, on account of the carelessness through which the application papers have been prepared. It has been an established practice with this office for some time past, to follow the rules adopted by the Interstate Extradition Conference in New York city, in 1887.

In view of the many difficulties that arise under the present system, I suggest the advisability of formulating these rules into statutory law, so that the requirements may be brought to the attention of the various prosecuting officers of this and other states. This matter should not be delayed, and should be considered by the Tenth General Assembly.

An immediate revision of the state constitution has become an imperative necessity. Time has conclusively demonstrated that the constitution of 1876 was framed with a too narrow conception of the expansive forces of civilization in Colorado. The present constitution, in its amended (mended) and patchwork condition, is a glaring absurdity in many particulars, and the longer revision is delayed, the more the interests of the people will suffer in consequence. A written constitution, embracing more than a bill of rights and the framework of government, needs frequent revision, that its provisions may always be in consonance with the progressive ideas of an intelligent people. A new constitution should be framed and adopted, under the provisions of which the people will administer their own governmental affairs, rather than delegating their inalienable rights to a horde of partisan politicians. I would suggest a constitution not patterned after or copied

from institutions born in the evolutionary periods of the dead past. Political distinctions and caste cannot be fostered in this country, if liberty is to live. A modern constitution should eliminate the state senate, a legislative branch that had its original in the fierce conflicts for supremacy between the patrician and plebian factions of the Roman empire. The Roman senate, like the English house of lords, was the embodiment of political power surrendered by the people to an aristocracy of wealth and blood. As a so-called balance-wheel in the legislative branch of government the state senate amounts to nothing, its members not being of a higher order of intelligence, or possessing more legislative ability than those of the house of representatives. The state senate is a costly obstruction in the way of good government; its existence makes our system of government more complex, and the enactment of beneficial legislation in the interest of the people, uncertain. The house represents the people directly, and by reason thereof this anomaly and public detriment known as a senate should be abolished and thrown into the waste basket of the dead centuries, where it belongs. The veto power now lodged in the hands of the governor should be abolished. The governor should have no further power than to see that the laws are faithfully executed. The executive veto originated in kingly prerogative, and was intended as an instrumentality to prevent the people from enlarging the scope of human liberty as against the crown. Why should the governor of an alleged free commonwealth possess a veto power equal to the legislative power of two-thirds of the members of the legislature, when his ability, ordinarily, is only equal, if at all, to that of one member? The representatives know the needs of their constituents, and if they enact a law it should become operative, unless declared unconstitutional by the supreme court. The court of appeals should be abolished, and the supreme court en-

larged to six members, divided into two departments, the judgment of each department to be final except in case of disagreement, or when a constitutional question is to be determined. An appellate court occupying an intermediate place between a trial court and the supreme court, and possessed of a limited jurisdiction, is of far less assistance to litigants than a supreme court of ultimate jurisdiction, having six members and two departments. It is a well-known fact that corporations endeavor to wear out poor litigants by appeal or writ of error to the higher courts. Justice should be speedy to be of much avail in this world. If the court of appeals should be abolished and a change made in the constitution of the supreme court, as I suggest, all litigants would get a final decision within six months after their cases reach the supreme court. What are the courts for, if they are not instituted in the interest of the people? A judge of the supreme court should be elected every four years, according to a plan of state elections hereinafter outlined.

The present election system in this state is sapping the life blood of the people through the frequency of elections. Every two years, and sometimes oftener when a judge of the supreme court is to be elected, there is a state election and alternating with the state election, a county election. Between county elections come municipal and school elections. It is probable that the recent state election cost the people nearly a quarter of a million dollars. The county and municipal elections cost in the aggregate an enormous sum of money. These election expenses are paid from revenues derived from taxation, and taxation is largely paid by the producing classes, the farmers, miners, mechanics and other wage earners. The bonds and stocks of the banker and broker usually escape taxation, while the cow of the farmer and the cottage of the wage earner are always listed in the assessor's roll. The total of taxation is con-

stantly increasing and by reason thereof the people are largely in debt. There is a remedy for this condition of things. All elections, state, county, city, town, precinct and school, should occur on the same day as the national election and not oftener. In case of a vacancy, the appointive power will be sufficient. In case the people desire to get rid of an unfaithful official, during his term of office, it can be done under the provisions of an imperative mandate law, by filing a written mandate in the proper office, signed and sworn to by a majority or two-thirds of the electors of the district, the vacancy to be filled under the mandate or the appointive power. This will be a simple and effective method by which the people can protect themselves and destroy the politicians. The initiative and referendum should be made a part of the system of state government, so that the people will directly participate in and control legislation, instead of through agencies often under the baleful influences of corporate power.

I believe that Colorado has become sufficiently civilized to abolish that relic of barbarism known as the death penalty. Statistics demonstrate that wherever the death penalty has been abolished, homicide has decreased. The theory that the death penalty is a deterrent to crime is no longer tenable. Crime is a result of environment and heredity, and civil society and not the individual is responsible therefor. Crime should be treated as a disease when not caused in the first instance by poverty alone. The penitentiary and reformatory institutions should be changed into hospital and school systems for the treatment of crime, and indeterminate sentences imposed in lieu of the present harsh and incongruous sentences. Without bringing convict labor into competition with free labor, it would seem to be both just and humane that the convicts be given an opportunity to earn a per diem, so that they may have a reasonable sum of money to start life anew with when discharged.

If juries were abolished in civil cases a large item of expense would be saved taxpayers and litigants. The principles of equity can never wholly take the place of common law rules and fictions until this is done. Trials in civil cases should be to the court without juries. Packed juries would thus be avoided, justice more speedily administered and the terms of courts shortened. The grand jury should be absolutely abolished and the petit jury retained in criminal cases. A juror and witness cash fund should be provided by law out of which the per diem and mileage of jurors and witnesses can be paid in cash at the end of the trial, or oftener if the jurors and witnesses need it, by warrants drawn on such fund signed by the judge and countersigned by the clerk of the court, without the subsequent action of the board of county commissioners. A large per cent. of jurors and witnesses are poor people and they need their per diem to pay expenses while attending court. This method would also avoid the certificate and warrant sharpers.

The office of coroner should be abolished. This office is simply dead wood drifted down the ages from Saxon feudalism, and is an unnecessary expense without being of any benefit to the people.

The statutory law of the state should be revised and codified by a commission appointed by the governor under the authority of the legislature, the commission to report its complete work at the next regular session of the legislature. The statutory law should be divided into three codes, viz: a criminal code, a civil code and a code of civil procedure. A proper revision and codification would reduce the size of the general statutes fully one-half by eliminating the trash that has accumulated within the lids of the book. Many of these statutes were copied from those of Ilinois more than a quarter of a century ago and while Illinois has repealed a large number of the originals, Colorado still retains the copies upon her statute book. Written laws should

be simple and brief in language so as to be easily and readily understood by the masses. Some of our statutes are clearly in conflict with the constitution, and many of them are bundles of grammatical inconsistencies and absurdities in legislative intention.

During the past two years a secret society known as the American Protective Association has taken deep root in the political organism of this commonwealth. Its avowed purpose is to protect the public school system from encroachments of the Catholic hierarchy. Its real purpose is to capture the offices at the disposal of the electorate. The society itself has a foundation of religious bigotry, but it is manipulated by and in the interest of politicians. It is unnecessary to fittingly describe this society, although the vocabulary is sufficient. My purpose in calling attention to it is to suggest a remedy within the domain of law. There is but one remedy that affords a complete solution of the question—and that remedy is a compulsory school system. It is a pleasing assertion by some that there is an absolute separation of church and state in Colorado, and in other American commonwealths. The fact is, that the religious sects have usurped and are usurping at the present time one of the most important functions of state government—viz: Education. Episcopalian, Catholic, Baptist, Presbyterian, Methodist and other denominational schools have been established in many localities in Colorado, and the number of such schools is constantly increasing. The students in these schools are drawn from among the children of school age who should attend the public schools. Herein lies the danger to the public school system. The denominational school is an octopus that will sooner or later destroy the public school, unless prevented by speedy remedial legislation. Moreover, the existence of a denominational school has a tendency, at least, to create a caste that ought not to exist in a pure democracy. It divides children of school age into two classes—the children in one class

paying for tuition in denominational schools, the other class, composed largely of children of poor parents, attending the public schools. All children of school age, and in good bodily health, should be compelled to attend the public schools, from the kinderten to the high school, and those desiring a higher education should be required to attend the state university. If any parents are too poor to furnish their children of school age with books, clothing and food, these things should be furnished by the state. This is the true compulsory school law, and its enactment would destroy the American Protective Association, and similar societies, for all time. It would separate church from state, in fact as well as in theory, by the utter extinction of the denominational school. The state is the first guardian of the child, and not the father or mother as commonly supposed, and it has the fundamental right, and it is a duty that it owes to civil society, to educate all children upon a plane of equality, as good citizenship is the ultimate aim in the preservation of democratic institutions. The cry of "personal liberty," in the individual, is without merit, as civil society has an inherent right to protect itself against either disease or death. The children of the farmer, mechanic, laborer, merchant, banker and railroad president, should be educated side by side in our public schools.

At the last regular session of the General Assembly a bill was passed by that body prohibiting, under heavy penalties, private detectives from operating in this state. An amendment was offered just prior to the final passage of the bill, but defeated, which, if it had been adopted, would have rendered the law valueless. As it was, this amendment, by some sort of legerdemain, was incorporated into the bill and the legislative records, after the bill had passed both houses in its original form. At the time the dirty work was done, the head of the Pinkerton outfit was in Denver. The police power being alone resident in civil government, it is evident that a pri-

vate detective is a violator of law, unless he derives his authority from the civil power to act in that capacity. I recommend that a penal statute be enacted making it felony for any person to act or advertise himself as a private detective in Colorado. The sheriffs, chiefs of police and marshals can furnish official detectives when needed.

An eight-hour law should be enacted. If our civilization should be unable to sustain itself on an eight-hour law for labor, it ought to die and give place to a better form of progression.

A law should be enacted prohibiting, under heavy penalties, the employment of children under eighteen years of age in factories and other industries. Child labor, in the various industries, dwarfs the mind and body of those so employed, and turns out upon the highways of a bastard civilization many of the adult tramps.

The practice of teaching military tactics in some of the state schools, and the law under which the militia is organized and maintained, are both detrimental to moral vigor in our civilization. They should be abolished. Military murder is but the counterpart of judicial murder.

Proportional or minority legislative representation should be adopted. The century-ago theory of "majority representation," and the "greatest good for the greatest number" is fundamentally false. Minorities as well as majorities should be represented in legislative assemblies, and laws should be enacted for the good of all, instead of for the greatest number.

To enact many of the laws hereinbefore suggested, the state constitution will have to be revised or amended, and as the overwhelming necessities of the people imperatively point to a revision of that instrument, as the only adequate remedy in the premises, the Tenth General Assembly should submit the question.

In conclusion I desire to extend my thanks to yourself and other state officials, and especially to the supreme court and court of appeals for uniform courtesy. I also desire to commend my assistants, Messrs. Sale and Thomas, for their intelligent aid in all matters pertaining to the office, and to Miss Nettie O'Connor, stenographer and clerk, whose skillful services have done much to make the work of the office a success.

EUGENE ENGLEY,
Attorney General.

OPINIONS.

OPINIONS.

IN RE ADJUTANT GENERAL.

1. The adjutant general is appointed by the governor, and such appointment can be made without the consent of the senate.

2. His term of office begins on the first Wednesday of April, next after his appointment, and continues for a term of two years.

Attorney General's Office,
Denver, Colo., Jan. 14, 1893.

Hon. Alexander Coleman, Adjutant General:

Dear Sir—On this date you submitted to me for an official opinion the two questions, viz.:

First—Is it the duty of the governor to nominate, and by and with the consent of the senate, to appoint the adjutant general; or, is the power to appoint such officer vested solely in the governor, as the commander-in-chief of the military forces of the state, without the consent or confirmation of the senate?

Second—At what time does the term of office of the adjutant general begin and end?

To the first question propounded, I answer that section 3 of article XVII. of the constitution lodges in the hands of the governor the power to "appoint all

general, field and staff officers and commission them," and while the language quoted embraces all the officers belonging to the three classes named, "general, field and staff officers," the particular and descriptive officers of each class are not named, the creation of the various offices, and defining the duties connected therewith, being left to legislative enactment. Standing alone, and without reference to any other provision of the constitution, the language of said section 3 clearly vests in the governor alone the power of appointment to any office created by statute and belonging to either of the classes named. But section 6 of article IV. of the constitution provides that the "governor shall nominate, and by and with the consent of the senate appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency neglect of duty or malfeasance in office," etc. Considering the proper interpretation to be given the language of the last quoted section, apart from the provisions of section 3, of article XVII., of the constitution, first above referred to, it has been held that the words "whose appointment or election is not otherwise provided for" prevent this section from applying to officers created by a statute which provides for the manner of making original appointments, etc.

7 Colo., 608.
5 Colo., 460.
11 Colo., 110.

It was also held that under this section it is competent for the governor to appoint, without the consent of the senate, certain officers, the offices not being established by the constitution, and inasmuch as the statutes creating them expressly confer such authority on the executive without requiring the consent of the senate.

12 Colo., 400.

The particular and descriptive office of adjutant general having been created by statute, and there being no provision of the constitution requiring that the appointment by the governor shall be with the consent of the senate, it is competent for the governor to appoint without such consent, unless the statute creating the office or conferring the authority on the executive, requires such consent.

Art. III., Sec. 1, p. 386, Sess. Laws 1889.

Sec. 2 of article 1 of chapter 63 of the general statutes, vested in the governor, as commander-in-chief of the militia, the power "by and with the consent of the senate" to appoint an adjutant general. By legislative enactment, approved April 2, 1889, said chapter 63 was repealed in toto and swept out of existence, and in lieu thereof a new law was enacted, which is still in force, one of the provisions of which vests the governor with the power to appoint an adjutant general without requiring the consent of the senate.

My opinion, however, is, that this appointment can be made by the governor by virtue of sec. 3, art. XVII. of the constitution, without the consent of the senate, and that sec. 6 of art. IV. of the constitution, does not apply to the military office in question.

Answering your second and last question, I am of the opinion that your term of office begins on the first Wednesday of April next after your appointment and ends at the expiration of two years thereafter. It is probable that whoever drafted the legislative act of 1889, concerning state militia, had in mind the intention of incorporating in said act a provision vesting the office in the appointee upon the appointment being made; but, if he did have such intention in his mind it does not sufficiently appear in the act itself to that extent that the legislative intent can seriously affect the provisions of sec. 1, p. 330, l. '85, which provide "that the term of office of all state officers hereafter appointed by the governor, except those whose terms of office are otherwise fixed by law, shall com-

mence on the first Wednesday of April, next after their appointment, and shall continue for the term of two years," etc. The act of 1889 referred to, provides that the governor "shall, immediately upon assuming his office, appoint an adjutant general," but the person who drafted the act of 1889 was doubtless ignorant of the existence of the above quoted act of 1885, and assumed that the adjutant general would immediately take office upon his appointment, which was probably the intention, as I have said, of the party who drafted the act in question, but the law as it exists and must be construed, is otherwise, the act of 1885 not being repealed by implication by the act of 1889, or by subsequent legislation.

[Note.—The appointment of Coleman was revoked and no commission issued.]

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE LIEUTENANT GOVERNOR.

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1. The lieutenant governor has no inherent power to appoint clerks or other employes of the senate, and such power is not incidental or necessary to the performance of his duties.

2. The legislative act of 1891 does not give to the president or president pro tempore any power or authority to select any of the officers or employes of the senate, and any such selection on the part of either, without the consent of the senate, is an usurpation of the rights of that body.

3. Under the act of 1891 the senate cannot employ more than four pages, nor more than one stenographer.

Attorney General's Office.
Denver, Colo., Jan. 17, 1893.

Hon. D. H. Nichols, Lieu't Governor and Pres't of the Senate.

Dear Sir—You have submitted for my consideration and official opinion the following questions, viz:

First—Does the legislative act, approved January 31, 1891, entitled "An Act to Amend General Sections Fifteen Hundred and Eighty, and to Repeal General Section Fifteen Hundred and Eighty-one, of the General Statutes of the State of Colorado," confer upon the president of the senate, power to appoint the "six other committee clerks," in said act provided for (as may be required) and, if so, can the president pro tempore exercise said power to the exclusion of the president?

Second—Can more than four pages be employed by the senate?

Third—Can the senate employ more than one stenographer?

Replying to your first interrogatory, I desire to say that, if the legislative enactment in question attempted to confer any such power on the president of the senate, it would, to that extent, be unconstitutional and void.

The executive and legislative departments of the state government are, under our constitution, separate and distinct. You, as lieutenant governor, belong to the executive branch of the government. You are not a member of the senate. You are president of the senate virtute officii and by reason of a provision of the constitution which makes the lieutenant governor the president of that body. Sec. 14 of article IV. of the constitution says: "The lieutenant governor shall be president of the senate and shall vote only when the senate is equally divided" * * *
It is held that when the presiding officer is not a member of the assembly over which he presides, but holds that office by constitutional provision in virtue of some other to which he is elected or appointed, he has and can have no other authority as such than that conferred upon him by the power from which he derives his appointment and, consequently, can merely preside, and only give the casting vote, where authority to do so is alone conferred. As president of the senate, by virtue of your office as lieutenant governor,

and by reason of the constitutional provision above quoted, you possess no inherent power to appoint clerks or other employes of the senate, and such power is not incidental or necessary to the performance of your duties. Neither can the legislature enlarge or abridge your authority. Of course, the presiding officer possesses certain functions not within the exceptions and qualifications above stated, but it is not necessary to this opinion to consider them. It is my opinion that the legislature cannot lodge the power in your hands to appoint clerks or other employes of the senate. If the legislature can confer the power upon you, in the matter of the six clerks referred to, then it would be tantamount to saying that it can strip the senate of its undoubted constitutional prerogative of selecting any or all of its employes and confer that power upon the president of the senate, the lieutenant governor, who is not a member of that body, and whose duties as such officer are restricted by the constitution. It is unnecessary to discuss the functions and duties of the president pro tempore, for they may be otherwise regulated by law or a rule of the senate where the president is not a member of the body over which he presides.

Sec. 27 of article V. of the constitution provides that "The general assembly shall prescribe by law the number, duties and compensation of the officers and employes of each house." * * * Nowhere in the constitution is it provided that the general assembly shall prescribe by law the manner of selection of these officers and employes. Sec. 1 of the legislative act in question, after enumerating the various officers and employes, provides that "All such officers and employes may be selected by the house employing them, either by ballot or resolution, and they shall perform the duties usually performed by like officers and employes, and such other duties as may be required of them by the proper members or officers." The language quoted is the last clause in said sec. 1, is sweeping in its character and goes to the manner of selection of all such officers and em-

ployes and includes the "six other committee clerks" mentioned in another part of said section. The legislative act of 1891 does not give to the president or president pro tempore any power or authority to select any of the officers or employes of the senate, and any such selection on the part of either, without the consent of the senate, is an usurpation of the rights of that body. Under the provisions of the legislative act in question the senate alone possesses the power to select such officers and employes in the manner and form prescribed by law. It is idle to say that the word "assigned" used in connection with the words "six other committee clerks" in the act of 1891, possesses the same signification as the word "selected" in another part of the same section. Nothing can be assigned until it exists. Assignment follows selection, although both acts may be embraced in one proceeding. The legislative intent appears too plain for any quibble.

In view of section 27 of article V. of the constitution and the act of 1891, it is my opinion that questions two and three should be decided in the negative.

Respectfully submitted,

EUGENE ENGLEY,
Attorney General.

IN RE REPORT OF ADJUTANT GENERAL TO THE GOVERNOR.

Section 3057, Mills' Annotated Statutes, requires the adjutant general to make a report biennially to the commander-in-chief. This report must be made as required by law. Extraneous matter cannot be printed.

Attorney General's Office,
Denver, Colo., Jan. 17, 1893.

Hon. Nelson O. McClees, Secretary of State:

Dear Sir—Section 3057, "Mills Annotated Statutes," requires the adjutant general to make a report biennially to the commander-in-chief, showing the actual situation and disposition of the military stores intrusted to his keeping. This report must be made as required by law, and must be complete in itself under the requirements of the statute, even though it requires more than twenty printed pages to show the situation and disposition of such military stores. All extraneous matter, not necessary to show the actual situation and disposition of such military stores, cannot under the law be printed.

EUGENE ENGLEY,
Attorney General.

IN RE LEGISLATIVE EXPENSES.

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1. The secretary of state is constituted by law the general purchasing agent in the matter of supplies or labor for the maintenance of the executive, legislative and judicial departments of state, and has the power to incur expenses therefor in accordance with law.

2. The fiscal year ends at midnight on the 30th of November of each and every year. All unexpended balances remaining to the credit of any appropriation, mentioned in the legislative general appropriation act of 1891, should, when all bills have been paid that were incurred under the provisions of that act and prior to the expiration of the fiscal year 1892, be transferred to the general fund.

Attorney General's Office,
Denver, Colo., Jan. 20, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In answer to questions submitted I desire to say: That the state government is composed

of three departments—executive, legislative and judicial. Each of these departments is distinct and separate from the others, as well in the matter of expenses as all other things, and the funds for their maintenance are always classified by distinct appropriations.

The secretary of state is constituted by law the general purchasing agent, in the matter of supplies or labor for the maintenance of these departments, and has the power to incur expenses therefor and in accordance with law.

Bills presented for supplies or labor performed, for any department of the state, and not covered by any contract, must be audited and allowed at the current price of such labor or supplies at the time such services were rendered or supplies furnished. The secretary of state must certify to the payment of any portion of the contingent expenses of the state government, properly incurred according to law, after the same has been presented to the auditor of state and by him allowed.

The fiscal year ends at midnight on the 30th of November of each and every year. All unexpended balances remaining to the credit of any appropriation mentioned in the legislative general appropriation act of 1891, should, when all bills have been paid that were incurred under the provisions of that act and prior to the expiration of the fiscal year 1892, be transferred to the general fund. If such balances have not been actually transferred, after all bills that were incurred prior to the expiration of the fiscal year 1892 have been paid, the law considers such balances as transferred so that the same cannot be used as moneys belonging to a fund where the appropriation has expired by limitation.

In the matter of the particular expense incurred by the secretary of state for the ninth general assembly, after the close of the fiscal year 1892, they must be paid out of the appropriation for the contingent and incidental expenses of the ninth gen-

eral assembly, as these expenses belong to the legislative department of the state government. I am of the opinion that, if these bills were properly incurred, you must audit the same to be certified by the secretary of state, and paid by the state treasurer out of any appropriation for the contingent and incidental expenses of the ninth general assembly.

EUGENE ENGLEY,
Attorney General.

IN RE VOUCHERS OF COMMITTEE TO EXAMINE BOOKS OF STATE TREASURER.

The statute makes it a condition precedent that the governor shall certify that the labor has been performed before the auditor is authorized to draw his warrant in favor of the persons performing such service.

Attorney General's Office,
Denver, Colo., Jan. 21, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In answer to your questions relative to the vouchers of W. H. Trask et al., a committee appointed by Governor Routt to examine books of the state treasurer, I desire to say:

That the law requires (section 1806, Mills' Ann. Stats.) that "The governor shall, upon the first day of April and October of each year, appoint a committee of three competent persons to examine the books and accounts of the state treasurer. Said committee shall make a report in writing, which shall be delivered to the secretary of state to be filed in his office. The said committee shall each receive as compensation for their services the sum of five dollars

per day for the time actually spent in said examination; and the auditor is hereby authorized to draw his warrant in favor of the persons performing such services, upon the certificate of the governor setting forth that the labor has been performed."

No itemized bills of the persons who did the work or certificate of the governor are attached to the vouchers in question, and I am informed by you that none are on file in your office. The vouchers, upon their face, do not show the number of days' time actually spent by the members of the committee in said examination. The statute makes it a condition pre cedent that the governor shall certify that the labor has been performed before the auditor is authorized to draw his warrant in favor of the persons performing such services. The governor has approved these vouchers without setting forth in a certificate that the labor has been performed. The auditor is bound to take notice of these precedent requirements of law. These vouchers not being in form or substance in conformity with the statute, the auditor should satisfy himself as to their justness before drawing his warrant in favor of the persons interested.

These bills, when paid, should be paid out of the general contingent fund of the executive department for the year 1892, unless the appropriation for this fund has been exhausted, or the unexpended balance remaining to the credit of this appropriation has been transferred to the general fund. Section 2 of the general appropriation act of 1892 must be given a reasonable construction, and not one that is forced and strained. It reads: "All unexpended balances remaining to the credit of any appropriation herein mentioned shall, when all bills have been paid, be transferred to the general fund." The words "when all bills have been paid" do not mean, nor is it the legislative intent, that the proper officer shall wait an unreasonable length of time after the close of the fiscal year before transferring such unexpended balances to the general fund, upon the bare possibility

that some one may have an unpresented bill against the general contingent fund of the fiscal year 1892; otherwise such balances would never be transferred. These expenses were legally incurred, if at all, in April and October, 1892, and the vouchers therefor were not made out until January 4, 1893, and approved by Governor Routt on January 6, 1893—some thirty-seven days having elapsed since the close of the fiscal year 1892. This shows want of due diligence on the part of some one. The unexpended balances having been transferred, in accordance with the statute, they belong to the general fund, and the state treasurer should not now make a retransferrance back to an old fund, the appropriation for which has expired by limitation, and to suit the convenience of persons who were at the time of such transferrance unknown claimants. These bills, if correct, may be paid out of appropriation made by the ninth general assembly to cover deficiencies of the fiscal year 1892.

EUGENE ENGLEY,
Attorney General.

IN RE SALARIES.

The act of January 18, 1893, making an appropriation of fifty thousand dollars, covers the salaries of all officers and employes of the executive and judicial departments of the state of Colorado for the fiscal year 1893, until said appropriation shall be exhausted, or the legislature, now in session, shall determine otherwise.

Attorney General's Office,
Denver, Colo., Feb. 3, 1893.

Hon. F. M. Goodykoontz, State Auditor:

Dear Sir—I am in receipt of your communication of the 1st inst., requesting an opinion from this office as to whether you have the authority in law, and if

so is it your duty thereunder, to draw warrants on the state treasury based upon certain vouchers in favor of Geo. M. McConaughy, deputy superintendent of insurance department, T. W. Monell, chief clerk of said department, Wm. A. Hamill, railroad commissioner and Thos. H. Bales, secretary to railroad commissioner, for salaries for such officers during the periods of time named in said vouchers. Within the purview of the appropriation act hereinafter referred to, the persons above named are considered as state officials belonging to the executive department of the state of Colorado. The vouchers are for salaries of officers or employes of said department during a certain period of the fiscal year, 1893.

On the 18th of January, 1893, an act of the legislature was approved, viz: "There is hereby appropriated out of any money in the treasury not otherwise appropriated, for the purpose of paying a part of the salaries of the officers and employes of the executive and judicial departments of the state of Colorado, for the fiscal year 1893, the sum of fifty thousand dollars." This is a blanket appropriation. It covers the salaries of all officers and employes of the executive and judicial departments of the state of Colorado for the fiscal year 1893, until said appropriation shall be exhausted, or the legislature, now in session, shall determine otherwise. This appropriation act is unlike the general appropriation act that is specific and descriptive as to particular sums and offices which by implication, exclude all others. Under the appropriation act in question, the only matter for you to determine is whether the person named in a voucher is an officer or employe of the executive or judicial departments, and that he is such an officer or employe as is known to and recognized by constitutional or statutory law. The persons named in these vouchers are so recognized and come within the language of this blanket appropriation act. If these vouchers are correct, warrants should issue. The reason Hamill was not paid during the fiscal years 1891-1892, lies in the fact that in the general appro-

priation act for those fiscal years, the same being specific and descriptive, no appropriation was made to pay the salary of the railroad commissioner and the expenses of his office. The act, however, that I am construing was passed for the purpose of bridging over a period of time reaching from the end of the fiscal year 1892 to the general appropriation law yet to be enacted for the fiscal years 1893-1894. No particular officer or employe of the executive or judicial departments is excluded in terms or by implication from the operation of this appropriation act now in question, and it is not for you or me to make distinctions against the clearly expressed legislative will. The warrants should issue and be paid.

This opinion goes only to the appropriation act approved January 18, 1893.

EUGENE ENGLEY,
Attorney General.

IN RE WORLD'S FAIR APPROPRIATION.

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1. The state constitution limits and confines all legislative appropriations to two classes, general and special.

2. The appropriation for the board of world's fair managers is a special appropriation and has no relation to the ordinary expenses of the executive, legislative and judicial departments of the state; interest on the public debt or for public schools.

3. Expenditures by the state government cannot legally exceed appropriations. Appropriations cannot legally exceed revenues. Appropriations made for carrying on and in support of all departments and institutions of the state must necessarily take precedence of special appropriations.

Attorney General's Office,
Denver, Colo., Feb. 6, 1893.

Hon. F. M. Goodykoontz, State Auditor:

Dear Sir—In answer to your inquiry of the 3rd inst. as to your duty in the premises relative to the

requisition of even date, made by the board of world's fair managers, per Davis H. Waite, governor and president, and O. C. French, secretary, for warrants in the sum of forty thousand dollars, under the legislative act approved February 1, 1893, appropriating one hundred thousand dollars for the use of said board, I desire to say:

The state constitution limits all legislative appropriations to two classes, general and special. The general appropriation bill must embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on public debt and for public schools. All other appropriations must be made by separate bills, each embracing but one subject.

The legislative enactment in question is a special appropriation, is intended as such, and has no relation to the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt or for public schools. The matters provided for in this special appropriation are not for the ordinary purposes of state government. The various departments and institutions of a state government are carried on and supported, principally by taxation. The state constitution has wisely limited the rate of taxation that can be levied for such purposes. The state revenue derived from taxation and other sources, is necessarily limited and may be reasonably estimated in approximate figures. Such estimates have been made by the last state auditor.

The expenditures by the state government cannot legally exceed appropriations. Appropriations cannot legally exceed revenues. Appropriations made for carrying on and in support of all departments and institutions of the state must necessarily take precedence of special appropriations like that in the legislative enactment in question, otherwise the general assembly could legislate away in special appropriations, all revenues and leave the state government inert and helpless. If warrants to the

amount of $40,000 should be issued under this requisition and thereafter the legislature should appropriate all of the revenue of the state for the payment of the ordinary expenses of the executive, legislative and judicial departments of state, interest on the public debt and for public schools, the warrants, if issued under the requisition, would become excess warrants for the reason that the ordinary expenses, etc., of the state must be provided for, and must take precedence, as hereinbefore stated. The fact that this special appropriation has been made first, in point of time, cuts no material figure.

Upon inquiry I have been informed by the house and senate committees on appropriations that the total amount appropriated and to be appropriated, including this appropriation, will not exceed the estimated revenues. While this may be, and probably is, true, it is nevertheless a fact that whatever is to be appropriated is, at present, largely a matter of conjecture. The legislature has the undoubted right to appropriate all revenues to the payment of the ordinary expenses of the three departments of state, interest on the public debt and for public schools, and thereby effectually kill this special appropriation. What the legislature may yet do I cannot with absolute certainty fortell. As the state auditor, you should estimate all of the probabilities as well as the facts, and determine the matter upon a reasonable basis. If you are satisfied that the total appropriations in the general appropriation bill yet to be passed, as well as the appropriations already made for partial payment of ordinary expenses, and the amount of the contemplated warrants ($40,000), will not exceed the probable revenue for the statutory fiscal period of time, then you will be justified in issuing the warrants; otherwise, not.

EUGENE ENGLEY,
Attorney General.

IN RE MEDICAL DEPARTMENT, UNIVERSITY OF COLORADO.

1. The University of Colorado is located by law at Boulder.

2. The law localized the site of the university at Boulder, but it was not the legislative intention to narrow the domain of knowledge, so that all instruction must be given within a circumscribed area of territory marked by the university site or the incorporated city of Boulder.

3. By authorizing the teaching of certain classes of the medical department, during certain and limited periods of the course, at Denver, the regents have violated no franchise or law, and are fully justified in pursuing such a plan.

Attorney General's Office.
Denver, Colo., Feb. 8, 1893.

Frank Jerome, Esq., Denver, Colo.

Dear Sir—On Dec. 26, 1892, you addressed to my predecessor in office the following communication, viz:

Denver, Colo., Dec. 26, 1892.

To the Hon. Joseph H. Maupin, Attorney General, Denver, Colo.

My Dear Sir—I desire to bring to your official attention the fact that the officers and regents of one of the institutions of this state are daily violating an important franchise.

By an act of the legislature of Colorado, approved Nov. 7, 1861, the University of Colorado was created and located at Boulder. The first section of article I of this act provides, "That said University shall be located at the city of Boulder." The declared purpose of this act was to establish a university, including the scientific, literary, theological, legal and medical departments of instruction.

All of these departments were to be a part of the institution and were manifestly, and by the inten-

tion of the legislature, to be located at Boulder. This action of the legislature in establishing a university and in locating it at Boulder was afterwards expressly approved by the makers of the constitution itself. Section 5 of article 8 provides:

"The following territorial institutions, to wit: The University of Colorado, * * * * shall upon the adoption of this constitution become institutions of the state of Colorado, and the management thereof subject to the control of the state, under such laws and regulations as the general assembly shall provide; and the location of said institutions, as well as all gifts, etc., etc., heretofore made to said several institutions, are hereby confirmed to the use and benefit of the same respectively."

The supreme court of this state, in construing this section, has said:

"The location of the agricultural college and certain other institutions having been fixed by the constitution, such location cannot be changed except by amendment of the constitution." (9 Colo., 626.)

In view of these facts, and for obvious reasons, it would seem to be perfectly plain that the intention of the lawmakers of this state was to locate this institution at Boulder. They chose that city because of its beautiful surroundings, and, anticipating the future, they saw a great and complete university, including all the various schools, existing at this place.

I am now informed and desire to call your attention to the fact, as the legal representative and counselor of the people of this state, that the regents of the University of Colorado, in violation of the franchise granted to this institution, and contrary to law, are now conducting, and have been for some time past, in the city of Denver, a medical college, designated the same as the medical college and department of the University of Colorado.

As a citizen of this commonweadth, I am interested in seeing this institution built up and main-

tained in its entirety at the place where its creators and founders designed it should be, and where the framers of the constitution of this state located it.

I am opposed to having it scattered all over the state, and think it a dangerous principle to allow the regents and officers of any state institution to decide where the institution may be located and when changed, according to their pleasure. I, therefore, wish to call your attention to this open and manifest violation of a valuable franchise, and ask, as a citizen of this commonwealth, that you take the proper legal steps to bring the matter into the courts so that the people may know whether the acts of the regents of the University of Colorado in locating their schools outside of Boulder, are legal or illegal.

Yours very truly,

FRANK JEROME.

No action was taken thereon by my predecessor for the reason that his term of office was near its close. Since my induction into office consideration of the communication has been requested, and in compliance therewith, opportunities have been given all parties interested that a full and fair presentation of the matter might be had.

You claim that the regents of the state university "are daily violating an important franchise." Furthermore, you assert that this office should be put in motion that the alleged violation may be corrected by means of appropriate proceedings. On the other hand, the regents deny any violation of law, and contend that by reason of the provisions of section 27, page 1012 of the general statutes, which constitute the attorney general the legal adviser of the president and regents of the university, and require him to institute and prosecute or defend all suits in behalf of the same, I am not in a position to take cognizance of this matter, and that I must defend any action, right or wrong, of the regents. In other words, the regents would circumscribe my official duty in the premises, within the compass of their volition.

Such a position is unsound in law and in morals. I cannot admit that the statute above referred to chloroforms this office to the extent that I must remain silent while the president and regents of the university are violating the law, and, when such violation is discovered, that I must defend it. I conceive it to be my official duty, when any officer of the state government or its various institutions, is violating the law, in his official capacity, and my attention is properly directed to it, to advise him in the premises, and, if necessary, to put in motion the appropriate legal proceedings to correct or stop it. An officer of the state is the servant of the whole people, and not the defender of the few against the many. I have constitutional duties to perform in the interests of the state, superior to any owing to the state university under a particular statute. If the regents "are daily violating an important franchise" it is my duty, as the attorney general of the state, to invoke the proper remedial writ. But are the regents violating an important franchise, or any law, as claimed?

It is asserted in the communication above set forth "that the regents of the university of Colorado, in violation to the franchise granted to this institution and contrary to law, are now conducting, and have been for some time past, in the city of Denver, a medical college, designating the same as the medical college and department of the university of Colorado." If this assertion be true, then said regents are guilty of an open and flagrant violation of law. In support of the claim certain statements have been presented, verbal and printed, as embodying the essential and material facts. These statements are not denied by the regents, who go so far as to affirm, in a large measure, their truth. The facts, in brief, are these: The university of Colorado is composed of and embraces several departments, one of which is the medical department. The course of instruction in the medical department is graded, and covers three years of nine months each. Instruction during the first year is given in Boulder (the location of the university), and

during the second and third years in Denver. Examinations for admission are held at both Boulder and Denver. All students of this department register in Boulder, where all graduating exercises are held and diplomas given. The studies are as follows, viz.:

First year studies (Boulder)—Anatomy, Physiology, Chemistry and Histology.

Second year studies (Denver)—Practice of Medicine, Clinical Medicine, Surgery, Clinical Surgery, Materia Medica, Therapeutics, Obstetrics, Nervous Diseases, Pathology, Railway Surgery, Othopedic Surgery, Physical Diagnosis, Hygiene, Bandaging and Minor Surgery.

Third year studies (Denver)—Practice of Medicine, Clinical Medicine, Surgery, Clinical Surgery, Therapeutics, Obstetrics, Pathology, Nervous and Mental Diseases, Medical Jurisprudence, Gynecology, the Diseases of Children, Ophthalmology, Otology, Lyrngology and Rhinology.

It appears that the medical department has a medical school building in Denver, which contains two large lecture rooms and several other rooms for clinical purposes. The building is situated at Seventeenth and Stout streets. It further appears that, for the purpose of clinical instruction, the students have access to the hospitals of Denver. It is also disclosed that the medical faculty is composed of a number of the leading physicians and surgeons of Denver. It is well not to confound the facts with the assertions of either side to this controversy, and in quoting from the medical school bulletin the assertion of the regents, I do so not for the purpose of giving it any weight, but rather to show the divergence between it and the assertion in said communication. The bulletin says: "The medical department of the university of Colorado has neither wholly nor in part been removed from Boulder to Denver. This department is still with the state university in Boulder, where all executive work is done, but owing to the scarcity of clinical material here, the regents have

authorized the faculty to give the instruction in medicine in Denver, during the second and third years of the course, until sufficient hospital advantages are secured in Boulder." It is clear, therefore, that while the claims of both sides of this controversy are diametrically opposed to each other, still there is a substantial agreement as to the facts. In the discussion of this question the main point to be kept in view is, whether the medical department of the university has been removed from Boulder to, or established in, Denver—or, at least, whether the admitted facts constitute such a partial removal as to make the acts of the regents in relation thereto illegal.

Messrs. Reuter, Hobson and their colleagues have ably and learnedly sought to convince me that the regents, by reason of the facts hereinbefore set forth, have violated the law. Mr. Reuter, in particular, traced the legislative history of the university from the time it was incorporated by an act of the territorial legislature in 1861, up to the present time, for the purpose of showing that its original location was fixed at Boulder, and that this act of the legislature in establishing the university and in locating it at that place was afterwards expressly approved by the makers of the state constitution, and that all legislative acts with reference to the matter since the adoption of the constitution fortify this position. I fully agree with Mr. Reuter that the university of Colorado is located by law at Boulder. In support of his position, that the facts alleged constitute a removal of the medical department, and that the regents have thereby violated the law, Mr. Reuter cites a decision of our supreme court (9 Colo., 626) and two decisions rendered in other states (5 Wend., 212; 17 Mich., 170). The Colorado decision cited was in answer to a senate resolution of inquiry as to whether the constitution prohibited the removal of either of the institutions referred to in section 5, article VIII. thereof, from their present location, or the consolidation of any two or more at the present location of any one, or at some place remote from the location of

either, and the answer of the supreme court can be reduced to the syllabus of the decision, without any loss to the reasoning of the court, when it is said: "The location of the agricultural college and certain other institutions, having been fixed by the constitution, such location cannot be changed except by amendment of the constitution." This is simply a naked construction of a constitutional provision, regardless of any facts that constitute or do not constitute a removal. It merely interpreted a constitu- facts. I apprehend that every case involving a dispute when presented in court rests upon particular facts and the law applicable thereto. And to support one side or the other of a controversy in court by citation of authorities, such cases, so cited, must be, to some extent, in point or analogous. The New York decision (The People vs. The Trustees of Geneva College, 5 Wend., 212) is not, in my opinion, in point, and I fail to see the analogy upon the facts. The facts in the New York case appear to be that, for the period of three years previous to the filing of the information in the nature of a quo warranto, Geneva College had used and employed liberties and franchises, enumerated, and had done so by virtue of a charter of incorporation granted to that college by the regents of the university of the state of New York, and that the trustees of the college, located in the village of Geneva, established a medical faculty in the city of New York, called "The Rutgers Medical Faculty of Geneva College," and appointed professors of medicine, surgery and anatomy, residing there, to have the care of the education and government of students in the city of New York; and claimed the right of granting the degree of doctor of medicine, and of granting and issuing diplomas of such degree to all persons of lawful age, who would appear to the trustees to have pursued their studies and attended the lectures prescribed by law, and who should appear to them to have distinguished themselves by their proficiency in medicine, surgery or anatomy, and to be worthy of such degree, wheresoever such persons

might reside, and whether they had been sent to or admitted into the college or not. The questions presented for decision in that case were:

1. Whether the appointment by defendants of a medical faculty in the city of New York for the purpose of instruction in medicine was a franchise?

2. Whether Geneva College had the power to exercise that franchise? And if not,

3. Whether the remedy sought was the appropriate remedy?

The dissimilarity of the facts in the New York case from those in the controversy concerning the medical department of the university of Colorado, appear, it seems to me, at a glance. Geneva College, located at the village of Geneva, in the western part of the state of New York, claimed the right and did establish a medical school, as a branch of that college, in the city of New York. All that Geneva College did after the establishment of the medical school was to grant degrees and issue diplomas and, except in these two particulars, the medical school was practically independent of and segregated from the college. Geneva College was attempting to exercise powers foreign to the grant contained in the franchise from the university of New York. The facts are different in so far as the medical department of the university of Colorado is concerned. The conclusion seems irresistable to me that this department is still with the university at Boulder, where all executive work is done, but owing to the scarcity of clinical material there, the regents have authorized the faculty to give the instruction in medicine in Denver during the second and third years of the course until sufficient hospital advantages are secured at Boulder. All students are registered at Boulder, and the entire first year's instruction given there. At stated periods during the year all students of the department meet at the state university and participate in important exercises. Graduating exercises are held at the university buildings in Boulder, and no degrees are con-

ferred at any other place. To constitute a new location there must be an abandonment of the old, and I am not aware that a body can occupy two places at one and the same time.

The Michigan case (The People ex rel. The Regents of the University vs. The Auditor General, 17 Mich., 170) does not, in my opinion, support the position taken that the regents of the university of Colorado have, upon the admitted facts, violated any franchise or law. This was an application for a mandamus, by the board of regents of the Michigan university, to compel the auditor general to pay the sum of $3,000.00, which they had appropriated by resolution, to establish a school of homeopathy, the legislature having provided for the payment, to the regents of the university, of a tax of one-twentieth of a mill on the dollar, upon all the taxable property in the state, "Provided, That the regents of the university shall carry into effect the law which provides that there shall always be at least one professor of homeopathy in the department of medicine, and appoint said professor at the same salary as the other professors in this department." The material part of the resolution was "that there be organized in the department of medicine a school to be called the Michigan school of homeopathy, to be located at such place (suitable in the opinion of the board of regents) other than Ann Arbor, in the state of Michigan, as shall pledge to the board of regents by June 20 next the greatest amount for buildings and endowment of said school." The auditor general refused to issue his warrant on the state treasurer for the payment of any of the money raised by said tax, on the ground that the resolution of the regents did not constitute performance of the condition upon which the aid was granted to the university; and insisting that the condition required the appointment of such professor in the existing medical department of the university at Ann Arbor, and not elsewhere. The writ was not granted. The law under which the regents sought to obtain this money was enacted in 1867. The

university was located at Ann Arbor by act of the legislature in 1837. The law of 1851 declares that the university shall consist of at least three departments: First, a department of literature, science and arts; second, a department of law; third, a department of medicine; fourth, such other departments as the regents shall deem necessary. Prior to the act of 1867 (above referred to) the law of 1855 provided, "that there shall be at least one professor of homeopathy in the department of medicine."

I cannot discover any analogy between the facts in the Michigan case and the acts of the regents of the university of Colorado, that raise a presumption or accelerate a conclusion that the regents of our state university are "daily violating an important franchise." Each university consists of different departments, among which is a department of medicine. The word university properly applies to a union in one whole of many parts, as universe, comprehending parts in one, a collection or union of a number of colleges in one corporate body. It is immaterial whether the divisions or parts are called "departments" or "colleges." In the Michigan case the "department of medicine" was a part of the "university," and as such part it was located at Ann Arbor. The university of Colorado is located at Boulder and its department of medicine is, I contend, located at the same place, in fact, as well as in contemplation of law. In the Michigan case the regents attempted by resolution, to organize in the department of medicine a school to be called "The Michigan School of Homeopathy," to be located at such place (suitable in the opinion of the board of regents) other than Ann Arbor, while the language of the legislative act could only mean that a new professor was to be added to the professorships already existing in the "Department of Medicine" in the university of Ann Arbor. It is clear that the regents had no such controlling power outside the act of the legislature as would justify them in establishing a school of homeopathy in a place separate and apart from the place where

the "Department of Medicine" in the university was established, to wit, at Ann Arbor. The controversy grew out of the conflict between two hostile schools or theories of medicine—big and minute doses, and their effects—and the regents, desiring peace and tranquility at Ann Arbor, were attempting to keep separate and apart, the ever and inter-ferocious combatants of the two schools by locating a school of homeopathy, as a part of the department of medicine, at some other place than Ann Arbor.

The facts concerning the medical department of the Colorado university are vastly different. In this case there is but one medical school, which is co-extensive with the medical department. There has been no attempt, so far as the acts of the regents in the premises are concerned, to establish a medical school at Denver, as a branch of, or segregate it from the "Medical Department" of the university. Because no clinical advantages can be secured at Boulder, the regents have authorized the teaching of the classes, during certain and limited periods of the course, at Denver. Unless this can be done, the regents will be compelled to close the medical department of the university as no clinical advantages can be had at Boulder. The law is supposed to be founded in reason and to effectuate certain purposes for the common good. The law localized the site of the university at Boulder, but it did not, in my opinion, trace a dead-line around the university grounds with a legislative intention to narrow the domain of knowledge, so that all instruction must be given within a circumscribed area of territory marked by the university site or the incorporated city of Boulder. To say that classes cannot go outside of the situs of the university to study botany, geology, medicine, etc., in the practical application of principles to anything that is corporeal, would be, in my opinion, tantamount to placing a limit on knowledge, reducing a particular science to an absurdity and making ignorance its chief mentor. It is doubtless true that there are one or more private schools in Denver where a

medical education may be obtained, and by reason thereof the medical department of the university might, in the opinion of some, be dispensed with. But I cannot subscribe to any proposition that private schools should take the place of any departments of, and thereby cripple, the university. The genius of free education holds in its open hands the life and perpetuity of this republic. The growth and excellence of its university will measure the civilization of Colorado and the liberal and progressive spirit of its lawmakers and citizens. The university of Colorado should be maintained, protected, and its interests advanced at all hazards. The legislature should appropriate large sums for its support, and thereby extend and widen its influence. If this institution of learning shall have been fostered as the interests of progress demand, the end of the next quarter of a century will behold it unexcelled even by Ann Arbor. The present officers and faculties are not, I am informed, inferior to those of any other university in the country, and they seem to be impelled with a laudable desire to enlarge the usefulness of the institution to the end that it may reflect credit upon the state and be placed in the forefront of the seats of learning.

Upon due and, as I consider, careful consideration of this matter, I have arrived at the conclusion that the regents have violated no franchise or law, and that they are fully justified in the course they have pursued.

This office approves of the regents' acts, and will not interfere to strike an unwarrantable blow at the university of Colorado.

Respectfully submitted,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTIVE POWER OF THE GOVERNOR.

The constitution gives the governor the power to remove a member of the state board of agriculture for incompetency, neglect of duty, or malfeasance in office.

Attorney General's Office,
Denver, Colo., Feb. 10, 1893.

To His Excellency, Davis H. Waite, Governor of Colorado:

Dear Sir—In answer to your inquiry of even date herewith, as to whether the governor can remove a member of the state board of agriculture, I have the honor to transmit the following opinion:

There are two classes of offices which the governor has the power to fill by appointment, when such power is conferred or delegated.

1. Offices established by the constitution.

2. Offices created by statute.

There are two ways by which such appointments can be made.

1. When the office is established by the constitution, the governor "shall nominate, and by and with the consent of the senate appoint."

2. When the office is created by statute the governor must appoint without the consent of the senate, unless the statute expressly requires such consent.

There are three ways by which power is conferred upon or delegated to the governor to remove an incumbent from office.

1. By the constitution.

2. By a statute vesting a specific power or a general power limited by exceptions.

3. By a statute vesting the power in relation to a particular office.

The office of member of the state board of agriculture is not established by the constitution, but is created by statute.

In a majority of statutes creating offices to be filled by appointment by the governor, either with or without the consent of the senate, the power of removal is expressly delegated to the governor. In the legislative act creating the state board of agriculture, whether omitted intentionally or not, no power of removal is conferred upon the governor; therefore, it will be necessary to discover a general power of removal delegated to the governor in some other statute or resort to the constitution. On March 23, 1885, a legislative act was approved "to fix and regulate the term of office of all state officers appointed by the governor, except those whose terms of office are otherwise fixed by law," in which statute there is a general power of removal vested in the governor, but limited by an exception. The statute creating the state board of agriculture falls within this exception.

But the state constitution confers ample power upon the governor in the premises. Section 6 of article IV. thereof says: The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by the constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty or malfeasance in office." The language of the constitutional provision last quoted undoubtedly confers on you the power to remove a member of the state board of agriculture for incompetency, neglect of duty or malfeasance in office. Some constitutional provisions necessitate the enactment of statutory laws so that powers delegated may be given operative force. This is not a case of that

kind. In this case the power is clear—the instrument certain—the governor.

EUGENE ENGLEY,
Attorney General.

IN RE REPORT OF TREASURER OF STATE BOARD OF MEDICAL EXAMINERS.

Under the law the treasurer of the state board of medical examiners has no legal right to use the fees received to pay expenses, but he must pay the money into the state treasury. All necessary expenses of said board are paid out of the funds of the state treasury not otherwise appropriated, upon vouchers duly audited by the state auditor.

Attorney General's Office.
Denver, Colo., Feb. 13, 1893.

Hon. Albert Nance, State Treasurer:

Dear Sir—I am in receipt of your communication of recent date, to which is annexed the report of the treasurer of the state board of medical examiners, wherein you request an opinion from this office as to the legal power of said treasurer to disburse moneys received by said board as statutory fees, and, further, whether you can require the treasurer of said board to report and pay into the state treasury such fees.

The treasurer of said board claims that he is under no legal obligation to report receipts and pay the same into the state treasury. The report that he has condescended to make, and seemingly as a mere act of kindness on his part, shows, upon its face, that the receipts from January 3, 1889, to January 3, 1893, inclusive, have been $3,950.00, and the disbursements $3,857.90. The treasurer of the board says: "I have in my hands said balance of $92.10, subject to the or-

ders of the board, and my accounts, receipts and disbursements have been properly audited by the state board of medical examiners."

It seems that during a period of four years the treasurer of said board has been receiving certain statutory fees, to a large amount, without reporting or turning the same into the state treasury, has expended the same, except an insignificant balance, and now denies any legal right on the part of the state treasurer to demand and compel an accounting.

If the claim of the treasurer of that board is to be taken seriously, then his acts of commission and omission indicate an assumption of autocratic power little in harmony with the constitution and laws of this commonwealth. The acts complained of by the state treasurer are, in themselves, if committed by any appointee of the state government, sufficient to warrant his instant removal from office. It appears that during the last two state administrations the treasurer of a state board created by law, and the duties and powers of which are defined and controlled by law, has failed to pay over any and all receipts, and now, when called upon for a show-down by the proper official of the state government, denies the existence of any power in a constitutional office to compel obedience to the plain mandates of law.

The state treasurer is a constitutional officer. He is the lawful custodian of all state moneys. Under the provisions of section 33 of article V. of the state constitution, no money can be paid out of the state treasury except on warrant drawn by the proper officer (the auditor). Section 3559 (Mills' Ann. Stats.) of the legislative act creating the board of medical examiners, says: "All fees received by the treasurer of said board of examiners, and all fines collected by any officer of the law, under this act, shall be paid into the state treasury; and all necessary expenses of the board shall be paid for out of the funds of the state treasury not otherwise appropriated; but no fee shall be required or accepted by any member of the board for services." The law quoted is plain, cold

and determinate. The treasurer of said board is supposed to know the law, and he cannot plead want of time, as he has had, according to his own showing, four years to become acquainted with it, and marked by continuous violations. Under the law in question the treasurer of the board has no legal right to use the said receipts to pay expenses, but he must pay the money into the state treasury. The law is plain that "all necessary expenses of the board shall be paid for out of the funds of the state treasury not otherwise appropriated." This can only be done by filing itemized vouchers with the state auditor, who will in all proper cases issue his warrant on the state treasurer. The diverting of state moneys, and the non-payment of the same into the state treasury, cannot be tolerated under this state administration.

The claim by the treasurer of that board that he is not required by law to make a report of fees received, and that no time is fixed for paying over moneys to the state treasurer, and, therefore, there is no limit as to time, is too bold an assumption to be recognized by this office. There must, necessarily, be some kind of a report, showing the amount of moneys received. Where no specific time is fixed by statute the law contemplates that the moneys shall be paid to the state treasurer when received, or within a reasonable time thereafter—time being measured by distance and reasonable opportunities. It is not to be presumed that the state of Colorado must wait for its money until an official is about to die, and then to hurriedly arm itself with a writ of ne exeat to prevent his departure, or chase his administrator around the records of a probate court to collect it.

According to his own showing the treasurer of the state board of medical examiners is indebted to the state treasury in the sum of $3,950.00, and it is your duty to compel him to turn it in.

This opinion applies to all boards and departments of state where similar conditions exist.

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF CERTIFICATES OF STOCK

1. A construction of tax laws is not to be adopted that would subject the same property to be twice charged for the same tax, unless it is required by the express words of the statute, or by necessary implication.

2. Under the act of 1891 certificates of stock of corporations are exempt from taxation and cannot be assessed by the county assessor.

Attorney General's Office,
Denver, Colo., Feb. 21, 1893.

Hon. M. B. Irvine, County Assessor, Colorado Springs, Colo.:

Sir—Referring to your letter of 31st ult., regarding the taxation of certificates of stock issued by corporations, I think your county attorney is correct in his opinion.

There can be no doubt that the legislature could create this tax. It did so by section 2838, general statutes. But in the act of 1891 (session laws, p. 295), in directing the assessors what to place on their lists, it omitted this class of property. The two acts—or sections—being substantially the same, with the difference noted, the legislature must be presumed to have intended to omit certificates of stock from the list of taxable property.

The taxing power belongs exclusively to the legislative department of the government—it includes the power to direct the methods of assessment and the classes of property it intends to assess—controlled only by the provisions of the constitution in regard to the matter.

It manifestly did not intend that assessors should have the power to assess these stocks for the reason stated by your county attorney, and the further reason that to tax the real and personal property of a

corporation, and at the same time to tax the certificates which are its representatives, would, in a sense, be to impose a duplicate taxation. (Cooley on Taxation, 2d Ed., p. 225.)

A construction of tax laws is not to be adopted that would subject the same property to be twice charged for the same tax, unless it is required by the express words of the statute or by necessary implication. (Id., 227 and 234.)

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE "HOUSE BILL NO. 178."

In view of the state constitution, the legislative act of 1891, and the contract of The Smith-Brooks Printing Co., there should be a provision in "House Bill 178" to print the proposed compiled laws under a special contract.

Attorney General's Office,
Denver, Colo., March 3, 1893.

Hon. E. A. Ammons, Speaker of the House of Representatives:

Dear Sir—In view of section 29 of article V. of the state constitution, the legislative act entitled "Public Printing" (page 275, session laws, 1891), and the contract now existing between the state and The Smith-Brooks Printing Company, I am of the opinion that, to be on the safe side, there should be a provision in "House Bill No. 178" to print the proposed compiled laws under a special contract. The legislative intention sought to be expressed in the act of 1891 was, undoubtedly, to comply with said section

of the constitution, and also to cover all matters mentioned therein relative to printing, etc., except the "printing and binding and distributing of the laws," but if such was the legislative intention it was very awkwardly expressed in language and leaves to the judicial mind the resolvement of a doubt.

Permit me to say that the purpose of the bill is a good one, as our statutes as now printed are a medley, and the proposed compilation will bring order out of chaos and be of great benefit to the people of this progressive commonwealth.

EUGENE ENGLEY,
Attorney General.

IN RE FIRE AND POLICE BOARD AND THE BOARD OF PUBLIC WORKS.

The fire and police board and the board of public works should, before entering upon the duties of their respective offices, take and subscribe before a judge of a court of record, sitting in the city of Denver, and file the same in the office of the city clerk, an oath in the form prescribed in section 1, article V., of the legislative act of 1885, and the members of the fire and police board should, within said time, give official bonds to be approved by said clerk. In the matter of bonds of board of public works there seems to be a legislative omission of any specific requirement, and it is doubtful whether section 9, of article V., of the act of 1885 applies. No law requires that the official oaths and bonds of the two boards should be filed with the secretary of state.

Attorney General's Office,
Denver, Colo., March 6, 1893.

Hon. N. O. McClees, Secretary of State:

Dear Sir—In response to your inquiry of the 3rd inst. relative to the oaths of office and official bonds of the board of public works and fire and police board of the city of Denver, I have to say:

The city of Denver was incorporated under a special charter prior to the adoption of the constitution. No action has been taken in pursuance of section 14, article 14, of that instrument, abandoning the charter and reincorporating under the general laws authorized by section 13 of the same article. In respect to said sections 13 and 14, they do not prohibit the passing of a special act to amend a city charter, granted by a territorial act passed prior to the adoption of the constitution, where such city has not elected to become subject to, and to be governed by, the general law relating to corporations. By sections 13-14, article 14, of the constitution, already referred to, the whole subject of towns and cities is, with two slight limitations, relegated to the legislature. Municipal corporations are creatures of legislative enactment, and, in the absence of inhibitory or limiting constitutional provisions, the general assembly has plenary power to adopt such measures as shall, in its judgment, be most conducive to their efficiency and usefulness. The special charter of the city of Denver has been preserved and from time to time amended by the legislature. The legislative act amending the city charter by the creation of the two boards above referred to is clearly constitutional. The boards in question are departments or branches of the city government. They are permanent in their nature, being charged with certain continuous duties and vested with certain perpetual powers. These duties relate exclusively to municipal affairs, and are essentially functions of the municipal government. The legislature had the undoubted right, and still retains the privilege of enacting such local or special laws with reference to the city of Denver as shall be deemed, in their judgment, advisable, provided the same may be fairly considered as revisory or amendatory of the charter existing prior to the constitution, and such local or special laws need not be submitted to the legal voters of the city for their approval to give them force and effect. The statute creating and regulating the two boards was a legiti-

mate exercise of the legislative privilege and does the matter of oaths of office and official bonds must not fall within the constitutional inhibition of certain special legislation. The two boards being legally existing departments of the city government, the matter of oaths of office and official bonds must be determined by statutory regulations, if any.

It is provided in section 1, article V, of the legislative act of March, 1885, that every officer elected or appointed shall file his oath of office in the office of the city clerk. This section has not been repealed or amended by any subsequent legislation.

Section 1 of the legislative act of March 4, 1891, provides that before entering upon their duties each member of the fire and police board shall take and subscribe the oath now provided for the mayor and other officers of the city, which shall be filed with the city clerk. It further provides in the same sentence that each member of the board shall give a bond to be approved by the city clerk, but does not, in so many words, state where it shall be filed.

The legislative act of March 11, 1889, creating the board of public works, and the act of April 11, 1891, amendatory thereof, make no specific provision for the oath and bond of members of the board of public works, and it is evident that the legislature considered the statutory law of 1885, in its general terms, sufficient in the matter of official oaths.

It is unnecessary to discuss the applicability of section 3357 of the general statutes to the subject matter in question as the charter of Denver is not affected by said section.

Section 9, article 12, of the constitution, cannot be interpreted so as to touch, in the remotest degree, the provisions of the city charter in the matter of oaths and bonds.

Construing together section 1, article V, of the act of 1885, and section 1, of the act of March 4, 1891, as well as the legislative intention, as contemplated in section 4, of the act of April 11, 1891, I am of the

opinion that the recent appointees of the fire and police board and the board of public works should, before entering upon the duties of their respective offices, take and subscribe before a judge of a court of record, sitting in the city of Denver, and file the same in the office of the city clerk, an oath, in the form prescribed in section 1, article V, of the legislative act of 1885, and that the members of the fire and police board should within said time, give official bonds to be approved by said clerk. In the matter of bonds of the board of public works, there seems to be a legislative omission of any specific requirement and it is doubtful whether section 9, of article V, of the act of 1885, applies.

No law requires that the official oaths and bonds of the two boards should be filed with the secretary of state. It is your duty to issue at once commissions to the recent appointees to said boards, as the creation of said boards and the appointments thereto are legal, and said appointees are entitled to the possession of said offices upon the expiration of the terms of the present incumbents.

EUGENE ENGLEY,
Attorney General.

IN RE RIGHT OF INSURANCE DEPARTMENT TO PAY SALARIES TO EMPLOYES.

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1. The act of 1893, as amended, requires that all moneys received by the superintendent of insurance shall be paid into the state treasury as an insurance fund, and shall be used for the purpose of defraying the expenses of the insurance department.

2. The law contemplates the payment of all necessary and legitimate expenses incurred within proper limits, and if the deputy superintendent of insurance cannot do all the work of the office, the act is broad enough, in terms, to allow the employment of a clerk and the payment to him of a reasonable salary.

Attorney General's Office.
Denver, Colo., March 7, 1893.

Hon. Albert Nance, State Treasurer:

Dear Sir—In reply to your inquiry of recent date, the same being accompanied with the communication of Col. M. B. Carpenter, touching the right of the insurance department to pay salaries to employes by issuing warrants, approved by the auditor, on the insurance fund in the hands of the state treasurer, the said communication making but one exception, and that being in favor of the "deputy of insurance," I have this to say:

The insurance department is a separate and distinct department. The deputy of insurance is a statutory officer, and in the insurance department stands in the shoes of his principal, the auditor of state, who is designated as the ex officio superintendent of insurance, the said deputy being possessed of all the powers and being authorized by law to perform all the duties attached to the office of said superintendent.

The legislative act of 1883, as amended, requires that all moneys received by the superintendent of insurance shall be paid into the state treasury for an insurance fund, and shall be used for the purpose of defraying the expenses of the insurance department. The said act further provides that all expenses of the insurance department, including salaries, shall be paid by the state treasurer out of moneys in his hands, to be known as the insurance fund, on warrants drawn upon such fund by the deputy superintendent of insurance, and approved by the state auditor. The language of the provisions referred to is ungrammatical, and the provisions themselves are loosely and awkwardly constructed. The legislative intention must be sought and, if possible, discovered in a mass of almost incoherent and illogical sentences.

It was not, in my opinion, the legislative intention to cast upon the deputy all of the clerical work

in the insurance office. The law must be given its reasonable scope so as to effectuate its manifest purpose in the proper conduct of the office, and that the work therein might not be delayed to the injury of the department and the state. One thing is clear, that all expenses of the department shall be paid out of its receipts and in a certain way. All the necessary expenses in the maintenance of the office are not specified, but it is evident that the law contemplates the payment of all necessary and legitimate expenses incurred within proper limits. If the deputy cannot do all the work of the office, the legislative act in question is broad enough, in terms, to allow the employment of a clerk and the payment to him of a reasonable salary. In fact, the word "salaries" is used in the plural sense in direct relation to "expenses," and the intention of the legislature must not be narrowed so as to defeat the purpose of the law and cripple the office. This opinion goes to the extent of necessary employment and reasonable salaries. The unnecessary employment of clerical help in the office is without authority of law, and any warrants therefor should not be paid, and if paid, can be recovered, the auditor and deputy being also responsible under their official bonds. The act of 1883, as amended, by reason of the loose expressions therein, is an inducement to corruption and a waste of the department fund, but the use of the fund for other than the absolutely necessary expenses incurred, as herein outlined, will be at the peril of the auditor and deputy.

The opinion heretofore rendered relative to extra compensation goes only to the payment of double compensation to employes in the insurance department and not to the payment of services of necessary employes.

EUGENE ENGLEY,
Attorney General.

IN RE PURCHASE OF SUPREME COURT REPORTS.

Under the provisions of section 1782, Mills' Annotated Statutes, the secretary of state is granted a general power to purchase all or any of the reports necessary for the use of the supreme court and the executive department of state, but for none others.

Attorney General's Office,
Denver, Colo., March 8, 1893.

Hon. N. O. McClees, Secretary of State:

Dear Sir—Under date of the 4th inst. you inquire of this office as to whether the secretary of state has authority to purchase from the publishers any volume of the Colorado supreme court reports that he may desire for distribution.

Replying to the same, I desire to say that section 996, Mills' Ann. Stats., vested in the secretary of state authority to purchase for the use of the state 150 copies of said reports, on the publication of each volume, at the price named in the printing contract, not exceeding $4.00 per volume, the same to be distributed as in said section required—the surplus copies, if any, to be deposited in the state library. The authority so vested related to volumes thereafter published and not to preceding volumes. This was the act of 1879.

The act of 1891 gave the secretary of state authority to purchase 300 copies of the reports thereafter published, to be distributed as in section 7 of that act, provided (session laws 1891, page 371, section 9), the surplus, if any, to be deposited in the state library. This act also does not apply to volumes published theretofore.

On April 13, 1891, an act was approved relative to the publication of volumes 1, 2, 3 and 4 of the re-

ports, which empowered the secretary of state to supply each district and county judge in the state, who had not theretofore received the same, with one copy of each of said volumes.

The power vested in the secretary of state to purchase said reports, by reason of the law above referred to, seems to be circumscribed by a limitation as to the number of volumes.

If the 150 and 300 volumes, respectively, have not been purchased to the full number, then you have the power to buy to the extent of the limitation, for the purpose in each section enumerated; also, to purchase the first four volumes for each district and county judge who had not theretofore received them.

Under the provisions of section 1782, Mills' Ann. Stats., I think you have the general power to purchase all or any of the reports necessary for the use of the supreme court and the executive department of state, but for none others.

EUGENE ENGLEY,
Attorney General.

IN RE BRANDS.

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1. The secretary of state cannot record a brand made by the connecting of any letter, figure or character to a brand heretofore recorded.

2. The brands, when recorded, become archives, and must not be altered in any respect.

Attorney General's Office,
Denver, Colo., March 10, 1893.

Hon. N. O. McClees, Secretary of State:

Sir—Referring to the letter of Mr. W. N. Lewis, your brand clerk, of the 8th inst., I have to say:

The act of March 22, 1877 (section 2586, page 857, G. L., Mills' Ann. Stats., section 4250, page 2198), is the only part of the statute relating to the adoption and recording of ear marks. It gives some directions as to how they shall be made and provides that "no county clerk or recorder shall record the same ear marks to more than one person." It also provides that the ear marks shall be taken in evidence in connection with the owner's recorded brand, in all suits at law or in equity in which the title to stock is involved.

The same act (section 2580, page 855, G. L.) provides that brands shall be recorded by the county clerk.

The act of 1885 (page 332) directs that all persons using any brand or brands on or before August 1, 1885, shall file a copy of the same with the secretary of state, and that after last mentioned date any person adopting a brand shall file a fac simile of the brand with the same officer, who, thereupon, shall record the same, and then the owner shall procure a certified copy of the brand to be recorded in the proper county or counties.

The act of 1885 differs from the act of 1877 in reference to brands, by providing a record to be made in the secretary of state's office.

The act of 1887 (page 427) amends section 4 of the act of 1885, last mentioned, by raising the fee of the secretary of state from fifty cents to one dollar, and also adds, "that the secretary of state shall not record any brand made by the connecting of any letter, figure, sign or character to a brand heretofore recorded."

By both acts a fac simile of the brand must be filed with the secretary of state. A fac simile is defined as a "close imitation."

These acts and parts of acts set forth the law to be applied in the premises.

Therefore, in response to your first question, I find that the secretary of state cannot record a brand made by the connecting of any letter, figure or character to a brand heretofore recorded.

The brands, when recorded by you, become archives, and must not be altered by you in any respect.

And as to your second question, the same rule applies. You cannot alter the record—and further, the brands described in this question are not fac similes of each other, and one could not stand for the other in any certificate, transcript or copy.

If the owner of a brand desires to file with you an additional brand, with or without an ear mark, there is nothing in the statute that forbids it. It is common for one person to own several brands and ear marks by purchase, and there is no reason why his ownership of the same could not be initiated by adoption as well as by purchase. But in all cases where a person desires to record a new brand, or one different from one already recorded in his name, he must file with you and pay the fees the same as if he had never owned any brand.

EUGENE ENGLEY,
Attorney General.

IN RE APPROPRIATIONS FOR INTERNAL IMPROVEMENTS.

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1. The internal improvement permanent fund and the internal improvement income fund are, for all practical purposes, one and the same.

2. It has been the custom when a balance was left to the credit of the board of construction, after completing a public work, to certify the fact to the state treasurer, who has placed the balance to the credit of the fund from which it was originally appropriated.

Attorney General's Office,
Denver, Colo., March 15, 1893.

To the Hon. John W. Lowell, Chairman House Committee on Finance, Ways and Means:

Sir—Referring to your letter of the 11th inst., concerning the appropriations for internal improvements, I submit the following:

The internal improvement fund of this state was provided for by an act of congress approved March 3, 1875—the "Enabling Act."

Mills' Ann. Stats., 1, p. 93.

By the act of 1887 (Mills' Ann. Stats., p. 1954, section 3634), the moneys arising from the sale of public lands are directed to be credited to the permanent fund to which the land sold belonged, and all interest on purchase money, and all rents from leased lands, to be credited to the income fund to which the land belonged.

There has been no reason for the division of these two funds. Practically they are the same, and, since said act, have always been so treated by the legislature and the public officers to whom they were confided for distribution.

It has been the custom heretofore, when a balance was left to the credit of the board of construction, after completing a public work, to certify the fact to the state treasurer, who has placed the balance to the credit of the fund from which it was originally appropriated.

By the acts of appropriation, in some cases, payment for the preliminary survey, exploration, etc., to be made by the state engineer, was provided to be made out of the gross sum appropriated—in other cases, no direction was given as to what fund was subject to this expense; but it is evident that the legislature intended that in all cases, the cost of survey and location should be included in the general cost of construction.

In that view, it makes no difference, as far as the balance is concerned, whether the board of construction went on and built the work, or decided to abandon it on the recommendation of the state engineer. After paying for the preliminary surveys, in the latter case, what remained in the hands of the board of construction was a balance, however large, and should be treated in the same manner as the balance left in a case where the work was actually constructed.

I therefore find that the balance of the funds appropriated by the legislature to the construction of the works mentioned in your letter ought to be certified by the several boards of construction to the treasurer, and that he should at once credit the internal improvement fund or the internal improvement interest fund with the same, and close the accounts which have heretofore been kept with each of the said works of construction.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STOCK INSPECTION.

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1. The stock inspection fund is derived from a tax each year of one-fifteenth of one mill levied and assessed upon each and every dollar of the assessed value of all taxable property in the state.

2. The inspection fund is used for the payment of cattle inspectors' bills, approved by the board of inspection commissioners, and warrants drawn thereon by the auditor.

3. Proceeds of the sale of estrays go into the school fund of the particular school district, or the general school fund of the county, as the case may be.

4. The state has nothing to do officially with the financial affairs of any cattle associations, and none such associations can be compelled to answer or report at the executive chamber.

5. The statute does not specifically provide that inspection commissioners shall report to the governor; but if any appointee of the governor fails to make a report when requested to do so, such failure or refusal would be cause for removal.

Attorney General's Office,
Denver, Colo., March 16, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Dear Sir—I am in receipt of your communication of recent date, wherein you propound the following interrogatories, and desire information:

"1. From what sources are derived the state stock inspection fund?"

"2. All objects for which the inspection commissioners may draw against the stock inspection fund?"

"3. By what law the cattle inspectors receive the avails of the sale of estray cattle?"

"4. If the inspection commissioners have such a fund, can they be required to make a statement thereof, showing receipts and disbursements, and what shall be the disposition of any balances in their hands (upon the expiration of their terms of office)?"

In answer I have to say:

1. The inspection fund is derived from a tax each year of one-fifteenth of one mill levied and assessed upon each and every dollar of the assessed value of all taxable property in the state; said tax to be assessed and collected in the same manner and at the same time as is now or may be prescribed by law for the assessment and collection of state revenues.

2. The inspection fund is used for the payment of cattle inspectors upon bills approved by the board of inspection commissioners and warrants drawn thereon by the auditor.

3. Proceeds of the sale of estrays go into the school fund of the particular school district, or the general school fund of the county, as the case may be.

4. In answer to interrogatory numbered "4," it is sufficient to say that the only statutory fund that bills approved by the inspection commissioners can be drawn upon by the auditor's warrant is the "inspection fund" hereinbefore referred to. The state has nothing to do officially with the financial affairs

of any cattle associations, and none such associations can be compelled to answer or report at the executive chamber.

I am unable to find any statute under the provisions of which the inspection commissioners are required, or can be compelled to report their doings to the governor. Section 8, article IV., of the constitution is not sufficiently broad in its language to embrace the inspection commissioners; still there must be a responsibility to the appointing power, and if any appointee of the governor fails to make a report when requested by the governor, the statute being silent, and the officer not being such as embraced within said section of the constitution, such officer can be removed if he refuses to make a report when so requested.

To be more specific in details relative to interrogatory No. "2," I desire to say that the board of inspection commissioners can employ competent cattle inspectors, not exceeding ten in number at any one time, and to distribute them at such points, either within or without the boundaries of the state, as will in their judgment most effectually prevent the illegal slaughtering or shipment of cattle. (See section 4233, Mills' Ann. Stats.)

The statutory compensation of each cattle inspector is not to exceed one hundred dollars per month during their time of actual service, the auditor to draw his warrant therefor upon bills approved by the board of inspection commissioners, the treasurer to pay the same out of the inspection fund. This compensation is the only expense directed by statute to be paid out of the inspection fund.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE WARRANTS; HOUSE BILL NO. 182.

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1. State warrants are not negotiable, as that term is used in the law. While it is a declaration signed by the auditor that the state is indebted to the claimant in the amount specified in the warrant, this declaration is not conclusive on the state.

2. It makes no difference in a legal aspect whether the warrants are in the hands of the payee or his assignee. There can be no such thing, strictly speaking, as an "innocent holder" of this kind of paper.

3. The fact that warrants are issued based upon vouchers issued by the secretary of state does not in any manner affect the legal status of the warrants.

4. The auditor, having such ample judicial powers conferred on him, passes quasi judgments that are entitled to great weight. His signature makes out a prima facie case for the holders of the warrants. Like all other officers, when he does an act within the scope of his powers, he is presumed to have done his duty. To overcome this presumption requires affirmative proof on the part of the state.

Attorney General's Office,
Denver, Colo., March 16, 1893.

To the Hon. W. W. Hallett, of the Special Committee of the House of Representatives:

Sir—In response to your letter of the 14th inst. in reference to certain warrants described in H. B. No. 182, I submit the following:

Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor to be audited, settled and allowed.

. . . . . .

Mills' Ann. Stats., p. 1148, section 1822.

The powers and duties of the auditor of state are set out in Mills' Annotated Statutes at pages 1146, 1826 and 1827. These sections of the statute clearly give that officer a judicial power in determining the question as to whether the claimant has a valid claim against the state, and the amount of it.

The form of the warrant drawn by the auditor, as prescribed by statute, is as follows:

"No. — State of Colorado.

Treasurer of the state of Colorado, pay to.....
.....or order.....dollars, out of any money in the treasury not otherwise appropriated (here state in brief the account on which such warrant is issued), and charge the same to.....
....., and this shall be your voucher.

Issued....., 18..

(Signed) .....

Auditor of State of Colorado."

Paper of this class is not negotiable, as that term is used in the law.

While it is a declaration signed by the auditor that the state is indebted to the claimant in the amount specified in the warrant, this declaration is not conclusive on the state, but the declaration may be shown to be false by the state and payment avoided on the ground of fraud, want of consideration, or any of the legal or equitable defenses recognized by the courts.

It makes no difference in a legal aspect whether the warrants are in the hands of the payee or his assignee. There can be no such thing, strictly speaking, as an "innocent holder" of this kind of paper. Innocence, in cases of this kind, does not mean a moral quality. One may be entirely honest in the purchase of a state warrant—entirely ignorant of any fact that would affect its legality or validity, and yet he is not an innocent holder. To be an innocent holder one must be a bona fide holder. Chief Justice Waite has said that "to be a bona fide holder, one must himself be a purchaser, for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence."

Burr. Pub., Sec. 331.

A purchaser is put upon his inquiry when he buys a state warrant. He stands in the same position as the original payee, as far as the defenses that might be interposed by the state to avoid payment are concerned.

In your letter you state that these warrants were based upon vouchers issued by the secretary of state. This fact does not in any manner affect the legal status of the warrants. It is a fact that the auditor ought to consider, in deciding the questions first referred to. It is a fact that may have controlled the judicial conclusion of the auditor when he decided to sign and deliver the warrants, but the state is not estopped by the existence of that fact, any more than any other fact, from setting up a defense in the premises.

But while the state might put in any legal or equitable defense in an action to recover upon these warrants, it might be well to consider the difficulties that would present themselves in such an event.

It is not within the province of my duties to refer to the damage that might result to the credit of the state by refusing the aid of legislation to the holders of these warrants. A discussion of that nature is properly had in the house itself. But it is a question of legal cognizance and legal experience as to what the state would be required to show in a case at bar between it and the holders of these warrants.

The auditor, having such ample judicial powers conferred on him, passes quasi judgments that are entitled to great weight. His signature makes out a prima facie case for the holders of the warrants. Like all other officers, when he does an act within the scope of his powers, he is presumed to have done his duty. To overcome this presumption requires affirmative proof on the part of the state.

It is a very grave question whether a defense set up on the ground that the auditor had allowed more to a claimant than his service or merchandise was worth, could be maintained by the state.

There can be no doubt that if there was a flagrant and outrageous overcharge patent to the community at large, a court would recognize a defense based on that ground. Yet the auditor has been selected by the state to make these very estimates. He has been empowered to administer oaths and to take testimony like any other judicial officer; and to set aside his decision in the premises, would impose upon the state the necessity of establishing a case that would be tantamount to a case of fraud—to show that a compensation has been allowed so grossly inadequate to the services rendered or articles furnished as to make a case that a court of equity would relieve against upon that ground.

In ordinary cases, a defect in the judgment of the auditor cannot be successfully advanced as a defense. The defect must be so glaringly manifest as to raise a reasonable presumption that collusion had been established between him and the payee of the warrant. Experience has shown that one of the most difficult defenses to maintain is the plea of fraud to an action on a contract. But there can be no doubt that, if the plea should be sustained, the contract would be avoided.

I have not been informed as to the facts in the case of any of these warrants, and base this opinion only on your letter and the copy of the said bill.

Owing to the short time allowed me, I am unable to submit an opinion as to the liability of the sureties of the officers concerned in this transaction.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT OF COUNTY ASSESSOR.

The county commissioners are authorized to meet in special session, and appoint a county assessor when a vacancy occurs in that office.

Attorney General's Office,
Denver, Colo., March 18, 1893.

Mr. M. A. Hunter, Chairman Board County Commissioners, Breckenridge, Colo.:

Sir—In response to your letter of 9th inst., I refer you to Mills' Ann. Stats., page 1058, section 1589, being section 1165 of the general statutes, page 414, and also to section 784, page 749, Mills' Ann. Stats., being section 531, page 256, general statutes. Under the provisions of those statutes it is the duty of the board of county commissioners to meet at once in special session and appoint a county assessor in place of the former incumbent.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE SERVICE OF PROCESS AND ANNUAL REPORTS OF SUPERINTENDENT OF INSURANCE.

1. In the absence or inability of the superintendent of insurance, process may be served upon the deputy superintendent, with like effect as if served upon his principal.

2. In making the annual report, the law contemplates that the superintendent of insurance shall make the same a comprehensive summary only, of the matters therein required to be reported.

3. There is no legal objection to the superintendent of insurance having the report bound in two volumes, one for the fire and the other for the life report, provided the expense of publishing is not materially increased.

Attorney General's Office,
Denver, Colo., March 21, 1893.

To the Hon. F. M. Goodykoontz, Auditor of State:

Sir—In response to your letter of 18th inst. I submit the following:

The statute makes it the duty of the superintendent of insurance to appoint a deputy whose qualifications are prescribed. The deputy takes an oath and gives a bond similar to that required of other public officers. He is given all the powers and must perform all the duties attached by law to the office of superintendent of insurance during the absence or inability of his principal.

Mills' Ann. Stats., p. 1328, sections 2202, 2203, 2204.

The powers and duties of the deputy depend upon the absence or inability of the superintendent of insurance. When the latter is present and able to act in his official capacity, the official duties and powers of the deputy cease. He then becomes only a ministerial agent of the superintendent, if he has any functions at all.

The statute further provides as follows: "No insurance company or association, organized by any other authority than the state of Colorado, shall directly or indirectly issue policies, take risks, or transact business in the state until it shall have first appointed, in writing, the superintendent of insurance of this state to be the true and lawful attorney of such company or association, in and for this state, upon whom all lawful processes, in any action or proceeding against the company, may be served with the same effect as if the company existed in this state."

Mills' Ann. Stats., pp. 1333, 1334, section 2217.

These sections of the statute show that, in the absence or inability of his principal, the deputy is to all intents and purposes the superintendent of in-

surance. The object of the legislature in giving him all the powers and exacting from him all the duties of the office, under the circumstances mentioned, was manifestly to provide that in such contingency the duties and powers of the office should not become dormant.

By the last section quoted it is plain that the legislature meant that the person lawfully exercising the functions of superintendent of insurance, at the time the service of process is made, should be the appointee of the power of attorney filed by the constituent company. The object of the statute is to provide an easy and expeditious method of bringing insurance companies, organized by any other authority than the state of Colorado, into our courts and subjecting them to their orders.

The statute requires the superintendent to notify the defendant company immediately on being served with process. If this is done the company cannot be heard to complain. No order of default against it would be permitted to stand in case the court should ascertain that the superintendent had failed to notify it of the service of the process.

The public necessity demands that this process find its way from the court to the defendant through the office of the superintendent of insurance, and no substantial rights of parties litigant can be affected by the method of service required by the statute.

Hence, service of summons on the deputy is service on his principal, in the absence or inability of his principal. The absence or inability of his principal ought to appear in the return to the process in cases where the deputy is served—but this is a matter of no concern to your office.

In answer to your second question:

Section 2209, page 1329, Mills' Ann. Stat., requires the superintendent of insurance to make an annual report to the governor of the affairs of the insurance department, which report shall contain a tabular statement and synopsis of the several statements as accepted by the superintendent, etc., etc.

Likewise, section 2219, page 1335, Id., requires every insurance company doing business in this state, to render, on or before the first day of March in each year, a report to the superintendent containing detailed statements of assets and liabilities, etc., and that a synopsis of such statement shall be published in some newspaper of general circulation, published at the capital, for at least four insertions, etc.

The occurrence of the word "synopsis" in both these sections, in connection with the statement of the duties of the superintendent, indicate that the legislature intended that his published statement and report should contain only a comprehensive summary of the matters therein required to be reported.

The records and original papers in your office are made public records by the statute, and any one desiring more explicit information of the condition of any insurance company can obtain it by examining these documents.

Hence, I find that you can make your report in the manner indicated in your letter.

In reply to your third question:

Section 2209, page 1329, Mills' Ann. Stats., provides for the publication of the report referred to. It does not state how it shall be bound.

Section 3673, page 1964, Mills' Ann. Stats., requires that all reports required to be printed shall be of uniform size, so as to admit of being bound together in compact form.

These are all the sections of the statutes that have a bearing on the question.

Hence, if you decide that it is more convenient to the public for the insurance report to be bound in two volumes, one for the fire and the other for the life report, and that by so doing you will not add materially to the expense of publication, there can be no legal objection why the same should not be done.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE GARNISHEE—STATE OF COLORADO.

The statute of 1891, giving the power to garnishee municipalities, cannot be enlarged so as to include the state.

Attorney General's Office,
Denver, Colo., March 21, 1893.

Hon. F. M. Goodykoontz, State Auditor:

Dear Sir—Replying to your inquiry of recent date relative to garnishee summons served on you in the case of John D. Miller, surviving partner of Hardman & Miller, vs. Thos. A. Rucker, I desire to say:

The writ runs: "The People of the State of Colorado to the State of Colorado." Inasmuch as "The People of the State of Colorado" and "The State of Colorado" are one and the same, it is not clearly apparent how the state can serve a process on itself. But, aside from the ludicrous character of the writ, the state cannot be garnished. It is against public policy. The statute of 1891, giving the power to garnishee municipalities, cannot be enlarged so as to include the state. You are not required to answer said writ further than to announce your reasons based upon this opinion.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE QUALIFICATIONS OF VOTERS IN INCORPORATED TOWNS.

A person, otherwise qualified, desiring to vote, must have been a resident of the state six months, of the county ninety days, and of the town ten days, preceding the election.

Attorney General's Office,
Denver, Colo., March 21, 1893.

Col. Hendrie, Esq., Wray, Colo.:

Dear Sir—In answer to your inquiry of recent date, relative to residence qualifications of voters in incorporated towns, I desire to say:

That the person, otherwise qualified, desiring to vote, must have been a resident of the state six months, of the county ninety days, and of the town ten days, preceding the election. The voter may live anywhere in the state during the six months, except he must have been a resident within the particular county where the town is situate 90 days preceding the election and live ten days within the town. For illustration: A person can move from the state of Kansas to El Paso county, Colorado, six months prior to the town election in Wray. Ninety days before the town election in Wray he may move into the county where Wray is situated but outside of the corporate limits of the town of Wray, and if he moves into the town of Wray ten days before the town election he can vote, provided he is otherwise qualified. That would make his residence six months in the state, ninety days in the county and ten days in the town of Wray.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE CONFISCATION AND SALE OF CONCEALED WEAPONS.

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1. The power to confiscate and sell concealed weapons is conferred by the latter clause of section 1, p. 129, session laws 1891.

2. Such weapons should be delivered to the county treasurer, who is the custodian of the school fund, and the sale should be conducted under his supervision, he receiving the proceeds of sale and placing the same to the credit of the school fund.

Attorney General's Office,
Denver, Colo., March 21, 1893.

Hon. H. M. Taylor, Justice of the Peace, Montezuma, Colorado:

Dear Sir—In answer to your inquiry of recent date, relative to the confiscation of and sale of concealed weapons, I desire to say:

The power to confiscate and sell such weapons is conferred by the latter clause of section 1 of the legislative enactment of 1891. (See section 1, page 129, session laws, 1891.) It will be perceived that said statute is silent as to who shall conduct the sale, the place, notice, etc. Evidently the legislative intention was that the justice of the peace should declare a forfeiture to the county, and that thereupon the weapon or weapons should be turned over to the proper county authorities to be sold at auction for the benefit of the school fund of that county. I think the weapons should be delivered to the county treasurer, who is the custodian of the school fund, and the sale should be conducted under his supervision, he receiving the proceeds of sale and placing the same to the credit of the school fund. He should give a reasonable notice of the sale, and can himself sell or have the sheriff or some one else do it for him. As there are no statutory regulations governing the sale, the law contemplates that the weapons shall be so sold as to bring the largest sum of money to the school fund.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF LANDS IN SOUTH CREEDE.

1. All interests in lands, legal and equitable, are real estate and taxable, unless specially exempted by statute.

2. Lands sold by the state to settlers, in South Creede, are taxable if the purchasers have paid all the purchase money, and nothing more is to be done in such case by the purchaser, and it only remains for the state to issue the patent or deed.

3. If any part of the purchase money is unpaid, or if any other condition precedent remains to be performed by the purchaser, these lands cannot be taxed under section 3647, Mills' Annotated Statutes.

Attorney General's Office,
Denver, Colo., March 22, 1893.

Geo. F. Fry, Clerk and Recorder, Lake City, Colo.:

Dear Sir—Replying to your letter of 13th inst. in reference to taxation of lands in South Creede, I submit the following:

By section 3765, page 2006, Mills' Ann. Stats., all property, real and personal, within the state, not expressly exempt by law, shall be subject to taxation.

Section 2529, page 1452, Id., provides that all and singular the goods and chattels, land, tenements and real estate of every person against whom any judgment shall be obtained in any court of record, either of law or in equity, for any debt, damages, costs or any other sum of money, shall be liable to be sold on execution, and also defines "real estate" to mean all interest of the defendant or any person to his use, held or claimed by virtue of any deed, bond, covenant or otherwise, for a conveyance or as mortgagor of lands, in fee for life, or for years.

Section 2582, page 1496, Id., makes every interest in land legal and equitable, except homesteads subject to levy and sale under executions.

By the act of March 30, 1889 (session laws, section 1, p. 313, Mills' Ann. Stats., section 3648, p. 1955), it is provided that all lands sold under the provisions of that act, or any interest therein, shall be exempt from taxation for and during the period of time in which the title to said land is vested in the state of Colorado.

The supreme court of the United States has decided that lands sold by the United States may be taxed by the states before patent has been issued to the purchasers; but only in cases where the equitable title of the purchaser is complete, and nothing remains to be done except the issuance of the patent.

16 Wall., 608.

22 Wall., 462.

95 W. S., 264-5.

From the foregoing statutes and decisions it follows:

First—That all interests in lands, legal and equitable, are real estate and taxable unless specially exempted by statute.

Second—That the lands sold by the state to settlers in South Creede are taxable if the purchasers have paid all the purchase money, and nothing more is to be done in such case by the purchaser, and it only remains for the state to issue the patent or deed.

Third—If any part of the purchase money is unpaid, or if any other condition precedent remains to be performed by the purchaser, these lands cannot be taxed under the statute last cited.

The act last mentioned does not conflict with the constitution. This special exemption may be presumed to be one of the considerations entering into the contract of sale, or in other words, in the nature of a commutation.

Cooley on Taxation, 234.

This opinion refers only to the taxation of the land itself, and not to the improvements on it.

EUGENE ENGLEY,
Attorney General.

IN RE TIME OF FILING OBJECTIONS TO CERTIFICATES OF NOMINATIONS.

A certificate of nomination being filed on the 20th day of March, 1893, the time within which objections could be filed thereto, expired at 12 o'clock midnight of the 23d day of March, 1893. The law does not recognize fractions of a day in matters of this kind.

Attorney General's Office,
Denver, Colo., March 25, 1893.

Hon. E. H. Boase, Town Clerk, Evans, Colo.:

Dear Sir—I am in receipt of a communication from Hon. William McFie, candidate for the office of mayor of the town of Evans, Colorado, on a ticket designated as the "People's Party Ticket," to be voted for at the municipal election to be held in said town of Evans on the 4th day of April, 1893, in which communication Mr. McFie makes a statement of proceedings had relative to the filing of said ticket in your office. He states, in effect, that the people's party of said town held a convention on or about the 13th day of March, 1893, and nominated candidates to fill the following offices, viz.: One mayor, for one year; three trustees for two years, and two trustees for one year, and to be voted for at said election. That thereafter a certificate of such nominations were filed with you as the clerk of said town, on or about the 17th day of March, 1893, and not more than thirty nor less than fifteen days before election. That thereafter and on

or about the 18th day of March, 1893, objections were filed to said convention certificate and notice thereof given. That thereafter and on or about the 20th day of March, said objections to said convention certificate were sustained by said clerk. That on the said 20th day of March, 1893, at about 5:30 p. m. of said day, a certificate of nominations, other than by convention or committee, signed by at least fifty voters of said town, was filed in the office of said clerk, which last said certificate contained the names of the candidates to be voted for at said election and on a ticket with the caption of "The People's Party Ticket" with the device thereon of a cottage home, and conforming substantially to the requirements of law as to information to be given in such certificates. It is also alleged that said last certificate was signed by fifty-one of said voters, and that all of said signatures were on one paper; that the place of residence of each signer was added, and that each signature was acknowledged and oath made that the signer was a voter in said town, the said acknowledgment and oath being made before a notary public. It is further stated that on the 24th day of March, 1893, at 8:45 a. m. of said day, objections to said last mentioned certificate were filed with said clerk, notice of which objections were given to candidates on said ticket, on the said 24th day of March, the said objections being against the printing of the people's party ticket on the official ballot. If the statement of what purports to be the fact be correct, it is the duy of the town clerk to print the people's party ticket on the official ballot to be used by the voters at said election. It appears that the law in all substantial particulars has been complied with. The certificate contains the names of the candidates, office, post office address, name of ticket and device, the signatures acknowledged, and oaths of signers that they were voters, etc. This certificate was signed by fifty-one voters. The certificate was filed not more than thirty and not less than fifteen days before election. The objections filed on the 24th day of March, at 8:45 a. m. of that day, have no

validity, the time having elapsed within which any one had a legal right to file objections to or question the last said certificate. If the last said certificate was filed on the 20th day of March, 1893, the time within which objections could be filed thereto expired at 12 o'clock midnight of the 23d day of March, 1893. The law does not recognize fractions of days in matters of this kind. The law is cold and determinate. The first clause of section 13 (page 146), session laws, 1891, reads: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three days after the filing of the same." The objections must be made within three days. The objections filed against the last named certificate were not made for four days. The 21st, 22d and 23d days of March were the days within which the objections should have been made to give them any validity. The objections not having been made within the statutory time, they never had any force, and the town clerk had no legal right to accept and file them. The fact that one of the candidates took the acknowledgments and administered the oaths to the signers of the certificate does not invalidate the same. The fact that candidates signed the certificate cuts no figure. They had a right to do so. The election law of 1891 was not enacted to disfranchise legal voters or to prevent the nomination and election of candidates. The law was enacted as a salutary measure of protection against and not to consecrate political fraud. The language in section 13, which says, "The officer with whom the original certificate was filed shall pass upon the validity of such objection, and his decision shall be final," does not mean that such decision is not open to review by the courts in cases of evident oppression and fraud. The writ of mandamus is not yet dead. The doors of the courts are not yet closed. Whenever there is a wrong the courts will reach it with an appropriate remedy.

The people's party ticket should be printed on the official ballot.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE ELECTION BALLOTS.

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1. The adoption of a device upon a ballot is not imperative.
2. All constructions of election laws ought to favor the extension of the franchise, and technicalities ought not to be resorted to, to deprive a qualified elector of his vote.

Attorney General's Office,
Denver, Colo., March 25, 1893.

Hon. John May Abbott, Chairman Central Committee People's Party, Colorado Springs, Colo.:

Sir—In answer to your letter of 24th inst. I submit the following:

No person or persons are pointed out by the section mentioned who shall "designate each or any set of nominations in the certificate thereof" by a device —but the device is such "as may be set forth in the certificate of nomination," and the only persons who have the right to "set forth" any matter in the certificate is the "committee appointed by a convention," referred to by you.

In answer to your second question I will state that the section referred to (section 8, p. 151, Id.) says the caption or device, if any, shall be printed, etc. From this it is apparent that the adoption of a device is not imperative.

Section 13, Id., provides for amendments in case of objections filed; but the construction of all election laws is liberal, and these amendments are proper or admissible in cases where no objection is filed, if made in time.

Section 6, Id., says that the signatures to a certificate of nomination need not all be appended to one paper.

With these parts of the statute before us, and in view of the principle so unmistakably fixed in our jurisprudence that all constructions of election laws ought to favor the extension of the franchise, and that technicalities ought not to be resorted to, to deprive a qualified elector of his vote, I hold that it is unlawful for the clerk to refuse to permit you to file your amendatory papers, if you so desire.

Owing to the short time allowed me, I cannot cite authorities on the last mentioned general propositions.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE NOTARIES PUBLIC OF MINERAL COUNTY.

Under the legislative act creating the county of Mineral, notaries public duly commissioned in either of the counties of Hinsdale. Rio Grande or Saguache, but now residing in the county of Mineral, may exercise the duties of a notary public in Mineral county; but such officers should, as soon as possible, secure new commissions and seals.

Attorney General's Office,
Denver, Colo., April 4, 1893.

Hon. Nelson O. McClees, Secretary of State:

Dear Sir—In reply to your letter of the 1st inst., in regard to the question as to "whether notaries

public appointed for the county of Hinsdale and now residing in the county of Mineral can take acknowledgments in the county of Mineral under the seal of Hinsdale county," etc., I submit the following:

The county of Mineral was established by act approved March 27, 1893. Section 2 of the act says: "All county and precinct officers who live in that part of Hinsdale, Rio Grande or Saguache county, as the case may be, that is hereby made Mineral county, shall hold their respective offices for the terms for which they have been elected, and are hereby declared to be the legal officers of Mineral county. This provision cannot be mistaken. Notaries public are county officers.

In re H. B. No. 166.
9 Colo., 629.
43 Ills., 479.

Notaries public are required to test their official acts by a seal, and also to designate in writing in all their official certificates the date of the expiration of their commissions.

Mills' Ann. Stats., section 3281, page 1842.

Copies of their commissions are required to be recorded in the proper county.

Id., section 3282.

Section 5 of the act of March, 1893, supra, gives directions for the transfer of suits pending in Hinsdale, Rio Grande and Saguache counties to the Mineral county courts in proper cases, and section 6 provides that all county records and other permanent county property shall remain in said counties.

Taking these sections of the statutes and construing them with reference to the decisions quoted, it appears that the legislature intended that there should be no delay in the transaction of public or private business in that portion of the territory embraced in Mineral county, and that acknowledgments can be taken in the county of Mineral by notaries who

are commissioned for either of the three counties mentioned, provided these officers now reside in Mineral county.

But it is the duty of the said officers to secure new commissions and provide seals accordingly, showing their authority to transact official business in Mineral county, and this they ought to do with all convenient dispatch.

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION, MEMBERS STATE BOARD MEDICAL EXAMINERS.

The members of the state board of medical examiners must be paid from the general fund, unless said fund has been otherwise appropriated. When there is no money in the general fund, certificates of indebtedness may issue.

Attorney General's Office,
Denver, Colo., April 5, 1893.

To the Hon. F. M. Goodykoontz, Auditor of State:

Sir—In regard to questions submitted in reference to payment for services of members of the state board of medical examiners, I submit the following:

Section 3559, page 1933, Mills' Ann. Stats., directs that all fees received by the treasurer of the board and all fines collected under the act shall be paid into the state treasury; and that all necessary expenses of the board shall be paid for "out of the funds of the state treasury not otherwise appropriated."

When these fees and fines are paid to the treasurer they go into the general fund, no other fund being designated by the act. The legislature has set apart no special fund from which the officers mentioned are to be paid, and consequently their pay must be drawn from the general fund; and when the general fund has been otherwise appropriated by the legislature, there remains no fund upon which a warrant can be drawn by the auditor in their favor.

The only way in which these claims can be met is provided by the statute (section 1829, p. 1149, Mills' Ann. Stats). The auditor shall audit them, and when they are approved by the governor and attorney general, he shall give certificates of the amounts, under his official seal, if demanded, and shall report the same to the next general assembly, who can take such action in the matter as they see fit.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE LEGISLATIVE BILLS AND ENACTMENTS

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1. The signature of the presiding officer of the senate is not indispensable to the validity of a bill, and when such bill is presented to the governor there can be no objection to his action in approving or disapproving the bill, if he is satisfied that such bill was passed by the general assembly.

2. It is essential that a bill should be read in each house, as required by the constitution, before it can be lawfully voted on by the body; but it is not necessary that the journal should show that this was done. It will be presumed that it was done unless the journal should show affirmatively that it was not done. The constitution does not require the fact of the reading of the bill to be recorded. In case the journal should not show the bill was read three times, it will be presumed that it was. The manner or method of reading is under the control of the house, and none

can be heard to object if that manner is satisfactory to the legislators present. If the bill is read the number of times required by the constitution, it is sufficient.

3. The constitutional limit of the session of the ninth general assembly expired at midnight, April 3, 1893. No legislative function could be exercised by the ninth general assembly after said date at midnight. It was functus officio by constitutional limitation.

Attorney General's Office,
Denver, Colo., April 10, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Sir—A response to your inquiries of the 5th inst. involves the consideration of three questions.

1. Is the signature of the presiding officer of the senate indispensable to the validity of a bill when presented to the governor for his approval or disapproval?

2. Must a bill be read as required by the constitution before it can pass either house?

3. Could the general assembly enact a law on April 4, 1893, after 12 m.?

In arriving at the conclusions herein set out, I have examined many decisions, some of which are conflicting; but I believe I am sustained by the weight of authority in assuming the positions taken in this opinion.

The constitution of Colorado provides as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the general assembly, after their titles have been publicly read, immediately before signing; and the fact of signing shall be entered in the journal.

Const., article 5, section 26.

The supreme court of Colorado, in discussing this section, say: "That the enrolled act of the general assembly duly signed and authenticated by the proper officers, and lodged with the proper custodian, is

evidence prima facie of what the law is, and of the regularity of its constitutional enactment. But this evidence is not conclusive. To so hold would leave the constitutional requirements touching the mode of passing bills binding only in conscience upon members of the legislature * * *. The legislative journals are required by the constitution, and for an obvious purpose certain things are required to be entered therein. They possess the character of public records, and as such are admissible as evidence of the proceedings of legislative bodies, and this independent of statutory provisions. * * *."

In re Roberts, 5 Colo., 525.

The case quoted differs from the one in question in this, that in that case the bill, as enrolled, was signed by the proper officers; whereas, in this, the bill was not signed by the presiding officer of the senate.

The supreme court of Nebraska say: "The signature of the presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. The vote upon the passage of the bill must be determined from the journals of the respective houses; and when it appears from the journals that a bill has passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same.

The act, therefore, is of the same validity as though signed by the presiding officer of the senate."

9 Neb., 125.
4 Neb., 503.

The constitution of Nebraska requires bills to be signed by the presiding officer of each house "while the same is in session and capable of transacting business.

Const. Neb. 1867, article 11, section 20.

The supreme court of Kansas say: "Whether the failure of the presiding officer of the senate to sign the enrolled bill of said act invalidates the law or not, is the main question in this case * * *. The constitution requires "that every bill and joint resolution passed by the house of representatives and senate shall, within two days thereafter, be signed by the presiding officer and presented to the governor * * *. The regular presiding officer of the senate is the lieutenant governor. But the senate may also elect a president pro tem. of the senate, who may preside in case of the absence or impeachment of the lieutenant governor, or where the lieutenant governor holds the office of governor. Now, it seems from the book of enrolled bills of the session of the legislature of 1865, that the regular president of the senate signed very few of the bills passed at that session. The most of them were signed by the president pro tem. But some of them were not signed by any presiding officer of the senate, among which was the bill now under consideration. The bill now under consideration was signed by the secretary of the senate, by the speaker of the house, by the chief clerk of the house, and by the governor * * *. Does the failure of the presiding officer of the senate to sign said bill invalidate everything connected therewith? If it does, then the presiding officer of the senate has more power to veto bills than the governor, or any other person or officer in the state. The legislature may pass a bill over the veto of the governor, but if the plaintiff in error is correct, they cannot pass a bill over the veto (so to speak) of the lieutenant governor, so as to make the bill become a valid law. The lieutenant governor is the president of the senate; he holds his office independent of the legislature; they have no power to remove him from office, except by the slow and tedious process of impeachment; they have no power to compel him to sign a bill, except by the slow and tedious process of mandamus, and this can only be done in the courts; and if the plaintiff in error is correct, they have no power to make a valid law ex-

cept with the aid of his signature, so long as he is acting presiding officer of the senate * * *. And upon the theory of the plaintiff in error, * * * if the bill has not yet been signed, it has become defunct. Everything connected therewith is dead. All the proceedings of the legislature with reference thereto have been annulled; and there is no power anywhere that can afterward breathe life or validity into them. * * * We think that mandamus would lie in such a case; but ordinarily it would be a very inadequate remedy. * * * But we think that mandamus is not the only remedy so far as determining the validity of the law is concerned. The signatures of the presiding officers do not constitute any portion of the law. It is not necessary that the consent of the presiding officers should be had in order to enact the law. The only office that the signature of the presiding officers is intended to perform is to furnish evidence of the due passage of the bill."

And the same court goes on to point out the means of evidence to which the courts must refer in deciding upon the validity of the bill.

17 Kan., 82.

The provisions of the constitution of the state of Kansas are substantially the same as in our own, regarding the matter in discussion.

Gen. Stat. Kans. 1889; Const., section 14.

There are many cases cited in re Roberts, supra, showing that the courts of the different states have adopted a different view of the constitutional provision referred to, but the supreme court of Colorado has adopted the more liberal and advanced view of the courts of Nebraska and Kansas, views that were possibly prompted by the frequent recurrence of acts of legedermain on the part of members and officers of western legislatures.

If, then, it is true that the courts may look behind the archives of the secretary of state to investigate the validity of a statute, a fortiori, it is true that the governor may do the same thing.

The supreme court of California say: "The executive is, by the constitution, a component part of the law-making power. In approving a law, he is not supposed to act in the capacity of the executive magistrate of the state, whose duty it is to see that the laws are properly executed, but as a part of the legislative branch of the government.

2 Cal., 165.
Cooley's Const. Lim., 153-155.

His signature being necessary to transform the bill into a law, it is much more within his province than in that of the judicial department to guard against irregular or uphold constitutional legislation. There is no power known to the constitution which can interfere with this prerogative right in the approval or rejection of a bill. There being no check upon him in the exercise of this important constitutional function, it is far more important that he examine, if he should desire, the grounds upon which a proposed law is claimed to be founded than that this duty should be relegated to the courts of the state, which can only act after the bill has been signed by the governor and printed in the statute book, and when many important public and private rights, founded on the supposed validity of the act, will be seriously affected, and in many cases destroyed. And, further, an examination can be made by the governor far more readily and certainly than by any court.

With the foregoing constitutional and statutory provisions, and the decisions of the courts in construing the same, in view, there can be no objection to the action of the governor in approving or disapproving the bill mentioned in your first inquiry, if you have satisfied yourself that the bill was passed by the general assembly.

In the matter of your second inquiry I submit the following:

It is essential that a bill should be read in each house, as required by the constitution, before it can

be lawfully voted on by that body; but it is not necessary that the journal should show that this was done. It will be presumed that it was done unless the journal should show affirmatively that it was not done. The constitution does not require the fact of the reading of the bill to be recorded.

Const., article 5, section 22.

In case the journal should not show the bill was read three times it will be presumed that it was.

25 Ills., 191.
3 Ohio St., 475.

If the objection referred to in your letter was to the manner of reading the bill, it is not well taken. The manner or method of reading is under the control of the house, and none can be heard to object if that manner is satisfactory to the legislators present. If the bill is read the number of times required by the constitution, it is sufficient.

3 Ohio St., 479.

The question presented by your third inquiry is one of the most momentous consequence. More than thirty bills—some of them concerning appropriations to the state institutions—and others of equally great and pressing importance, are awaiting action on your part for approval or disapproval.

If the journals show that the legislature attempted to pass an act after the expiration of ninety days from the beginning of the regular session of 1893, it has gone beyond the powers conferred upon it by the constitution, and all such action is absolutely void; and if the consequences are disastrous to the great public institutions of Colorado and to the interests and industries of the whole people or individual citizens, the evil can only be remedied by a special session to be called by your excellency.

The question to be examined is, when did the ninety days expire, within the limits of which it could enact laws?

The constitution provides that the session shall begin at 12 o'clock, noon, on the first Wednesday in January. The first Wednesday in January of this year was the fourth day of that month. Sundays are included in the computation of the ninety days. If we are to compute the ninety days by the hours in each day, the time expired on Tuesday, April 4, at 12 o'clock, noon, of that day.

At 2:30 p. m. of the clock on the last mentioned day, a protest against further legislation was made by one of the senators, on the ground that the time had expired in which the ninth general assembly could act.

This protest was entered on the senate journal in accordance with a rule of the senate, and formally advises your excellency of the existence of the fact set out in the same. There are three different interpretations that may be placed on this clause in the constitution.

1. The sitting of the general assembly on the 4th day of January, although it met at 12 o'clock, noon, on that day, may be considered as a day's session. In that case the term expired with the expiration of the third day of April following.

2. The ninety days' session may be computed by the number of hours; that is, it may be said that the intention of the constitutional convention was that the session should close at the expiration of ninety times twenty-four hours. If that interpretation should prevail, then the term expired at 12 o'clock, noon, on the 4th day of April following.

3. The last day of the term may be considered as an entirety, and that the constitutional convention intended that the legislature might close its session at any time during that day; that is, at any time before midnight of the 4th day of April following.

The supreme court of Colorado, in construing the last sentence of section 11, article 4, of the constitution say:

"In the computation of time presented by constitutional or statutory provisions for the performance of official duties the general rule, subject to no exception occurring in the present case, is, that fractions of a day are not to be noticed, but each fraction of a day is to be considered in the computation as a full day.

In the matter of Senate Resolution of March 31, 1887, 9 Colo., 632.

This is the only light thrown upon this question by our supreme court that I have been able to find.

The doctrine that the first day, or any part of the first day, must not be counted, cannot be applied to a session of the general assembly. The constitution has fixed the day and hour when it must be commenced, and its duration must be computed from that hour. But I do not think the constitutional convention intended that the hours should be counted in computing ninety days—the extreme limit of a legislative session. Hence, the second interpretation cannot be adopted, and the legislative term did not expire at 12 o'clock, noon, April 4.

The only conclusion I can come to is that the constitutional limit of the ninth general assembly expired at midnight, April 3. There might be a doubt or question as to the hour in any day that a bill was presented to the governor, as in the case cited in 9 Colo., supra; hence the supreme court disregarded that day entirely. But here the constitutional convention has fixed an hour upon which the legislature shall go to work on a fixed day. This must be considered as a day in the computation of the period embracing ninety days.

The probable reason why the hour mentioned was adopted by the constitutional convention was, that the members might have time in the forenoon to get fully ready to discharge their duties on that important day—to discuss the organization of the houses in a preliminary way; and generally to exchange views with regard to a prompt organization. This

appears more reasonable when we observe that it was not so explicit in fixing the hour for adjournment. I believe that so much of the principle adopted by the supreme court in 9 Colo., supra, and is applicable; that is, that "each fraction of a day is to be considered in the computation as a whole day" should be adopted in this matter; and hence I conclude that no legislative function could be exercised by the ninth general assembly after April 3, at midnight. It was functus officio by constitutional limitation.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT OF MEMBER OF LEGISTURE TO A CIVIL OFFICE.

No representative can, during the time for which he shall have been elected, be appointed to any civil office in this state.

Attorney General's Office,
Denver, Colo., April 10, 1893.

Hon. C. C. Calkins, Longmont, Colo.:

Dear Sir—In answer to your question, "If a representative resign, can he be appointed to a civil office during the period for which he was elected?", I beg leave to submit the following:

Section 3, article 5, of the constitution, reads as follows:

"Senators shall be elected for the term of four years, except as hereinafter provided, and representatives for the term of two years."

Section 8, Id., provides as follows: "No senator or representative shall, during the term for which he

shall have been elected, be appointed to any civil office under this state." * * *

Your question, in my opinion, raises but one point for interpretation, and that is as to whether or not a member of the legislature, by resigning, can avoid the constitutional prohibition declared in said section 8. The language of this section is perfectly clear, intelligible and certain, and in my opinion no amount of elucidation could alter its meaning. There might arise, perhaps, in the discussion of the question propounded, some doubt as to what is or is not a civil office under the state as contemplated by this section of the constitution, but in the absence of any specific office being mentioned, we can only consider it in its general sense.

8 Colo., 426.

The effect of a resignation would be to terminate the period of service of the member and again give him the privileges of a private citizen, but as the language of the constitution is explicit in referring to "the time for which he shall have been elected," neither the time of service nor the fact of becoming a private citizen could, in my judgment, change the purport of such provision.

The supreme court of this state have been called upon to consider this question in some of its phases in the case above quoted, wherein the court say, after citing their authorities upon the subject: "We prefer, however, to rest the decision of the point upon the plain words of the constitution." It only prohibits a senator from being appointed to a civil office, not his election thereto.

A careful examination of all the various provisions of the constitution pertaining to offices of various kinds and grades, convinces us that the framers of that instrument did not employ the words "elect" and "appoint" as synonymous, but with due regard to the primary and proper significance of both words. Any one who will take the time to make a careful examination of the constitution will appreciate the

force of this proposition by observing the accuracy of selection displayed in their use.

In view of the above, it is my opinion that no representative can, during the time for which he shall have been elected, be appointed to any civil office in this state.

As to the reason for such provision, the framers of our constitution undoubtedly intended by this to better protect the administration of the affairs of state the propriety of which we do not question.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE CLAIMS OF WM. A. HAMILL, THOMAS H. BATES AND GEORGE J. TROWBRIDGE.

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1. The statutes of this state authorize the governor and attorney general to approve such claims when the laws recognize a claim for money against the state, and no appropriations shall have been made by law to pay the same.

2. The adjustment of these claims does not create a debt or liability against the state. The debt, if any exists, is antecedent. The adjustment is a method prescribed by statute that the claim may be put in proper form for legislative action. If the legislature never appropriates moneys, by act of recognition, that may be used for the payment of such claims, they will have no legal vitality at the doors of the state treasury.

Attorney General's Office,
Denver, Colo., April 12, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—Your communication of the 7th inst., directed to this office, requesting an opinion relative to the claims of Wm. A. Hamill, Thomas H. Bates and

George J. Trowbridge against the state of Colorado, the same having been approved by Davis H. Waite, governor, and Eugene Engley, attorney general, has been received, and in answer to your interrogatories propounded therein I desire to state:

That by the statutory law of this state, the governor and attorney general are authorized to approve such claims where the laws recognize a claim for money against the state, and no appropriations shall have been made by law to pay the same.

Section 1829, Mills' Ann. Stats.

In the case of these claims to which you refer in said communication, they were approved as aforesaid, in the matter of official salaries, covering a certain period of time for which no appropriation had been made by the general assembly. It is true that the ninth general assembly passed a bill through both houses to take away from the governor and attorney general the right to approve claims where no appropriations had been made, but that bill has been vetoed by the governor; and, therefore, said section 1892 is in force and effect, and the claims were approved under the operation of that law.

Your suggestion, as stated in said communication with reference to a casualty happening after the making of an appropriation, has no force in this regard, for the reason that the latter clause of said section 1892 refers to a different subject and different conditions. The first clause of said section, under which these claims were approved, covers matters where no appropriation had been made. The second clause of said section covers matters where an appropriation had been made, but became exhausted.

In matters of this kind you merely audit and adjust an account, approved by the governor and attorney general, for the purpose of reporting the same to the next general assembly for its action. The certificate mentioned in the statute is not a warrant on the treasury, nor will you issue warrants in the first instance upon such claims. The certificate is a state-

ment, that the legislature may become informed of the facts, and if it so desire, appropriate funds to pay the claims, which payment would necessitate the issuance of warrants thereafter in the usual way, and by reason of legislative authorization. The adjustment of these claims does not create a debt or liability against the state. The debt, if any exists, is antecedent. The adjustment is a method prescribed by statute that the claim may be put in the proper form for legislative action. If the legislature never appropriates moneys, by act of recognition, that may be used for the payment of such claims, they will have no legal vitality at the doors of the state treasury.

The legislature simply says to the governor, attorney general and auditor, "Give us a certified statement of the claim."

In accordance with this opinion, you should audit and adjust the claims as required by the provisions of section 1829, to which your attention has herein been called.

EUGENE ENGLEY,
Attorney General.

IN RE COURT OF APPEALS' REPORTS, SESSION LAWS, ETC.

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1. The secretary of state should distribute the court of appeals' reports in the same manner and to the same officers and libraries as he is directed to do in the case of reports of the supreme court.

2. The secretary of state is not authorized to furnish law books to clerks of the district court.

Attorney General's Office,
Denver, Colo., April 13, 1893.

Hon. Nelson O. McClees, Secretary of State:

Sir—In response to your letter of the 11th inst. I submit the following:

Section 7 of the act of 1891 (p. 371, session laws) reads as follows: "On the publication of each volume of said reports, the secretary of state shall purchase for the use of the state three hundred (300) copies of said volume at the price named in the contract, not exceeding two dollars per volume; and must, as soon as he receives them, distribute them as follows: To each state and territorial library and the library of congress, two copies; to each department of this state, to each of the judges of the United States supreme court, and to each of the United States circuit and district judges for this state, to each of the supreme, district and county judges, and the judge of any court of record hereafter established, one copy; to the reporter of the supreme court, ten copies. The surplus copies, if any there be, he shall deposit in the state library for the use of lawyers attending the supreme court and members of the legislature when in session." The reports referred to are the reports of the supreme court.

The act of 1891 concerning the court of appeals reads as follows: "Opinions shall be delivered as may be required of the supreme court, and may be published in like manner and in separate volumes. The reporter of the supreme court shall be the reporter of the court of appeals and shall receive for his services as reporter of both of said courts the sum of three thousand dollars per annum."

The act of 1891 does not make any specific provisions for the distribution of the volumes of reports of the court of appeals when published; but there can be no doubt that the secretary of state should distribute them in the same manner and to the same officers and libraries as he is directed to do in the case of reports of the supreme court.

In response to your second question, I find that the statute (Mills' Ann. Stats., section 3677, p. 1965) directs the county clerk of each county to forward to you within a month after the adjournment of the general assembly a statement of the number of officers

and persons in his county entitled to a copy of the laws of the last session; and the secretary of state shall, at his office, deliver to such clerk or his order, properly packed, the number of copies set forth in such statement.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE APPROVAL BY THE GOVERNOR OF LEGISLATIVE BILLS.

When the governor signs a bill and the same is deposited with the secretary of state, it must be regularly printed in the session laws of the state, whether the same is signed by the speaker of the house and the presiding officer of the senate or not.

Attorney General's Office,
Denver, Colo., April 13, 1893.

Hon. Nelson O. McClees, Secretary of State:

Sir—In response to your letter of the 12th inst. I submit the following:

This office has lately held that it is lawful for the governor to sign a bill notwithstanding the absence of the signatures of the speaker of the house or the presiding officer of the senate. Consequently I hold that when the governor signs a bill and deposits it with you it must be printed with the other session laws.

EUGENE ENGLEY,
Attorney General.

IN RE APPROVAL OF THE GOVERNOR OF S. B. NO. 314.

After the governor has approved or disapproved of a measure, and the same has been deposited with the secretary of state, it is beyond his control and cannot be reconsidered.

Attorney General's Office,
Denver, Colo., April 13, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Sir—In relation to the reconsideration of S. B. No. 314, and the power of the governor therein, I beg leave to submit that the matter has been fully decided by the supreme court of Illinois in the case of The People ex rel. vs. Hatch, in which the court say:

"As in every other department of the government, so in the executive, whilst the matter before it is In Fieri, there is the locus paenitentiae—the right to consider—to change an opinion expressed, and to cancel a signature of approval * * *. While a bill is yet before him, neither himself nor the public is concluded by anything which he may do. After that, his constitutional power is exhausted. The subject matter is gone from him, and he may no longer deliberate or retract. He and all others are concluded. The record which declares his acts can alone speak his intentions, * * * or had he deposited the law, with his approval upon it, with the secretary of state, then it would have passed beyond his control, and its status would have become fixed and unalterable (in so far as the governor is concerned), although his approval may have been signified by mistake."

19 Ills., 283.

The language of this decision is explicit, and can result in but one conclusion, and that is, after the

governor has approved or disapproved of a measure, and the same has been deposited with the secretary of state, it is beyond his control and cannot be reconsidered.

EUGENE ENGLEY,
Attorney General.

IN RE APPORTIONMENT OF SCHOOL FUNDS.

Section 1, p. 316, session laws 1891, contemplates that the two mill tax therein provided shall be apportioned among the school districts per capita, and not $160 for each school district. The $40 per month therein provided is established as a basis in estimating the teachers' salaries.

Attorney General's Office,
Denver, Colo., April 17, 1893.

Hon. J. F. Murray, Supt. Public Instruction, State of Colorado:

Dear Sir—In reply to the letter of Hon. Sam. W. White, county superintendent of Garfield county, in which an opinion is asked as to the meaning of section 64, chapter XCVII., of the general statutes of Colorado, would say, that to me, the most reasonable construction to be placed upon said section is that the county superintendent shall make the apportionment per capita.

The provision in the section that "he shall use as a basis for making his estimate the sum of forty ($40) dollars per month for the teacher's salary" is, in my opinion, only intended as a basis in establishing this one item of expense.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE GENERAL AND SPECIAL SCHOOL FUNDS.

There is no difference in a general school fund and a fund derived by a special tax upon the district for general school purposes, only in the manner of their creation. They may both be used for the same purpose.

Attorney General's Office,
Denver, Colo., April 17, 1893.

Hon. J. F. Murray, Supt. Public Instruction, State of Colorado:

Dear Sir—In reply to the letter of Mr. Frank Humble, submitted by you to this office, permit me to say that, in my opinion, there is no difference between the general fund and the special fund mentioned, only in their creation. Their purpose is the same.

The special fund is created by the levy of a tax upon the taxable property in the district, but may be expended for any of the purposes enumerated in section 51, chapter XCVII., general statutes.

I would therefore suggest that no transfer of the special fund to the general fund be made, but that warrants be drawn upon the special fund for any purpose mentioned in said section, and that said fund be given credit accordingly.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE QUALIFICATIONS OF ELECTORS.

Any foreigner in this state, in declaring his intention to become a citizen of the United States according to law, four months before he offers to vote, thereby becomes a qualified elector, and is therefore eligible for election to office, and can act as a judge of election.

Attorney General's Office.
Denver, Colo., April 18, 1893.

John A. Norwood, Esq., Tin Cup, Colo.

Dear Sir—In reply to your letter of March 6, permit me to say, that the constitution of this state provides for the qualifications of an elector, and, inter alia, that he shall have declared his intention to become a citizen of the United States not less than four months before he offers to vote.

Cons. art. 7, sec. 403.

It again provides that no person except a qualified elector shall be elected or appointed to any civil or military office in this state.

Cons. art. 7, sec. 408.

Section 1596, Mills' Ann. Stats., provides that any persons possessing the qualifications of an elector can be a judge of election.

I do not know as I comprehend fully the third question, but the first papers are valid for the purpose for which they were granted, until the holder thereof, by some act in violition of law, becomes disqualified from enjoying the rights and privileges of citizenship.

In conclusion, it is my opinion, that any foreigner in this state in declaring his intention to become a citizen of the United States according to law, therecitizen of the United States according to law four

months before he offers to vote, thereby becomes a qualified elector, and is therefore eligible for election to office and can act as judge of election.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE CITIZENSHIP OF WOMEN.

No person can, by act of his own, without the consent of the government, put off his allegiance and become an alien.

Attorney General's Office,
Denver, Colo., April 9, 1893.

Hon. J. F. Murray, Supt. Public Instruction, State of Colorado.

Dear Sir—In reply to your inquiry of the 17th inst., as to whether or not a lady who is a citizen would lose her citizenship by marrying an unnaturalized foreigner, permit me to say: The act of Congress of February 10, 1855, declares "that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." That is, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also.

7 Wall. U. S., 496.
63 N. C., 299.

No person can by act of his own, without the consent of the government, put off his allegiance and become an alien.

3 Pet., 242.

I fail to find any law by which a woman loses her citizenship by marriage, and therefore answer your question in the negative.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE QUALIFICATION OF WOMEN TO VOTE AT SCHOOL ELECTIONS.

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1. A woman does not lose her citizenship by marrying a man who is not a citizen.

2. Women, under the law, although possessing all the qualifications of citizenship, are prohibited from voting at general elections, but may do so at school elections.

3. A woman not being a citizen of the United States cannot vote at any election without first being naturalized, or, by becoming a citizen by marriage, as provided by law.

Attorney General's Office.
Denver, Colo., April 19, 1893.

Hon. J. F. Murray, Supt. Public Instruction, State of Colorado.

Dear Sir—In reply to yours of the 17th inst., in which you ask: "A widow lady comes to this country from a foreign country, has not been here twelve months, but has been within the state for more than six months. Can she vote at the coming school election without being naturalized?" would say:

The session laws of 1891, page 318, provide for the qualification of electors in school elections as follows: "Every elector legally qualified to vote at a general election, having been a resident of the school district for thirty (30) days next preceding the day of election, shall be entitled to a vote; provided, that

no person shall be denied the right to vote at any school district election, or to hold any school district office on account of sex."

Women, under the law, although possessing all the qualifications of citizenship are prohibited from voting at general elections, but as provided above, may do so at school elections.

The proviso only obviates the distinction as to sex, she must possess the other qualifications of an elector.

The person mentioned in your letter not being a citizen of the United States, cannot vote at any election without first being naturalized, or by becoming a citizen by marriage, as provided by law.

EUGENE ENGLEY,
Attorney General.

[Note.—Since the foregoing opinion was written full electoral rights have been conferred upon women in Colorado.]

IN RE APPOINTMENT OF SENATORS AND REPRESENTATIVES TO A CIVIL OFFICE.

1. Section 8, article V., of the constitution of Colorado, provides that no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state.

Membership upon the state board of charities and corrections is a civil office under this state, and no senator or representative is eligible for appointment thereon during his term as such senator or representative.

Attorney General's Office,
Denver, Colo., April 24, 1893.

Hon. E. H. Benton, Greeley, Colo.:

Dear Sir—In reply to your inquiry of recent date as to whether or not you were eligible to appointment

as a member of the state board of charities and corrections, having been elected a member of the ninth general assembly, I beg leave to submit the following:

The constitution of the state of Colorado provides that no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state.

Article 5, section 8, Const.

Why the constitutional convention of Colorado saw fit to reject the precise provision of the U. S. constitution in the adoption of said section we are not at this time to consider. The fact remains that it did so, and by so doing left the section in such plain language that no amount of elucidation could in any manner alter its meaning.

The supreme court of Colorado decided that the words "elect" and "appoint" are not used synonymously in the constitution, but with due regard to the primary and proper significance of both words.

8 Colo., 129.

The only point to my mind upon which your eligibility depends is as to whether or not a membership upon the state board of charities and corrections is a civil office under this state. After considerable investigation I am convinced that it is, and that the courts would so hold.

From several definitions and constructions I find the term "civil office" to be such an office as is created by the constitution or such an office as appertains to the state at large, and are filled by appointment of the executive, if not otherwise provided for by the constitution.

Crabbe's Synonyms; Johnson's Dict.; Webster's Dict.

"Any office is a civil office which is derived from the citizens, as such, whether more or less."

1 Showers Rep., 240.

"A civil office is a grant and possession of the sovereign power, and the exercise of such power within

the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office, and it is distinguished in this respect from mere employment, as a contractor or agent under some public office."

3 Mo., 481.
17 Serg. & R., 219.
13 Vt., 309.
Smed. & Mar., 550.

The state board of charities and corrections is created and the members are appointed, their powers given, their duties defined, and its maintenance provided for directly by act of the legislature. They exercise a share of the powers of civil government, and their authority comes directly from the state and, as a body constituted for purposes of civil government, the members thereof are unquestionably civil officers under this state.

However unreasonable in some instances this provision in our constitution might appear, my opinion must be based upon the law as I find it, and as the courts construe it.

In view of the foregoing, therefore, I am constrained to hold that you are ineligible for the appointment as a member of the state board of charities and corrections.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF INSURANCE COMPANIES.

The constitution has put it out of the power of the general assembly to relieve insurance companies from taxation on property of any class, when other owners of such class of property must endure the burden of such taxation.

Attorney General's Office,
Denver, Colo., April 27, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In your communication of the 10th ultimo, you ask me if county authorities in this state are allowed by law to levy a tax per centum in any manner on any insurance company doing business in this state and within the respective jurisdictions of said authorities.

I presume the question is suggested by section 12 of the insurance law, which provides that insurance companies doing business in this state shall not be subject to any taxation, "except on real estate and the fees provided in this act." Substantially the same question was submitted to my immediate predecessor in office, Hon. Jos. H. Maupin, and in answering your question permit me to refer you to page 102 of his official report, in which he quotes the pertinent provisions of sections 3 and 10, of article X., of our state constitution, and makes the following application thereof:

"I think no comment on this language can make its meaning any plainer, and that its evident purport is: That any real or personal property owned or used by the aforesaid insurance companies, in any county of this state, is subject to taxation for all the purposes named in the constitution, the same as if it was owned or used by any other corporation, or any person in such county, and that the constitution has placed it beyond the power of the general assembly to relieve insurance companies, or any one else, from uniform taxation, upon property of any class, when other owners of such class of property must endure the burden of such taxation."

Such conclusion is, in my judgment, a necessary deduction from the parts of the constitution cited.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF INSURANCE COMPANIES.

All insurance companies engaged in the transaction of the business of insurance in this state shall annually, on or before the first day of March in each year, pay to the superintendent of insurance two per cent on the excess of premiums received over losses and ordinary expenses incurred within this state during the year ending previous to the 31st day of December.

Attorney General's Office,
Denver, Colo., April 28, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—You submit to me, for advice relating thereto, the tax statement for the year 1892 of the Northwestern Mutual Life Insurance Co., which is briefly as follows:

Entire premiums received		$303,684 75
Losses paid	$91,650 00	
Ordinary expenses	62,965 72	
Including dividends to pay premiums	22,543 50	
Net premiums		$126,525 53

The law applicable to the case is section 12, of the act of 1883, establishing the insurance department and providing for the regulation of insurance companies, which provides that "All insurance companies * * * engaged in the transaction of the business of insurance in this state shall annually, on or before the first day of March, in each year, pay to the superintendent of insurance two per cent. on the excess of premiums received over losses and ordinary expenses incurred within this state during the year ending previous the 31st day of December."

You desire to know whether said company can lawfully include under the head of "ordinary ex-

penses" dividends used by it during the year 1892 to "pay off premiums." An examination of the annual statements, required by law of assets and condition, made by insurance companies of this class shows that dividends paid in this way are not usually placed in the "expense" column; so that the companies, evidently, for some purpose, make a distinction between the payment of said dividends and ordinary expenses, and since the law permits deduction for only "losses and ordinary expenses," it appears at first sight that a deduction for the aforesaid dividends should not be allowed. It will be necessary, therefore, to look further to find any reason for the claim made by the company.

Dividends to policy holders are principally derived from the premiums which are unused in the payment of losses and expenses during a given year or period, and are declared at the end of the year, or other period fixed by the terms of the policy, at which time, and not before, the policy holders become entitled to said dividends. So far as I am informed, all such insurance companies, by the terms of their policies, make payment of such dividends to their policy holders, not by actual disbursement from the treasury of the company, but by deducting the dividend due to each policy holder from the premium due for that year on his policy, so that the company actually receives no more than the excess of such premium over the dividend to which the policy holder is entitled. It is clear from this that the sum total of premiums actually received is not equal to the total amount of annual premiums named by this class of policies; but from the estimates of this amount made from the face of the policies, should be subtracted, the dividends allowed by the company in settlement with policy holders, in order to obtain the true account. This, I think, is what this company attempted to show by its statement, but its accountant charged it with the amounts allowed policy holders as dividends on annual premiums, as money collected; and adjusted the account by taking credit by same

amount as money "paid on premiums," though such sums were neither collected nor paid. It might have been better for the company to have shown by its statement the amount of premiums actually collected which would have rendered deduction unnecessary, and it might be well for you to require this and all other companies to show by their statements the actual facts, and no more. In the statement under consideration, as it is, the accountant appears to have resorted to a fiction not infrequent with book-keepers, for the purpose of squaring his account by the prima facie receipts of the company for the year 1892, as appeared from the premiums named by all its policies of this class.

The foregoing discussion is upon the assumption that there is no doubt that the policy holders in this state have received the benefits of the dividends in question. If this be true, it is my opinion that the balance shown by the company for taxation is correct.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE VETERINARY SANITARY BOARD.

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1. A comparison of the statutes show that the state veterinary sanitary board has the power to inspect all southern cattle which come through or into Colorado.

2. Sections 4288 and 4304, Mills' Annotated Statutes, indicate with certainty that the expense of cattle inspection shall be borne by the owner or persons having them in charge.

Attorney General's Office,
Denver, Colo., April 28, 1893.

To Charles Gresswell, State Veterinary Surgeon:

Sir—In response to your letter of inquiry of the 21st inst. I submit the following:

The act of March 23, 1885, amended March 3, 1887, and April 1, 1891, creates the state veterinary sanitary board and the office of state veterinary surgeon, and prescribes their duties.

Among these it is the duty of the latter officer to investigate "any and all cases of infectious or contagious diseases among the domestic animals of the state which may come to his knowledge, and for such purpose he shall visit any locality in the state where such diseases may be reported to exist, and make full and careful examination of any or all animals in that locality * * *."

Mills' Ann. Stats., section 4298.

It also provides that the state veterinary sanitary board shall adopt such quarantine regulations as are deemed necessary to prevent the introduction or spread of Texas or splenic fever, etc., under such regulations as may be prescribed by law.

Section 4299, Id.

In the same connection the law says: "Such board shall have power to employ, at the expense of the state, such persons, and purchase such supplies and materials as may be necessary to carry into full effect all its orders."

And also, that "whenever the board shall have good reason to believe that any contagious or infectious disease exists in any other states, territories or countries, or that there are conditions which render domestic animals from such districts liable to convey such disease, they shall report the same to the governor.

Thereupon, the governor shall, by proclamation, prohibit the importation of any live stock of the kind diseased into the state, unless accompanied with a certificate of health given by said board, who shall carefully examine all such live stock previous to giving such certificate. All expenses connected with such examination shall be paid by the owner or owners of such stock.

Section 4304, Id.

The act of March 21, 1885, provides "that no person, association or corporation shall bring or drive, or cause to be driven, into this state, between April 1 and November 1, any cattle or horses from south of parallel 36 degrees north * * *; unless the animals shall have been held ninety days at some place north of said parallel, or unless the owner or party in charge shall procure a certificate to the effect that the animals are free from the diseases mentioned, etc., and provides that the expense connected with the inspection in such cases shall be paid by the owners * * *."

Section 4288, Id.

A comparison of these statutes show that the state veterinary sanitary board has clearly the power to make regulation "fifth," of the circular submitted with your letter. This expense to be paid by the state in the way of employment of persons and purchasing supplies and material, in my opinion, applies to cases where an inspection is not contemplated or included in the action of the board.

Section 4303, Id.

Sections 4288 and 4304, Mills' Ann. Stats., indicate with certainty that the expense of cattle inspection shall be borne by the owner or persons having them in charge.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE EXTRA COMPENSATION OF EMPLOYES IN INSURANCE DEPARTMENT.

A distinction must be made between the duties of constitutional and statutory officers and the employment of clerks. Constitutional and statutory officers cannot receive other compensation than that fixed by law. But there can be no objection to the payment of extra compensation to clerks and other employes for work done or services performed outside of the regular office hours of the state departments, so long as such work or services cannot be done during office hours.

Attorney General's Office,
Denver, Colo., April 28, 1893.

Hon. Albert Nance, State Treasurer:

Dear Sir—On the 27th day of February, 1893, and during my absence from the city, an opinion was rendered by this office, in response to your request, relative to warrant No. 767, issued to John W. Inman and T. F. Simmons for services performed by them, under a contract duly signed and executed by John W. Henderson, state auditor and ex officio superintendent of insurance, in preparing an insurance report. The opinion then rendered negatives the payment of said warrant by reason of the statement theretofore made to this office upon which said opinion was predicated. Upon careful investigation of the manner in which said services were performed, it appears that a full statement of all the facts was not presented to this office at the time said opinion was requested and given. In writing that opinion my assistant naturally inferred from the statement made to him that said services were performed by said Inman and Simmons, as regular employes of the insurance department, and during office hours, while receiving a stated salary, and that said warrant was for extra compensation for work otherwise paid for.

It now appears that said work was extra labor performed by Simmons, an employe, outside of the regular office hours of the state department, aided by his wife and said John W. Inman, the other contractee, the last two persons not being regular employes of said office, outside of said contract. A distinction must be made between the duties of constitutional and statutory officers and the employment of clerks. Constitutional and statutory officers cannot receive other compensation than that fixed by law. But there can be no objection to the payment of extra compensation to clerks and other employes, for work done or services performd outside of the regular office hours of the state departments, so long as such work or services cannot be done during office hours.

In accordance with this opinion said warrant No. 767 should be paid.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE SCHOOL BOARD—EXPULSION OF PUPILS.

The power to expel or suspend a pupil from the privileges of the schools of Colorado is conferred by law solely and exclusively on the school board, and no teacher has the right to perform that act.

Attorney General's Office,
Denver, Colo., May 4, 1893.

To the Honorable State Board of Education, Denver, Colo.:

Gentlemen—In reply to the letter of Mr. D. H. Dickason, submitted to this office, in which two questions are asked, viz.:

1. "Has a teacher in the public schools of Colorado authority by law to suspend a pupil? and

2. "Can a school board delegate their duty to others than themselves?" permit me to say:

First—The power to expel or suspend a pupil from the privileges of the schools of Colorado is conferred by law solely and exclusively on the school board, and no teacher, therefore, has the right to perform that act.

In answer to the second question I desire to state that school boards may delegate some powers conferred upon them as are incidental only to the performance of their duty, but it is a well-established

principle of law that powers involving the exercise of judgment and discretion cannot be delegated, a principle which applies to public bodies and officers as well as to private individuals.

Throop on Public Officers.
75 N. Y., 388.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF SUPERINTENDENT OF SCHOOLS.

When the county commissioners make an approprition for the county superintendent of schools for the fiscal year, the amount so appropriated is all that can be expended for that office during such fiscal year.

Attorney General's Office,
Denver, Colo., May 2, 1893.

Hon. James A. Kimber, Chairman Board County Commissioners, Wray, Colo.

Dear Sir—In reply to your inquiry of recent date as to whether or not the expense of maintaining the office of county superintendent of schools can be limited to the amount of the annual appropriation made by the county commissioners; or whether the case of Smith vs. Com'rs., 10 Colo., 17, control as to your powers in relation to the superintendent's office, permit me to say, that in my opinion, the act of 1891, gives the county commissioners full power as to limiting the expenditures for county purposes.

In the case of the office of superintendent of schools, although the statute provides that the superintendent in all counties, except those of the first and second class, shall receive as compensation "The sum of five dollars per day, actually and necessarily employed for the county, and ten cents per mile for each mile actually and necessarily traveled in the performance of duty," the sum total of his compensation for any one year based upon such per diem and mileage cannot exceed the amount appropriated for that year by the commissioners. (Sec. 14, p. 312, Sess. Laws 1891.)

The language of the statute as quoted, is awkward and inartistic, but the legislative intention is clear as to the per diem and mileage. The case of Smith vs. Com'rs, 10 Colo., 17, was decided in the absence of, and prior to the passage of the act of 1891, and can therefore in no way affect the intent and purpose thereof.

The act of 1891 was passed for the express purpose of confining the expenditures to within the probable amount of revenue, and section 2 of the act is particularly explicit in its provision that, "neither the board of county commissioners, not any officer of the county shall add to the county expenditures in any one year, anything over and above the amount provided for in the annual appropriation resolution of that year, except as is herein otherwise specially provided." The proviso mentioned in the act only contemplates some necessary improvement arising upon a contingency unforseen at the time the annual appropriation was made.

In view of the foregoing, I believe the sum of $800 appropriated by your commissioners for the office of the county superintendent of schools is all that can be expended for that office during the fiscal year for which said appropriation was made.

In answer to your second inquiry, it is my opinion that the limitation as to the rate of levy for county purposes, as provided in section 3768, Mills' Ann.

Stats., is repealed by section 4 of the act of 1891, page 112, as the last act is evidently intended as a substitute for the former, although not repealing it in terms.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE LEASING OF LANDS BY STATE LAND BOARD.

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1. There is undoubtedly a difference between the provisions of the law applicable to the leasing of mineral lands and those considered as agricultural. In the one instance, the time and terms for which they may be let are discretionary with the state board of land commissioners, while on the other the time is limited by the act itself, and the terms are virtually determined by the public by means of their being submitted to public bidding.

2. Any person entering and locating upon state lands without the knowledge or consent of the state board of land commissioners, does so at his peril and can claim no right that the state land board or subsequent lessee is bound to respect.

Attorney General's Office,
Denver, Colo., May 5, 1893.

Hon. H. C. Childs, Register State Board Land Com'rs:

Dear Sir—In reply to yours of the 4th inst. and the questions therein submitted, I beg leave to offer the following:

Sec. 8 of the act of 1887, "An act creating the office of Register of the State Board of Land Commissioners," etc., provides as follows, as to the leasing of mineral land: * * * "If stone, coal, coal oil, gas or other mineral not herein mentioned be found upon the state land, such land may be leased for the

purpose of obtaining therefrom the stone, coal, coal oil, gas, or other mineral, for such length of time, and conditioned upon the payment of the state board of such royalty upon the product as the state board of land commissioners may determine."

There is undoubtedly a difference between the provisions of the law applicable to the leasing of mineral lands and those considered as agricultural. In the one instance the time and terms for which they may be let are discretionary with the state board of land commissioners, while in the other it is limited by the act itself, and the terms are virtually determined by the public by means of their being submitted to public bidding. The reason for this is obvious.

In the case of agricultural lands, applicants therefor are, in a measure, apprised of the benefits to be derived from their use and occupation. Their value may be reasonably estimated, there is nothing hidden, and the state is in some degree protected in its rights by the knowledge of such facts. In the case of mineral lands the opposite is true, and it is only upon development that their value can be determined. I believe the framers of the law anticipating these conditions, intended that the distinction should be made, and that the method of disposition applicable to the nature and character of state lands should be scrupulously complied with.

The fact of the state land board having the power to stipulate a certain and specific royalty upon the product of mineral lands, as provided in the section above quoted, would, in my opinion, preclude the idea of submitting such lands to public bidding, and having established the royalty it is within their prerogative to grant a lease to such person or persons, applicants therefor, as in their judgment and discretion would best subserve the interests of the state.

In reply to the second question, as to whether or not a lessee may be required to reimburse the discoverer for the value of the work or improvements made upon said land, would say, that I find no author-

ity in law, or in the broad and liberal principles of equity that gives any person the right to take advantage of his own wrong. Any person entering and locating upon state lands without the knowledge or consent of the state board of land commissioners, does so at his peril and can claim no right that the state land board or a subsequent lessee is bound to respect.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE VACANCY IN OFFICE OF COUNTY COMMISSIONER.

If a county commissioner remove without the district in which he resided when elected, his office thereupon becomes vacant.

Attorney General's Office,
Denver, Colo., May 5, 1893.

John Gray, Esq., District Attorney, Lake City, Colo.:

Dear Sir—In reply to your inquiry relating to to the office of commissioner of Hinsdale county, permit me to say, that from the facts submitted by your letter, I should consider Mr. Carroll to be the legally qualified commissioner of Hinsdale county, with full authority to act in that capacity.

If, as stated by you, Mr. Harrington removed from the district in which he resided when elected, this action upon his part created a vacancy in the office, and Mr. Woodruff at the time, being one of the commissioners, had authority to notify the governor of such fact. The governor then proceeded and filled the vacancy as provided by law.

Secs. 783-790, Mills' Ann. Stats.

The fact that Mr. Woodruff having stated in his letter to the governor that Mr. Harrington had removed from the county, when, in reality, he had only removed from his district, would avail nothing, if the fact remained that he removed from within to without his district. The latter only is sufficient to create a vacancy under the law covering the precise facts presented us.

In my opinion, quo warranto proceedings to oust Mr. Carroll would be unsuccessful, unless the real facts of the case are different from those submitted to this office.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE CLAIMS OF BACA AND LAS ANIMAS COUNTIES.

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1. Under the act creating the county of Baca, full power and authority were given the commissioners of Baca and Las Animas counties to adjust all matters of revenue and indebtedness; and in conformity with said act said commissioners entered into the agreement of May 23d, 1889.

2. After the transfer of the funds the liability of Las Animas county ceased and that of Baca county immediately ensued.

Attorney General's Office,
Denver, Colo., May 5, 1893.

Ezra C. Nowels, County Attorney, Lamar, Colo.:

Dear Sir—In reply to your inquiry of recent date regarding claims against Baca county, I beg leave to state, that under the facts as presented, I should consider Baca county responsible for the amounts mentioned.

I find by the act establishing the county of Baca, that full power and authority were given the commissioners of the two counties to adjust all matters of revenue and indebtedness (See Sess. Laws 1889, p. 27), and in conformity with said act, said commissioners did enter into the agreement of May 23, 1889.

In the transcribing of the tax roll for Baca county, the commissioners erred in ordering the state and general school taxes to be entered under the general county revenue fund. When this transcription was made it was clearly the duty of Baca county to give to the several funds the amount due them, as they were represented upon the books of Las Animas county, then the treasurer of Baca county should have complied with the law as to their disposition.

The agreement between the counties as to the transfer of the funds, simply amounted to a change of agencies, and when the transfer was made Baca county simply became the custodian of the funds, and stands in the same relation regarding them as did Las Animas prior to the transfer, and consequently became equally responsible under the law as to their disposition.

After the transfer was made the liability of Las Animas county ceased and that of Baca county immediately ensued.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE BOUNDARIES OF MINERAL COUNTY.

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1. It is an error to suppose that geographical boundaries must, in every instance, be described in and limited to the phraseology of civil engineers and surveyors, even when government surveys are referred to and made a part of the description. Except when technical language is alone used, it is seldom that two or more persons will employ the identical words to express an idea or describe a thing.

2. The statutory description of the boundaries of Mineral county is precise and determinate. They embrace from the east to the west lines thereof a territory twenty-four miles wide.

Attorney General's Office,
Denver, Colo., May 6, 1893.

Hon. W. S. Adams, Chairman Board County Commissioners, Mineral County, Colo.

Dear Sir—I am in receipt of your communication of recent date, requesting an opinion from this office, relative to the statutory description of the boundaries of Mineral county, and the effect of the error, if any there be, in such description. The context and tenor of your communication would seem to imply that the descriptive boundaries of that county have been questioned, and that the real boundaries fixed by the statute, establishing such county, may not be the ones intended by the author of the legislative bill which has become a law. What the author of said bill may have intended is an antecedent matter, apart from legislative action and executive sanction, that cannot now be inquired into for the purpose of throwing light upon this question. Behind the law and the archives of the state the courts cannot go. We must seek for the legislative intention in the language employed, and the particular descriptive boundaries must be deducible, if at all, from that language.

In my opinion, the words used as descriptive of the boundaries of Mineral county are simple and determinate in their nature. They are largely devoid of the technic of language, and appeal to the common understanding of the people. It is an error to suppose that geographical boundaries must in every instance be described in and limited to the phraseology of civil engineers and surveyors, even when government surveys are referred to and made a part of the description. Except when technical language is alone used, it is seldom that two or more persons will employ the identical words to express an idea or des-

cribe a thing. The reason of the divergence in the forms of expression is the fundamental difference in the faculties of individuals. Hence, if some one other than the author of the legislative bill to create Mineral county had written the description thereof, he would have used different language—either technical in which arbitrary signs or forms are expressed, or words of common import. In the case of Mineral county, the author of said bill used both, and by a simple and happy combination expressed, in a descriptive sense, the boundaries of that county, so that any one of ordinary ability can readily and easily trace them upon the proper map.

The particular part of the law establishing the boundaries of Mineral county is found in section one of the legislative act, and reads as follows:

"Sec. 1. That the county of Mineral is hereby established with the legal capacities and functions of other counties in this state, and the boundaries are as follows: Beginning at a point where the township line two (2) east of the New Mexico Principal Meridian intersects the southern boundary of the county of Rio Grande, thence north along said line to the summit of the spur range that separates the waters running to the Rio Grande river from those running to the Saguache and La Garita creeks; thence westerly along the top of said spur range to the Continental divide; thence westerly along the summit of said range to the point where the township line two (2) west of the New Mexico Principal Meridian intersects the same; thence south along said line to a point that intersects with the southern line of Hinsdale county; thence east to the place of beginning."

The contention is, if I am correctly informed, over the words "township line two (2) east" and "township line two (2) west," it being suggested and asserted that these words and figures, as above quoted, may, in the absence of anything in the description designating the "range" apply to either line

of a particular township, and, therefore, by reason of a well-known principle of law and canon of statutory interpretation, in case of doubt, the boundaries cannot be extended beyond the limits of the lesser territory. This rule of interpretation can have no application in this instance as there is nothing in the contention. No doubt can impinge upon the descriptive boundaries of Mineral county.

Owing to the descriptive language used, it was unnecessary and would have been superfluous to have designated the "range."

The place of beginning of the description is definite and relates by direction to a meridian line designated and known as the "New Mexico Principal Meridian." The name, "New Mexico Principal Meridian," is an arbitrary appellation given to that particular principal meridian. As the New Mexico Principal Meridian is the line from which the initial point of the description is to be determined, it is essential to the purpose of this opinion that definitions be precise and clearly understood. A "meridian," geographically, is an imaginary great circle on the surface of the earth, passing through the poles and any given place, as, the meridian of Washington. Meridians on a map are lines drawn at certain intervals due north and south, or in the direction of the poles. The first meridian is the meridian from which longitudes are reckoned. A guide meridian is a line marked by monuments, running north and south through a section of country between other more carefully established meridians, called principal meridians, used for reference in surveying. A "range," in the public land system of the United States, is a row or line of townships lying between two successive meridian lines six miles apart. A township, in surveys of the public land of the United States, is a division of territory six miles square containing thirty-six sections.

The meridians included in each great survey are numbered in order east and west from the "principal

meridian" of that survey, and the townships in the range are numbered north and south from the "base," or correction line. In other words, the line of one township running north and south, is the line of each successive township running north and south, until a "base," or correction line is reached. The meridian line is the east or west line, as the case may be, of the township lying next to it and running north and south. (See map hereto annexed and made a part of this opinion.) The "New Mexico Principal Meridian" is marked by monuments and runs north and south through the center of Mineral county. With the foregoing definitions and descriptions in mind, it will be an easy matter to determine, by reference to the proper map, the east and west boundaries of Mineral county. The meridian line running north and south through the center of the county is the east line of the townships immediately west of and running north and south along the line of said meridian. The same meridian line is the west line of the townships lying immediately east of and running north and south along said meridian. (See said annexed map.) The whole description of the east and west boundaries of said county rests, as it were, upon the meridian line. The descriptive language of the statute relating to the east boundary in so far as applicable to the boundary under discussion, reads: "Beginning at a point where the township line two (2) east of the New Mexico Principal Meridian intersects the southern boundary of the county of Rio Grande, thence north along said line, etc. The words, "township line two (2) east of the New Mexico Principal Meridian" are clearly determinate. There is not room for a quibble upon such words. The word, "two" and the numeral,"(2)," the latter in parenthesis, refer to a line designated as a "township line" and not to a line of a particular township, and these lines may be numbered consecutively as township line "one (1)" or "two (2)," etc., "east" and constitute an accurate boundary, as in the case of Mineral county. The first "township line" east of said meridian is six miles east

of that meridian line, the meridian line being the western line of the townships east of and running north and south along said line. The second township line east, or "township line two (2) east" is a relative line running north and south, with the meridian line and twelve miles distant from that meridian line. (See annexed map.)

The descriptive language of the west boundary line stands upon the same basis of elucidation and need not, therefore, be discussed. The statutory description of the boundaries of Mineral county is precise and determinate. They embrace from the east to the west lines thereof a territory twenty-four miles wide. The possibility that other people might have, each in his own way, used other language to describe these boundaries, cannot militate against the descriptive boundaries of Mineral county, as fixed by statute. Nor was it necessary to have the boundaries described in technical language. The language used has the merit of simplicity and definiteness

Yours truly,

EUGENE ENGLEY,

Attorney General.

IN RE SENATE BILL NO. 320, DISPOSING OF UNEXPENDED BALANCES.

The funds named in section 1 of said act are statutory funds, and the unexpended balances of said funds remaining at the end of the fiscal year may be transferred to the general revenue fund of the state, as provided in said act.

Attorney General's Office,

Denver, Colo., May 11, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In answer to your communication of recent date, relative to "Senate Bill No. 320," the same

being an "Act to transfer certain unexpended balances to the general revenue fund of 1893," I desire to say: That the funds named in section 1 of said act are statutory funds, and the unexpended balances standing to the credit thereof at the end of the fiscal year or years covered by said act may be transferred to the credit of the general revenue fund of the state for the year 1893 as directed by said act.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE EXPENSES OF STATE MEDICAL BOARD OF EXAMINERS.

In the absence of any appropriation specifically made, or funds in the treasury to pay the expenses of the state board of medical examiners, certificates of indebtedness may issue, as provided by law.

Attorney General's Office,
Denver, Colo., May 13, 1893.

J. N. Hall, M. D., Secretary State Board Medical Examiners:

Dear Sir—In reply to your communication of recent date, would state: The state board of medical examiners is a legally constituted board and the law provides that all necessary expenses of the board shall be paid for out of the funds of the state treasury, not otherwise appropriated.

Mills' Ann. Stat., Sec. 3559.

In the absence of any appropriation specifically made, or funds in the treasury to pay said expenses,

it is my opinion that certificates of indebtedness could be issued as provided by law.

Mills' Ann. Stats., Sec. 1829.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FEES AND SALARIES.

Under the fee and salary law county officers are deprived of discretionary powers regarding fees.

Attorney General's Office,
Denver, Colo., May 13, 1893.

Hon. John M. Heineke, County Clerk, Yuma, Colo.

Dear Sir—In answer to your communication of recent date, in which you ask if county clerks can give reduced rates on recording fees, where a large number of instruments are brought in for record at one time, permit me to say that, in my opinion they cannot.

Prior to the enactment of the present fee and salary law, (Sess. Laws 1891, pp. 200 and 307), the officers for whose services fees were provided were not limited by law as to their disposition, but had absolute control over them; they could make such rates and charges as they saw fit, provided they did not exceed the limit prescribed by law. Under the act of 1891, (Sess. Laws 1891, pp. 313, 314 and 315), the said officers are in a sense, constituted bookkeepers for the county; they are held responsible to the county for all fees collected and must make regular monthly reports to the chairman of the board of county commis-

sioners; the board of commissioners are required to audit the accounts so rendered and the fees collected must be paid over to the county treasurer, the custodian of the county funds. Every fee as prescribed in the act must be collected in advance, if the same can be ascertained, and the officer is made responsible for neglect in collecting such fees. If any balance remains after paying the salaries of the officers collecting and reporting said fees, the same must be credited by the county treasurer to the general county fund.

In view of the provisions of the law governing fees and salaries, I am of the opinion that county officers are deprived of discretionary powers regarding fees.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE SALARY OF PRESIDENT AND TREASURER OF SCHOOL DISTRICTS.

The law does not authorize the payment of salaries to the president and treasurer of a school district.

Attorney General's Office,
Denver, Colo., May 13, 1893.

Walter W. Smith, Esq., Erie, Colo.

Dear Sir—In answer to your inquiry of recent date, would say: That neither the president or treasurer of a school district are authorized to receive compensation for their services under the law; but the secretary may receive such compensation as the board may determine.

Mills' Ann. Stats., Sec. 4015.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE APPROPRIATION OF WATER.

Appropriation, use and non-use are the tests of a person's rights; and place of use and character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.

Attorney General's Office,
Denver, Colo., May 13, 1893.

Hon. R. Q. Tenney, Water Com. Dist. 3, Div. 1, Fort Collins, Colo.

Dear Sir—I have just received a call from Ex-Governor John L. Routt, relative to a ditch matter in your district. He informs me that he is the owner of certain lands situate in Water District 3, Division 1; that he is the owner of (or interested in) two ditches, "Canon Canal" and "Upper Canon High Line Ditch and Reservoir," constructed for the purpose of irrigating in whole or in part said lands; that the water appropriation for a portion of his lands through the lower ditch is prior to that of the upper ditch. That he desires to use, temporarily, a portion or all of his prior appropriation of water on a part of his lands, by transference to the upper ditch, that is to say, the water appropriated for use on lands lying under the lower ditch will be shut off in like proportion and turned into the upper ditch for the irrigation of his lands lying under the upper ditch, there being no intervening ditches of other parties lying between his said two ditches.

There can be no legal objection to the request of Governor Routt in this matter.

In Davis vs. Gale, 32 Cal., 27, the court, in speaking of the rights of an appropriator of water, say: "Appropriation, use and non-use are the tests of his rights; and place of use and character of use are not.

When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it." In Maeris vs. Bicknell, 7 Cal., 262-264, it was held that "a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change."

In Kidd vs. Laird, 15 Cal., 162-168, it was held that the rights of an appropriator to the water of a stream are strictly usufructuary, and "that in all cases the effect of the change upon the rights of others is the controlling consideration, and that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper." In Fuller vs. Swan River P. M. Co., 12 Colo., 19, our supreme court say: "We think that the rule announced in Kidd vs. Laird, that, in the absence of injurlous consequences to others, any change which the party chooses to make is legal and proper," is the only rule under which the rights of the prior appropriator can be fully exercised, and his rights, and the rights of all other persons, fully protected. The right to change, so limited, includes the right of diversion and place and character of use." The same doctrine is approved in 16 Colo., 62.

As there are no intervening ditches between the two ditches in question, it would appear that there can be no "injurious consequences to others in this case. As above stated, there can be no legal objection, upon the statement made, to the use of the water or any part of it, under the said appropriation, for the irrigation of lands lying under the upper ditch, provided, the same amount of water is shut off, in the meantime, from the lower ditch, there being no adjudication of water rights for the upper ditch.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE VOUCHERS BY BOARD OF LAND COMMISSIONERS.

Section 11, Act of 1887 (Sess. Laws, 1887, p. 337), provides for errors in payment of money upon lands in case of lease or sale by the state land board.

Attorney General's Office,
Denver, Colo., May 13, 1893.

Hon. F. M. Goodykoontz, State Auditor:

Dear Sir—In answer to your inquiry of recent date, relative to the voucher of one, F. J. Chamberlain for the sum of $439.80, by the board of land commissioners, I desire to say: That section 11 of the legislative act approved April 2, 1887, provides, in part, as follows: "If by any mistake or error, any money has been or shall hereafter be paid on account of any sale or lease of state lands, it shall be the duty of the board to draw a voucher in favor of the party paying said money; and on the presentation of said voucher, the auditor shall draw his warrant upon the state treasurer for the amount and the state treasurer shall pay the same out of the fund into which such money was deposited or placed."

The warrant should be drawn in conformity with said law.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE STATE BOARD OF DENTAL EXAMINERS

The law governing the examination of applicants to practice dentistry in this state, expressly provides that said applicants shall appear before the board in person.

Attorney General's Office,
Denver, Colo., May 15, 1893.

C. N. Guyer, D. D. S., Secretary State Board Dental Examiners:

Dear Sir—In reply to your communication of recent date, would say: That the law governing the examination of applicants to practice dentistry in this state, expressly provides that said applicants shall appear before the board in person; there is no specific provision or regulation as to the manner in which the examination shall be conducted, and the board may prescribe such rules as in their judgment will best subserve the purposes of the act.

Mills' Ann. Stats., Secs. 1520-1521.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE PRINTING CERTIFICATES OF NOMINATIONS IN GENERAL ELECTIONS.

1. There is no specific rule in the statute as to the kind of type to be used in the printing of the certificates of nominations or official ballots, except that it shall be "clear, plain type."

2. The clerk may exercise his statutory discretion in the matter so long as it is exercised within the limits of reason.

Attorney General's Office,
Denver, Colo., May 18, 1893.

J. A. Williams, Esq., Editor Yuma Pioneer, Yuma, Colo.

Dear Sir—In answer to your communication of recent date, would say: That the act of 1891 provides for the publishing of certificates of nominations and the manner in which it shall be done. Among said provisions we find that the publication of said certificates shall be, as far as possible, in the form in which such nominations shall appear upon the official ballot. Section 18 of said act provides that "each county, city or town clerk shall use precisely the same quality and tint of paper and kind of type, and quality and tint of plain black ink for all ballots furnished by him at one election.

Sess. Laws 1891, page 152, Sec. 18; pp. 146, 147, 148.

There is no specific rule in the statute as to the kind of type to be used in the printing of certificate of nominations or of official ballots, except that it shall be "clear, plain type," Sess. Laws 1891, page 151, Sec. 18. But the law makes it the duty of the county, city or town clerk to print and publish such certificates and ballots in manner and form as above pointed out, and gives him the right to say what type shall be used for such purpose, so long as it is "clear, plain type," and is adapted for such printing, and will meet the requirements of the statute. Of course he would have a right to say that "nonpareil" is not "clear, plain type," for such a purpose, for it is very evident that that kind of type is too small to print the certificates and ballots with, and the clerk can exer-

cise his statutory discretion in the matter so long as it is exercised within the limits of reason.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE MONEYS OF THE STATE PENITENTIARY.

Under the statutes the warden and board of penitentiary commissioners must transact their financial business with the state in the same manner as other boards or bureaus, through the auditor and treasurer.

Attorney General's Office,
Denver, Colo., May 18, 1893.

Hon. Frank McLister, Warden State Penitentiary:

Sir—In response to your letter of the 16th inst., I submit the following:

Your duty requires you to keep "in suitable books, regular and complete accounts of all income, business and concerns of the penitentiary; * * * a true account of all moneys received for labor or other sources belonging to the penitentiary," and to "turn the same over to the state treasurer, to be placed to the credit of the penitentiary account." Mills' Ann. Stats., Secs. 3433 and 3437. The state treasurer is ex-officio treasurer of the penitentiary. Id., Sec. 3405.

The constitution provides that no money shall be paid out of the treasury, except upon appropriation made by law, and on warrants drawn by the proper officer in pursuance thereof.

Const. Colo., Art. 5, Sec. 33.

Mills' Ann. Stats., Sec. 356.

The board of penitentiary commissioners shall meet as often as once in three months. Id., Sec. 3415. They shall collect claims due the state on account of the penitentiary, purchase supplies and make semi-annual statements of disbursements and expenses, to the auditor, and biennially to the governor.

Id., Secs. 3415, 3418, 3427, 3429-3444.

From these sections it is evident that the warden and board of penitentiary commissioners must transact their financial business with the state in the same manner as other boards or bureaus, through the auditor and treasurer. All moneys received must be paid directly to the treasurer, whose receipt they will take and he immediately credits the penitentiary fund with the amount. All expenses must be audited by the board, vouched for, and paid for by warrants drawn by the auditor on the treasurer. In other words, the transaction of the financial business of the penitentiary is regulated by the same checks and safeguards, and must be transacted through the same channels as that of any other department; and it is no more lawful for the board to divert public moneys to any purpose however lawful, except to pay over the same into the public treasury, than for any other officers of the state to do the same. It is the examination made by the auditor, his allowance of a claim and his warrant for the payment of it, that authorizes the withdrawal of any money from the state treasury. If any moneys should reach the hands of the warden or the board, it should at the earliest convenient period, be turned into the treasury, and if they incur expenses, they can draw on the treasury to meet it. The statute does not forbid them to meet whenever, in their opinion, the public business requires. As to whether there is a net earning or a deficit, can only appear authoritatively from the treasurer's books.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF COUNTY COMMISSIONERS.

1. The act of 1891 gives the county commissioners a per diem together with mileage at the rate of "ten cents per mile for the distance actually traveled in going to and returning from the place of meeting."

2. It is not the intention of the act to allow a member of the board of county commissioners mileage each time he shall travel the distance in going to and returning from the place of each day's meeting of the board, but once only in going to and returning from the place of meeting (general or special) as an entire session.

Attorney General's Office,
Denver, Colo., May 16, 1893.

Hon. R. C. Nisbett, County Commissioner, Pueblo, Colo.:

Dear Sir—In answer to your communication of recent date, would say, that in construing the meaning of statutes, we must, if possible, arrive at the intention of the legislature in passing the act. The law of 1891 providing for compensation of county commissioners (See Sess. Laws 1891, page 213), gives the county commissioners a per diem, together with mileage at the rate of "ten cents per mile for the distance actually travelled in going to and returning from the place of meeting." Whenever mileage is provided it is to be considered as compensation and the person or officer entitled to it can demand its payment the same as any other fee or salary.

Sess. Laws 1891, page 213.

The law further designates the time and place that each board of county commisioners shall meet.

Mills' Ann. Stats., Sec. 784.

Although the language of the act of 1891 pertaining to mileage, taken alone, may appear ambig-

uous, the intention of the legislature may be deduced by taking the provisions above cited and construing them together. The board is required to meet at the county seat at certain specified times during each year; these are its regular meetings; upon due notice to all members of the board, special meetings may be held. It is seldom the commisioners transact the business of such meeting in one day, and therefore continue the same from day to day until the business is completed or adjourn over to some future day, but under the law it is considered one and the same meeting or session until an adjournment sine die.

In view of the foregoing, it is my opinion that it is not the intention of the act to allow a member of the board of county commisioners mileage each time he shall travel the distance in going to and returning from the place of each day's meeting of the board, but once only in going to and returning from the place of meeting, for each and every meeting (general or special) as an entire session; except in the case of an adjourned regular session to some future and not succeeding day, in which case it seems that a member of the board would be entitled to mileage to and from such adjourned regular meeting.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE VETERINARY SANITARY BOARD.

1. The state veterinary sanitary board has the right to condemn and order the destruction of stock in order to prevent the spread of contagious disease.

2. No more than one thousand dollars can be allowed for the value of stock killed in one year, and no stock shall be paid for

which shall have been in a diseased condition when brought into the state, or brought into the state contrary to law or rule adopted by the board.

Attorney General's Office,
Denver, Colo., May 23, 1893.

Hon. Charles Cresswell, Secretary State Veterinary Sanitary Board.

Sir—In response to your letter of 20th inst., I submit the following:

The act of 1885 provides that in all cases where lawful claims for money exist against the state, and no appropriations have been made to pay the same, the auditor shall audit the same, and, when the same has been approved by the governor and attorney general, he shall give the holder a certificate of the amount of the claims, under seal if demanded, and shall report the same to the general assembly as soon as possible, with a statement.

Sess. Laws 1885, p. 205, Sec. 5.

Mills' Ann. Stats., Sec. 1829.

Also, the question of creating such indebtedness must, in the first instance, be submitted to the governor and attorney general for their approval.

The act of 1885 (Sess. Laws 1885, pp. 345, 346, Secs. 10, 11, 12 and 13, Mills' Ann. Stats., Secs. 4300, 4301, 4302 and 4303) gives authority to the state veterinary sanitary board to condemn and order the destruction of stock in order to prevent the spread of contagious disease, the methods to be pursued in appraising the value of stock so killed and of securing payment for the same.

There being no appropriation made to pay these bills for stock condemned and killed by order of the board, the claims must be audited as hereinbefore set out.

The probable expenditure to be incurred in the discharge of these duties ought to be submitted to

the governor and attorney general, and when they shall have approved the expenditure, the expense may be lawfully incurred.

Two important qualifications are attached to these proceedings by the law. Not more than one thousand dollars can be allowed for the value of stock killed in one year, and no stock shall be paid for which shall have been in a diseased condition when brought into the state, or brought into the state contrary to law or rule adopted by the board.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE TAXIDERMISTS.

A taxidermist can only prepare birds and animals killed in Colorado, by virtue of a permit from the game warden; and he can, in no case, sell such animals or birds, but may prepare the specimens furnished him for scientific purposes or preservation in museums or cabinets. The number so prepared must be prescribed in the permit.

Attorney General's Office,
Denver, Colo., May 23, 1893.

Hon. W. R. Callicotte, State Game and Fish Warden.

Sir—In reply to your letter of 13th inst., regarding taxidermists, I submit the following:

Section 1 of the act approved April 7th, 1893, prohibits the killing or trapping, ensnaring or netting within the state of any robin, lark, whipporwill, finch, sparrow, thrush, wren, martin, swallow, snowbird, bobolink, red-winged blackbird, crow, raven, turkey-buzzard, oriole, king-bird, mocking-bird, song-sparrow or other insectivorious bird, or Mongolian

pheasant, quail, ptarmigan, partridge or dove at any time, except that doves may be shot from July 15th to October 1st; and section 2 provides the same with reference to the wild-turkey pheasant, prairie-hen, prairie-chicken or grouse, except that they may be shot between August 15th and November 1st of the same year, and makes the possession of any pheasant, wild-turkey, prairie-chicken or grouse at any time between the dates mentioned or of any of the birds mentioned in section 1, prima facie evidence of a violation of the act; provided, any person may import and deal in any of said birds killed or taken in any other state or territory; and, provided, the importer shall exhibit, on demand of the authorized officer, a bill of lading, with an affidavit attached, of the party offering the same for sale, identifying the birds offered as being the same as in the bill of lading.

Section 7 forbids the sale of the birds mentioned or any wild-duck, wild-goose, brant, swan, or other water-fowl; or any elk, deer, antelope, moose or other game, or game fowl killed or taken in Colorado, except as afterwards provided for in section 19.

If the animal is imported, the party offering it or any part of it for sale, shall on demand of the proper officer, exhibit a bill of lading and affidavit identifying the same, as before mentioned, and his own affidavit showing that such bird or animal was not killed within the state of Colorado.

Section 11 forbids the wounding or killing of buffalo, bison or mountain sheep at any time.

Section 13 makes it unlawful to offer for sale or have in possession the hides, heads or horns of any of the quadrupeds mentioned and killed within this state; but exempts from the operation of the law all persons legally in the possession of the same under the provisions of the act.

Section 19 gives the game and fish warden the power to grant permits to collect such animals and birds for scientific purposes or preservation in mus-

eums, but not for sale—always excepting bison, buffalo and mountain sheep.

From a review of these sections it becomes apparent that a taxidermist can only prepare birds and animals killed in Colorado, by virtue of a permit from the warden, and that he can, in no case, sell such animals or birds, but may prepare the specimens furnished him for scientific purposes or preservation in museums or cabinets. The number so prepared must be prescribed in the permit.

But there is no restriction on the taxidermist in buying carcasses, or parts of the same, killed in another state or territory or in preparing the same for others; nor in selling the same.

The object of the law seems to be to protect these quadrupeds and birds within the state.

This law was approved April 7th, 1893, and does not take effect until ninety days from its passage.

It enacts substantially many of the provisions of the present law. Until the time shall arrive when the above law goes into effect, professional taxidermists may kill birds and animals in Colorado for preservation in cabinets and museums of the kind mentioned in section 1543 of the general statutes, as amended by the act of 1885.

Professional taxidermists only are exempted from the penalties of the law, and they must do their own killing. They can ply their trade as heretofore until the 7th of July next, at which time they lose their exclusive privileges, and are to be governed by the act of April 7th, 1893, as first quoted.

Under both laws, dealers may handle carcasses, or parts of them, brought from without the borders of the state: whether for the purpose of selling them to consumers of the flesh or to persons desiring to preserve them in cabinets or collections.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE EXTENSION OF ASSESSMENT ROLL.

The act of 1893 provides that the county assessor shall extend the taxes instead of the county clerk, as formerly.

Attorney General's Office,
Denver, Colo., May 26, 1893.

Hon. C. H. Holt, County Assessor, Buena Vista, Colorado.

Dear Sir—In answer to your inquiry of recent date, would say, that "House Bill 233," passed by the ninth general assembly, goes into effect on the 10th day of July, 1893. This bill is an act entitled "An act to provide for the better assessment and collection of revenue; to prescribe the duties of the state board of equalization, state and county officers in relation thereto," etc.; also to amend and repeal certain sections of Chapter XCIV. of the general statutes entitled "Revenue."

It is presumed that an amendatory statute is enacted for the purpose of remedying some defect or evil in an existing law, and when it goes into effect, takes the place of the old law in so far as the amendments are concerned, and all proceedings had thereafter affected by the act must comply with it, unless exceptions have been made in a saving clause.

Under the law for the better assessment and collection of revenue, many provisions are made, the performance of which is necessary to attain the ultimate object of the act, but many of these provisions are separate and distinct from any other, and may be amended without in any way altering or changing the effect of other parts or the act itself.

Section 11 of the act of 1893, to which your communication has reference, provides, inter alia, that

the county assessor shall deliver to the county treasurer the assessment book or roll, on or before the first day of January, annually, with the taxes extended, etc.

Section 28 of the act of 1891 provides that the county assessor shall on or before the 1st day of October, annually, deliver such assessment book or roll to the county clerk whose duty it is to extend the taxes, and then report, or turn over said book to the county treasurer.

The evident intention of the legislature in amending this section was not only to change the date on or before which said work should be done, but also, by inserting the words "with the taxes extended" that the county assessor should complete the work, and report to the county treasurer.

The amendments contained in section 11 of the act of 1893 above referred to, must be complied with after the time the act goes into effect. The provisions contained therein are not retrospective, nor do they in their operation impair or vitiate any acts done under the old law prior to July 10th, 1893.

The adoption of the amendments involves no conflict between the officers designated to execute their provisions, and I see no reason why you should not assume and perform the duties devolved upon you as provided in the act of 1893, on and after the time the same becomes a law.

EUGENE ENGLEY,
Attorney General.

IN RE MUTE AND BLIND INSTITUTE INTERNAL IMPROVEMENTS.

The internal improvement fund may be used for public buildings and for machinery, provided such machinery is made a permanent accession to the building.

Attorney General's Office,
Denver, Colo., May 26th, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In answer to your questions submitted to this office for an opinion relative to "Senate Bill No. 9," the same being a legislative act "To provide for the erection of additional buildings, and to furnish machinery, etc., for the education of the deaf and the blind of Colorado, and for furnishing the buildings, and making an appropriation therefor," I desire to direct your attention to the opinion of this date rendered you by this office and covering analogous subject matter. Inasmuch as the opinion referred to explains, within limits, the nature of "internal improvements" it will be unnecessary to discuss it here. Nevertheless, it may be well to advert to some of the specified matters contained in this particular act so as to avoid any misapprehension as to definitions. The fund mentioned in said act may be used for the erection of "an industrial building" and also to "provide the necessary machinery therefor," provided the "machinery" is made a permanent accession to the "building." "A gymnasium with the necessary paraphernalia for the same" stands upon the same basis and must be permanent in its character and an accession to the building or ground; the same reasoning applies to an electric light plant and additional boilers for power and steam heating. The words "school and house furnishings" ordinarily import chattels or personal prop-

erty and if such they be in this instance then said fund cannot be used for any such purpose. Of course the "cottage," "grading," and "paving walks" come within the meaning of "internal improvements."

Before issuing the warrants mentioned in the said act you should require the proper parties to present vouchers disclosing the nature of the several items mentioned, so that said fund may not be diverted from its intended purpose under the terms of the congressional grant.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE MILEAGE STATE INSPECTOR OF COAL MINES.

The mileage of "ten cents per mile is a fixed statutory allowance to the official, and he is entitled to that definite sum, no more or less, and it is immaterial whether the actual cost of traveling was a greater or lesser mileage. The auditor cannot legally require the official to certify that he paid ten cents per mile in cash as mileage.

Attorney General's Office,
Denver, Colo., May 27th, 1893.

Hon. John McNeil, State Inspector of Coal Mines:

Dear Sir—In answer to your communication of date, May 11th, 1893, requesting an opinion from this office relative to the statutory mileage allowed the state inspector of coal mines, I desire to say:

That general section 3197 (Mills' Annotated Statutes), in part, says: "And the said inspector shall be allowed the further sum of ten cents per mile mileage for all distances actually traveled by him, or by his

deputy, in the active discharge of their official duties, but the total sum of such mileage allowed for the mileage expenses of both such inspector and his deputy, shall not exceed the sum of two thousand five hundred dollars in any one year." Webster defines "mileage" as "an allowance for traveling expenses at a certain rate per mile." It would seem that the definition given the word "mileage" by Webster, if granted the same signification in its statutory use, includes the expenses to which you refer in your communication to this office, that is to say, the number of miles certified to must have been actually traveled, but the ten cents per mile as mileage may be used for the incidental expense of traveling.

The mileage of "ten cents per mile" is a fixed statutory allowance to the official, and he is entitled to that definite sum, no more or less, and it is immaterial whether the actual cost of traveling was a greater or lesser mileage. The auditor cannot legally require the official to certify that he paid ten cents per mile in cash as mileage. To illustrate: If the official paid five cents in cash per mile as mileage, he is entitled to the statutory allowance of ten cents per mile; if he paid fifteen cents in cash as mileage he is entitled to the statutory allowance of ten cents per mile only.

The form of affidavit presented by the state inspector of coal mines is the correct one. The date "December 31st, 1893," in the first itemized account is incorrect, as that date had not arrived in the division of time. The inspector has made a clerical error in the date mentioned as he evidently intends to designate the month ending December 31st, 1892, although that month of the year 1892 is a part of the "fiscal year" 1893.

The proviso in the statute of 1893 that "said itemized account must be accompanied by proper vouchers therefor, signed by the party to whom such money has been paid" cannot be made applicable to these particular accounts insofar as the words "signed by the party to whom such money has been paid" are

concerned. This statutory requirement was not in existence at the time these expenses were incurred. Except as to the date mentioned, the affidavit and vouchers of the inspector appear to be in proper form.

EUGENE ENGLEY,
Attorney General.

IN RE PREMIUM UPON TREES.

The premium upon trees is to be paid by the collector of revenue for the county in which such trees may be growing, upon the certificate and affidavit of the county assessor, and such collector is allowed pay out of the state treasury for the same.

Attorney General's Office,
Denver, Colo., May 31, 1893.

Hon. M. J. Underwood, County Clerk, Lamar, Colo.:

Dear Sir—In reply to your communication of recent date, would say, that the premium upon trees provided for by general section 3426, p. 1004, general statutes of Colorado, referred to by you, is to be paid by the collector of revenue for the county in which such trees may be growing, upon the certificate and affidavit of the county assessor, and such collector is allowed pay out of the state treasury for the same.

Mills' Ann. Stats., Sec. 2007.

Gen. Stats., Sec. 3431.

The county treasurer is by law constituted the collector of revenue for the county.

Mills' Ann. Stats., Secs. 483, 902, 1576.

In the absence of any specific appropriation for such purpose, I am of the opinion that the premiums mentioned could be paid out of the ordinary county

revenue fund. I do not apprehend that the boards of county commissioners in drawing the annual appropriation resolution in which the law requires them to "specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purposes," are required to particularize to the extent of naming each specific article for which such fund is to be used, but only in general terms such as for the support of schools, for ordinary county expenses, etc., and the latter provision may include any legitimate claim or expense of the county not otherwise expressly provided for by law. The payment of premiums upon trees is authorized by statute and consequently such premiums are constituted legal claims, and while the county treasurer is reimbursed by the state treasurer for any moneys expended in pursuance of the statute for such purpose, the claimant deals with the county only, and so far as he is concerned such premium must be considered as a claim against the county.

The county assessor is required to report the number of trees upon which such premium may be due at the time he makes his return. He is required to report to the county commissioners the complete assessment of his county, and also to file a duplicate abstract of such assessment with the state auditor.

Mills' Ann. Stats., Secs. 2010, 3816-3817.

The county commissioners are apprised of the number of premium trees in the country from such report, and, based upon the certificate and affidavit of the county assessor may order a warrant drawn upon the county treasurer to the proper party for the amount of premium due. From the abstract of assessment furnished the auditor above referred to, in which is reported the number of premium trees in the county, he is able to make his report to the governor as required by Sec. 2011, Mills' Ann. Stats., or Sec. 3430, Gen. Stats., referred to by you. In cases of spec-

ial reports by county assessors, the mode of proceedure is provided for by Sec 2012 Mills' Ann. Stats., (Gen. Stats., gen. sec 3431.)

EUGENE ENGLEY,
Attorney General.

IN RE BOARDS OF COUNTY COMMISSIONERS.

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1. The statutes provide that at the first meeting after the election, and after every annual election, the board of county commissioners shall choose a chairman.

2. The chairman is the creature of the board; he is not elected or appointed a member of the board, as such, but the members thereof may choose any one of their members for the position.

Attorney General's Office,
Denver, Colo., June 1, 1893.

Hon. S. D. Coffin, County Commissioner, Amethyst, Colo.:

Dear Sir—In answer to your communication of recent date, would say the law provides that at the first meeting after the election, and after every annual election, the board of county commissioners shall choose a chairman, etc., (Mills' Ann. Stats., Sec. 798). The language of the statute must be liberally construed in order that the intent and purpose of the legislature enacting it may be fully met. It was evidently the intention of the legislature to provide for the organization of the several boards of the county commissioners by the election of a chairman at their first meeting and annually thereafter, whether such boards were created by the members thereof being elected or appointed. This is deemed necessary for the transaction of business, as the law delegates certain

duties to be performed by the chairman, such as administering oaths, and the signing of county orders. In case of his absence from any meeting, the members present must choose a temporary chairman. (Mills' Ann. Stats., Sec. 799). The chairman is the creature of the board. He is not elected or appointed a member of the board as such, but the members thereof may choose any one of their number for the position. While Commissioner Woodruff by virtue of the locality in which he lived became a member of the board of county commissioners of Mineral county, under the act creating said county, he entered said board upon the same footing as the other members, and in their organization they could elect him chairman or not as they saw fit. The fact of his having been chairman of the board of county commissioners of Hinsdale county would cut no figure and could not in any manner affect the rights of the board of commissioners of Mineral county in their organization.

In becoming a member of the board of commissioners of Mineral county, Commissioner Woodruff assumes the duties and liabilities thereof as an officer of said county, entirely separate and distinct from any functions he had exercised as a commissioner of Hinsdale county. In his official acts he is responsible to Mineral county, and in order to secure to the people thereof strict compliance with the law in their performance, he must execute a bond to Mineral county in the manner and form prescribed for county commissioners.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE STATE WAGON ROAD IN CLEAR CREEK COUNTY.

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1. The governor, the state engineer and the chairman of the board of county commissioners of Clear Creek county shall constitute a board for the purpose of building said road.

2. The legislative act making the appropriation does not by limitation, fix the time within which the road must be completed, or the appropriation expended. The statute making the appropriation has never been repealed.

Attorney General's Office,
Denver, Colo., June 5, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In answer to a communication addressed to this office by Senator Turner in relation to the legislative act approved April 16, 1891, the same being amendatory of an act approved April 24, 1889, entitled "An act to build a wagon road in Clear Creek county, from a point near the mouth of Trail Run to the Argo mine and terminate at the Ouida mine," I desire to say:

That section 3 of said legislative act of 1889, provides that "the governor, the state engineer and the chairman of the board of county commissioners of Clear Creek county, shall constitute a board for the purpose of building said road." The act of 1891, in part, provides, "That if on making a survey and estimate of the cost of construction of said road it is found that the amount herein appropriated is not sufficient to complete said road, then no part of the appropriation herein provided for shall be used except so much thereof as shall be necessary to pay for the making of such survey and estimate, unless the board of county commissioners, or some other responsible party of said Clear Creek county, shall agree to fur-

nish the amount required in excess of this appropriation, and shall furnish to this board satisfactory evidence that such money shall be forthcoming on demand of such board or the contractor on the completion of said road." The "internal improvement permanent fund" is a fund arising from the proceeds of sales of state lands donated to the state for the construction of "internal improvements." The proposed wagon road mentioned in said act is an "internal improvement," and the legislature in appropriating the sum named in said act, exercised the direct powers conferred upon them for the purpose by the terms of the congressional grant. The legislature constituted the governor, the state engineer and the chairman of the board of county commissioners, a board for the purpose named and vested in them ample powers to carry out the legislative direction. The powers of the said board are restricted to the purpose only, but the execution thereof is made dependent upon the sufficiency of the appropriation to complete the road, or in case the appropriation is insufficient, that the board of county commisionsers of Clear Creek county, or "some other responsible party" of said county, shall furnish the amount required in excess of the appropriation. The state engineer has reported or certified, if I am correctly informed, that the amount appropriated is insufficient to complete said road. The report of the state engineer, if any such was made, can only form a basis upon which may be predicated definite action on the part of said board of construction. The state engineer is only a member of said board, and if he made the survey and estimate of the cost of construction of said road by order of said board, or by virtue of his office, his report thereof must be to the board for its information and action. It appears from the information furnished this office, that said board has never officially acted upon the report of the state engineer, and that said appropriation remains as a credit on the books of the state treasurer for the construction of said road. The state auditor and state treasurer have never been notified officially by said

board that said appropriation is insufficient. The legislative act making the appropriation does not by limitation fix the time within which the road must be completed, or the appropriation expended. The statute making the appropriation has never been repealed. In my opinion, to defeat the appropriation, the legislative act must be repealed, or the board of construction, in its official capacity, must certify to the state treasurer the insufficiency of the appropriation, whereupon it would become the duty of the state treasurer to turn the appropriation back into the internal improvement permanent fund and close the account.

Upon the facts presented, and by reason of the existing statute, I am of the opinion, that the state auditor should issue and the state treasurer pay warrants against said appropriation upon proper vouchers being filed, together with satisfactory evidence that the board of county commissioners, or some other responsible party of Clear Creek county has agreed to furnish the amount required in excess of the appropriation, and that such money shall be forthcoming on demand of such board or the contractor on the completion of said road.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE APPROPRIATIONS BY STATE MILITARY BOARD.

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1. The act of 1893 directs the auditor and treasurer to transfer upon the books of their respective offices the unexpended balance standing to the credit of the military poll fund, to the credit of the general revenue fund of the state for the year 1893.

2. The "unexpended balance" referred to by the statute means a balance ascertained by adding to the amount which the treasurer's books show has been actually paid out, to the sums appropriated by the board (but not actually paid out) and subtracting the sum from the entire military fund.

Attorney General's Office,
Denver, Colo., July 6, 1893.

Gen. T. J. Tarsney, Adjutant General:

Sir—In reply to your letter of the 6th inst., I submit the following:

The act of 1893 directs the auditor and treasurer to transfer upon the books of their respective offices the unexpended balances standing to the credit of the military poll fund to the credit of the general revenue fund of the state for the year 1893. This act took effect July 5, 1893. By the "unexpended balance" referred to, the legislature could not have meant the balance left after deducting only the amount of warrants that will have been actually paid by the treasurer on July 5. On July 5 some warrants which had heretofore been lawfully issued by the auditor may not have been actually presented to the treasurer, and if, on that day, the treasurer and auditor should transfer the actual cash balance remaining to the credit of the military poll fund to the general fund, an injury would be worked on the holders of these outstanding unpaid warrants.

Nor is this all. The legislature must be presumed to have had in view the fact, that in the interval between April 5, when the act was passed, and July 5, when it took effect, the military board would necessarily transact some business that would require the expenditure of money—and that this expenditure would ensue upon the performance of contracts made by the board with persons for the furnishing of supplies, etc., to the different branches of the military establishment. These contracts may have not been fully completed on July 5. Contractors

may have undergone great expense in carrying out their contracts with the board made before the 5th of July. This expense is undertaken by the contractors with the express or implied agreement on the part of the board that they shall be reimbursed from the fund set apart for that purpose, which fund is composed of the moneys collected as military poll tax. To meet the obligations of these contracts, it is customary for the military board to set aside an amount commensurate with the same. This is done by an order made to that effect entered in the minutes of the board.

This, as I take it, is an appropriation of so much money made by the board, and the action of the board in the premises, being in the discharge of their lawful duty, ought to be protected.

In order, however, that the auditor and treasurer may be justified in retaining to the credit of the military poll fund, the amount of the appropriations made by the board, as last mentioned, the board ought to lodge in their offices a certified copy of the order of appropriation. If this has been done they will then treat the moneys so appropriated by the board as being money "expended," and then will transfer any balance to the general fund. In other words, the "unexpended balance" referred to by the statute, means, a balance ascertained by adding to the amount which the treasurer's books show has been actually paid out, the sums appropriated by the board (but not actually paid out) and subtracting the sum from the entire military fund.

EUGENE ENGLEY,
Attorney General.

IN RE SALE FOR TAXES OF STATE REFORMATORY LANDS.

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1. The state cannot be subjected to the jurisdiction of the courts, nor be compelled to defend in them.

2. When the title of lands of the state reformatory became vested in the state, any claim or lien the state might have held against said land on account of taxes was thereby absolved and fully relinquished. The land is no longer accountable for a tax, and any proceeding that aims to make it responsible therefor is nugatory and ineffective.

Attorney General's Office,
Denver, Colo., June 7, 1893.

Hon. W. J. Dean, Member House Representatives,
Buena Vista, Colo.:

Dear Sir—In reply to your communication of recent date relative to the land belonging to the state reformatory, and the sale thereof for taxes, would say, that in my opinion such sale was invalid and a tax deed granted in pursuance thereof is null and void.

Taxes are levied for the support of the government, for the administration of the laws, and as the means of continuing in operation the various legitimate functions of the state. A tax is not a debt in the ordinary sense of the word. The state may distrain and sell property for a tax, if not paid when demanded, without first obtaining a judgment, and as between it and creditors of the person owing the tax, the state is entitled to a preference. The claim of the government upon the citizen for the payment of taxes is paramount to all other claims and liens against his property.

Black on Tax Titles, Sec. 2.

A tax upon land is a claim made upon land that inures to the benefit of the public; by statutory enactment it may be constituted a lien upon the land for the benefit of the state, and when delinquent the land may be sold by the state for the purpose of satisfying such lien.

The state may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation, for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself. the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. * * * * Hence the courts can acquire no jurisdiction over the rights or interests of the state land in proceedings to enforce the collection of taxes.

Black on Tax Titles, Sec. 43.

In Colorado lands owned by the state are expressly exempt from taxation by the constitution and by statute.

Colo. Const., Sec. 4.

Mills' Ann. Stats., Sec. 3766.

Title to such lands in the state either directly or through municipalities, or such agencies as it may create for that purpose, for the use and benefit of all its citizens. The rights or interests of the state in land are not subject to the provisions of the laws for the assessment and collection of taxes.

The state cannot be subjected to the jurisdiction of the courts, nor be compelled to defend in them.

Sanborn vs. Minneapolis, 35 Minn., 314.

In view of the above, it necessarily follows, that in the case of the state reformatory lands when the

title thereof became vested in the state, any claim or lien the state might have held against said land on account of taxes was thereby absolved and fully relinquished. It would be absurd for the state to proceed to sell its own lands.

The land is no longer accountable for the tax, and any proceeding that aims to make it responsible for a tax is nugatory and ineffective. If any taxes upon said land were due and unpaid at the time the same was deeded to the state, the grantor may be held responsible in a proper action, but the land itself is released, for and during the time the title remains in the state.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT OF SUPERINTENDENT OF MUTE AND BLIND INSTITUTE.

The appointment of Dr. Gillett was regular, and the appointment of another person to the position of superintendent, without a legal removal of Dr. Gillett, would be a breach of contract.

Attorney General's Office,
Denver, Colo., June 8, 1893.

To the Honorable, The President of the Board of Trustees of the Institute for the Mute and Blind:

Sir—In response to a question of the board of this date, I submit the following:

The minutes of the board show that on the 14th day of April, 1885, by-laws were adopted by the board for their government, and the same are now in force.

The second by-law reads as follows: "It shall be the duty of the secretary of the board to notify the officers of their appointment, and the duty of the officers so notified to inform the secretary in writing whether or not they accept the same. Any one not so accepting the position offered within one month after the notification shall be regarded as rejecting it."

On April 6, 1893, the board, after an informal ballot, telegraphed Dr. Gillett, at Jacksonville, Illinois, inquiring if he would accept the position of superintendent. He replied in the affirmative. The board then proceeded to hold an election for superintendent, on the day following. Dr. Gillett has not since informed the secretary in writing of his acceptance. He has, however, been present at two meetings of the board—one on April 26 and one on April 20, at which he outlined the plan of action he intended to pursue in his management of the institution; which suggestions were approved by the board, and a resolution to that effect spread on the minutes.

In my opinion, these last proceedings amounted to an agreement to waive a formal written acceptance by Dr. Gillett.

It being conceded that Dr. Gillett had been duly elected or rather appointed, for an election by your body is in legal effect an appointment—the appointing power for the ensuing term has been exhausted—and in case you should appoint any other person to the office of superintendent without a legal removal of Dr. Gillett, it would at least amount to a breach of contract.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE SUPERINTENDENT OF THE INSTITUTE FOR THE EDUCATION OF THE MUTE AND BLIND.

In order to remove an officer duly elected or appointed, having qualified and been inducted into office, there must be an investigation, with due notice to the officer of the time and place of such investigation, and the charges preferred against him.

Attorney General's Office,
Denver, Colo., June 9, 1893.

To the Honorable, The President of the Board of Trustees of the Institute for the Mute and Blind:

Sir—In regard to your inquiry as to the power of your board to annul its action on April last in the election of P. G. Gillett, as superintendent, and in declaring the office vacant or open to election for the coming term, and to elect another person to said office, I submit the following:

I have already found that the appointment of Gillett was complete. In case of Alderman of Denver vs. Darrow, 8 Colo., 460, the court say: "It cannot be claimed * * * that one who had been duly elected, duly qualified and duly inducted into office as an alderman, could be summarily removed by resolution upon a charge of disqualification without notice, without having an investigation of any kind. The contrary * * * in our judgment, is in keeping with the majority of authorities upon this question."

In Throop on Public Officers, p. 394, we find this language: "It is well settled, that when the removing officer or body is vested with a discretion in a particular case, the courts will not interfere with the exercise of that discretion."

In 59 Maryland, 283, it was held that where the sole power to determine whether a cause for the removal of an officer had occurred, and the matter vested in their own discretion and judgment, the exercise of their discretion could not be reviewed by an appeal—that mandamus will not lie where the power of removal depends upon the exercise of personal judgment, even if it was exercised maliciously or dishonestly."

Throop on Public Offices, sec. 396, says "that where a statute gives a power of removal 'for cause' without any specification of the causes, this power is of a discretionary and judicial nature; and unless the statute otherwise specially provides, the exercise thereof cannot be reviewed by any other tribunal, with respect either to the cause or to its sufficiency or existence, or otherwise.

People vs. Stout, 11 Abb. Prac. R., 17.

19 Howard Pr. 171.

35 Barb. 254.

And in the same connection the author says "under similar statutory provisions, and even in some cases where the statute specifies the causes of removal, it has been ruled in other American decisions, that the removing authority is the sole and exclusive judge of the cause and the sufficiency thereof; and that the courts cannot review its decision in any case where it had jurisdiction" (citing many authorities.) But all, or nearly all, of these cases were decided and these doctrines held upon the theory that a notice had been given to the alleged delinquent officer. There is a great difference between the principle that denies a court the power to review the action of a board in discharging a discretionary function, and the principle that an officer can be removed by the board without notice. I believe that there is no difference in principle between the case of an officer who has been actually inducted into office and that of one who has been regularly appointed, and has accepted the appointment to an office, but has not yet qualified.

Throop says: "Where the appointment * * * is complete and a removal can be made only for cause, a resolution rescinding the appointment does not affect a removal, nor affect in any manner the rights of the person appointed.

Throop Public Officers, sec. 349.

If Gillett then stands with reference to the office of superintendent, in the same attitude, in a legal point of view, as if he had qualified and been inducted therein, he must have notice of the action of the board in discharging him—if it can be given him—and of the notice of the investigation about to be had, which must be had upon charges of which he should be apprised. If, after notifying him, the board should investigate these charges and find them true and remove him, I believe their action in the premises will not be reviewed. But the board, once having found Gillett to be a fit person, a reversal of that judgment ought to be based on an investigation with notice to him.

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT OF MEMBERS OF THE BOARD OF TRUSTEES OF THE STATE NORMAL SCHOOL.

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1. Under section 8, article V., of the state constitution, "no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state. * * * * ."

2. In general a strict construction of constitutional provisions is the safe and reasonable rule. The clause of the constitutional provision in questiton is specific in pointing out, by the use of descriptive official appellations, the persons against whom the inhibition runs, as, a "senator" or a "representative."

3. The words "during the time for which he shall have been elected" clearly measure the limitation as to the period of time within which the inhibition runs. The inhibition embraces not only "civil offices under the state" that are established by the constitution, but those created by statute.

4. In general a "civil office" (officium civiles, pertaining to a state, city, etc.) is a public position or station conferred by the apppointment of government and embracing the ideas of tenure, duration, emoluments and duties. It is a grant and possession of sovereign power, and the exercise of such power within the limits prescribed by law which creates the office constitutes the discharge of the duties of the office.

5. The courts have made a clear and well grounded distinction between civil offices under a state and offices pertaining to municipal, quasi municipal and other public corporations. A municipal or public officer may be appointed by the governor and the office to which he is appointed not be a civil office under the state.

6. It is clear that membership on the board of trustees of the state normal school is by the statute put on the same footing as membership on the governing body of a municipal corporation; it is a corporate office; an office in a municipal corporation by the very letter of its charter. The corporate body is charged with no direct functions of the state government. In it are reposed none of the immediate powers of state government.

Attorney General's Office,
Denver, Colo., June 9, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Dear Sir—I am in receipt of your communication of recent date, in which you request an opinion from this department, relative to the legality of the appointment of James W. McCreery and J. R. Flickinger as members of the board of trustees of the state normal school. Your inquiry, as formulated, is:

Were the appointments in question inhibited by section 8, of article 5, of the constitution of the state of Colorado?

McCreery and Flickinger were members of the eighth general assembly, the former as a senator and the latter as a representative, at the time Governor Routt appointed and the senate confirmed them, to the positions in question, on the 4th day of April, 1891.

Said section 8, article 5, of the constitution, is as follows:

"Sec. 8. No senator or representative shall, during the time for which he shall have been elected, be

appointed to any civil office under this state; and no member of congress, or other person holding any office (except of attorney at law, notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office."

It is apparant at a glance that the first clause of the provision quoted is alone applicable to the matter under consideration, the latter part of the paragraph following the semicolon having no relevancy to this inquiry. The provision is inhibitory. It contains a prohibition within a limitation.

The prohibition in said clause embraces the members of two legislative bodies constituting a "general assembly" as a co-ordinate and separate branch of the state government. The language employed to designate these members of the legislative department is descriptive of the official character of the incumbents, and it cannot be enlarged so as to include any of the other state officers. In general a strict construction of constitutional provisions is the safe and reasonable rule. (7 Ind., 44). The "general assembly" is divided into two houses, the upper and less numerous body called a "senate," and the lower and more numerous body known as the "house of representatives." The clause of the constitutional provision in question is specific in pointing out, by the use of descriptive official appellations, the words being descriptio personae, the persons against whom the inhibition runs, as, a "senator" or a "representative." As stated, the words employed in a descriptive sense designating a member of one body of the legislature as a "senator," and a member of the other branch as a "representative" excludes by implication all other state officers. The maxim, expressio unis est exclusio alterius, is not yet dead.

Proceeding with the analysis of this clause of the constitutional provision, the words, "during the time for which he shall have been elected" clearly measure the limitation as to the period of time within

which the inhibition runs. The time for which senators and representatives are elected is fixed by the provisions of section 3, of article 5, of the constitution as follows: "Senators shall be elected for the term of four years, except as herein provided, and representatives for the term of two years." The exception referred to in the last quoted provision relates to the classification of senators at the first session of the first general assembly. The inhibition runs, therefore, during a period of four years as to senators (two years where there is a short term) and two years as to representatives. Nor can this inhibition as to time be avoided by the resignation of a senator or a representative, and the reason therefor is well founded in the fundamental law which expresses a salutary design on the part of its framers. The inhibition embraces not only "civil offices under the state" that are established by the constitution, but those created by statute. Many weighty reasons impelled the constitutional convention to incorporate this inhibition as to time in the organic law, one of which undoubtedly was to prevent senators and representatives from being appointed to statutory civil offices under the state, in the creation of which they took part and might become personally interested in reaping the emoluments thereof.

The time during which, and the particular legislative members against whom the prohibition runs, being accurately measured and described by and in the language of the clause so far analyzed, it is necessary, for the purposes of this opinion, to seek the intendment of the constitutional convention in the use of the words, "be appointed to any civil office under the state." It will be noticed that this constitutional provision only prohibits a "senator" or a "representative" from being appointed to a "civil office under this state," not his election thereto.

Carpenter vs. The People, 8 Colo., 129.

What meaning has the words "any civil office under this state," in the relation of language in this con-

stitutional provision? What is a "civil office under this state?" The true answer to this inquiry must be the solution of the question as to whether a trustee of the state normal school is an incumbent of a "civil office under this state." The relation and significance of the word "under" as here used, denotes something that is superior and involves the idea of subjection or subordination. In general, a "civil office" (officium civilis, pertaining to a state, city, etc.), is a public position or station conferred by the appointment of government, and embracing the ideas of tenure, duration, emoluments, and duties. (U. S. vs. Hartwell, 6 Wall., 385-393, 9 Colo., 629). It is a grant and possession of sovereign power, and the exercise of such power within the limts prescribed by law which creates the office constitutes the discharge of the duties of the office. (Opinion of Judges, 3 Me., 481; Shelby vs. Alcorn, 36 Miss., 273; 72 Am. Dec., 169). But the term "civil office" as used in this provision of our constitution is given a restricted application and relates alone to the "state" government. We must look at the intent of the provision, and so ascertain the meaning of the words used, and who are aimed at. The words, "civil office" relate to a permanent public trust to be exercised in behalf of government and not to a merely transient, occasional or incidental employment. A civil office is an employment, but every employment for the state may not be an office. An employment for a special and single object in which there is no enduring element; or an agency, the duties of which when completed, though years may be required for their performance, is not an office, but a mere employment. To the latter class belong the state capitol commissioners and the board of world's fair managers of Colorado. The appointment of Senator McKinley to the latter board was legal and not an invasion of the constitutional provision under consideration. Nor does the constitution prohibit the employment of a "senator" or a "representative" in any of the departments of state where such employment is not a civil office established by the constitution or created

by statute. For illustration, Representative Thomas is a mere employe and not an incumbent of an office in this department.

Recurring again to what constitutes a civil office under the state, it was held in Britton vs. Steber et al. 62 Mo., 370, that the mayor of the City of St. Louis was not an officer under the state, within the meaning of section 15, article IV, of the constitution of Missouri, which provides that, "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state," etc. The cases of the People vs. Provines, 34 Cal., 520, and Santo vs. The State, 2 Iowa 165 and 220, are to the same effect, upon constitutional provisions similar to our own. The supreme court of Colorado say: "These authorities are in point and we have no reason to doubt their soundness." The same doctrine is enunciated in State of Delaware vs. Wilmington City Council, 3 Harrington, 294, and Commonwealth vs. Dallas, 3 Yeates R., 303, 314. The courts have made a clear and well grounded distinction between civil offices under a state and offices pertaining to municipal, quasi municipal and other public corporations. In the case of the People vs. Provines, already noticed, the courts say: "We understand the constitution to have been formed for the purpose of establishing a state government; and we here use the term "state government" in contradistinction to local, or to county and municipal governments."

There is a recognized distinction between state officers, whose duties concern the state at large, or the general public, and officers of public corporations, whose functions relate exclusively to the particular corporation. It is true that there is a lodgement by delegation of some portion of the sovereignty of the state in municipal and other public corporations, but in the exercise of powers conferred the separation is sufficiently distinct. As respects the state such corporation is an imperium in imperio. The method of

appointment to, in no manner affects the status of the office. A municipal or public officer may be appointed by the governor and the office to which he is appointed not be a civil office under the state. The members of the boards of public works and fire and police of the city of Denver are officers of that municipality, though appointed by the governor, and not incumbents of civil offices under the state. The method of appointment is a mere incident of the legislative regulation of the corporate government and not the performance of an executive function by the governor granted him by the constitution. (Regents of the University of Maryland vs. Williams, 9 Gill and Johnson, 365). The governor is invested with power to appoint notaries public and to fill vacancies in boards of county commissioners, but it cannot be seriously contended that these are state offices. Our constitution distinguishes between a civil office under the state and a municipal or corporate office. Art. XII., sec. 1, provides: "Every person holding any civil office under the state, or in any municipality," etc. Art. XIV, Sec. 12, declares: "The general assembly shall provide for the election or appointment of such other county, township, precinct, or other municipal office as public convenience may require." The general principle seems to be established that membership in the governing board of a municipal corporation, a quasi municipal corporation, or any corporation created for purposes which are subservient to the public good, is a corporate office, and not a civil office under the state within the meaning of the constitutional provision under discussion.

Keeping in view the distinctions hereinbefore elucidated, it will now be necessary to specially consider so much of the statute creating the governing body of the state normal school as is applicable to this inquiry.

Sec. 1, in part, provides: "That a donation shall be made of a site for said state normal school, consisting of forty acres of land, with a building erected

thereon according to plans and specifications furnished by the state board of education, and to cost not less than twenty-five thousand dollars, ten thousand dollars of which shall be paid by the state as hereinafter provided."

Sec. 2, provides: "Said schools shall be under the control of a board of six trustees; the said board shall be and is hereby declared a body corporate by the name and style of "The trustees of the state normal school," and as such and by its said name may hold property for the use of said school, be party to all suits and contracts, and do all things thereto lawfully appertaining, in like manner as municipal corporations of this state. The said trustees and their successors in office shall have perpetual succession, shall have a common seal, and may make by-laws and regulations for the well ordering and government of the said corporation and its business not repugnant to the constitution and laws of the state.

Sec. 3, in part, provides: "The governor shall, upon the approval of this act, appoint, by the advice and with the consent of the senate, the six trustees mentioned and provided in this act, two of whom shall be appointed for the term of two years, two for the term of four years and two for the term of six years. Their terms of office shall begin from their appointment and qualification, and shall continue for the period for which they shall be so appointed, and until their successors are appointed and qualified. Every two years after the first appointment aforesaid two trustees shall be appointed in like manner to succeed those whose terms are first thereafter to expire."

By the provisions of section 4, the school is constituted an integral part of the public school system of the state. By the provisions of section 14, the board of trustees are given power to receive, demand and hold for the uses and purposes of said school such money, lands or other property as may be donated or devised for or thereto, and to apply the same,

within the powers conferred by law, in such a manner as shall best subserve the interests and objects of said normal school.

The second section of the statute expressly creates a corporate body. This corporate body holds property which it receives in part from private donations for the use of the school. If the state should dissolve the corporation the real estate donated would clearly revert to the donors and not to the state, since it was donated not to the state, but to the corporation for educational purposes. This corporate body, the statute expressly provides, may "do all things thereto lawfully appertaining in like manner as municipal corporations of the state." It is clear that membership of this body is by the statute put on the same footing as membership in the governing body of a municipal corporation; it is a corporate office—an office in a quasi municipal corporation by the very letter of its charter. This corporate body has perpetual succession, a common seal, and may make by-laws and regulations for the government of the corporation. It is charged with no direct functions of the state goverment; in it are reposed none of the immediate powers of state government. The analogy to the board of directors of a school district is almost perfect. A school district is an integral part of the school system of the state just as the normal school is. It would be in the legislative power to provide for the appointment of members of such school districts boards, in such manner as the legislature should see fit, unless limited by some express constitutional provision. If the legislature should provide that such an appointment should be made by the governor, the member would still be an officer of the school district, just as members of the boards of fire and police and public works are officers of the city of Denver. The legislature might have provided that part of the board of trustees of the normal school could have been appointed by the governor and the other part by the donors.

Hence, it follows, that the membership of ex-Senator McCreery and ex-Representative Flickinger in this board does not make them civil officers under the state, but officers of the corporation managing that particular school, and upon the same principle, and by reason of the same distinction, that the mayor of a city, the board of trustees of a town or the board of directors of a school district are not civil officers under the state, but officers of the city, town or school district. It is my opinion, that the appointment by Governor Routt of Senator McCreery and Representative Flickinger to the positions they now hold as members of the board of trustees of the state normal school was a legal appointment.

This opinion is in answer to the precise question presented and extends no further, except by way of illustration, than the scope of the inhibition contained in the particular constitutional provision discussed. The power of removal for cause, lodged in the hands of the governor by the constitution or particular statutes, is not here adverted to. This office rendered an opinion sometime ago relative to the power of appointment by the governor of Representatives Calkins, Benton and Crowley to the offices of state dairy commissioner, member of the state board of pardons and member of the state board of horticulture (Laws 1893), respectively, in which it was held that they are within said constitutional inhibition. It is sufficient to say that the last mentioned offices are civil offices under the state, directly involving the exercise of a portion of the sovereign power of the state government, and are not offices belonging or incident to a corporate body. The distinction ought to be apparent.

Owing to the press of official business, I have been unable to answer this inquiry sooner.

EUGENE ENGLEY,
Attorney General.

IN RE GUARANTEE AND ACCIDENT LLOYDS.

Our statute provides: "It shall be unlawful for any person, company or corporation in this state" to do an insurance business without being licensed by the superintendent of insurance; and provides for a fine of five hundred dollars or imprisonment for six months in the county jail, or both, for a violation of the provisions of the section.

Attorney General's Office,
Denver, Colo., June 12, 1893.

Hon. F. M. Goodykoontz, Auditor of State and Superintendent of Insurance:

Sir—In reply to your letter of the 6th inst., in re Guarantee and Accident Lloyds, I submit the following:

I understand from your letter that the institution named claims that it is not amenable to the laws of this state, although doing business as insurers therein.

I find from the circular or folder handed me, in which the business of the concern is advertised, that it expressly claims "The Lloyds" are not an association or corporation, or even a co-partnership; they neither have nor claim any corporate franchise or license; they issue no stock or shares or negotiable certificates of any kind; they are merely an aggregation of individuals doing business in their several respective capacities as individuals, each one acting by and through his attorneys, and no claim is made of exemption from liability in respect to any of the obligations for which an individual may be responsible."

This language indicates that this concern intends to and does transact business in the state of Colorado, but that, according to its peculiar organization, it cannot be reached by the laws which it may choose

to defy at pleasure; that it can meet its competitors in a fair, open and honest market without incurring the penalties prescribed by the law for carrying on the business of insurance in a manner contrary to its provisions, and without assuming the burdens which all other insurance companies must carry, and this simply because they claim they are not an entity recognized by the law.

It is hardly necessary to discuss the absurdity of such a position.

Our statute provides that "it shall be unlawful for any person, company or corporation in this state" to do an insurance business without being licensed by the superintendent of insurance.

Mills' Ann. Stats., Sec. 2216,

And provides for a fine of five hundred dollars or imprisonment for six months in the county jail, or both, for a violation of the provisions of the section.

The persons issuing policies or taking premiums for this nondescript concern violate this law, and I recommend that you lay the matter before the district attorney of the second judicial district, who will prosecute the offenders.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE DUTIES OF WATER COMMISSIONER.

1. The only function the county commissioners can discharge in relation to the duties of water commissioners is to audit and allow their statutory compensation. The county commissioners have no supervision or control over the water commissioners in his official capacity.

2. The time a water commissioner must devote to his duties is his entire time, measured from the time he is called upon to distribute water to the time when the necessities of irrigation cease.

3. When the account for services of the water commissioner is presented to the county commissioners, in the absence of any evidences of fraud, the county commissioners must presume that he has exercised due discretion in the performance of his duties and allow the statutory compensation.

Attorney General's Office,
Denver, Colo., June 13, 1893.

Hon. R. Q. Tenney, Water Commissioner, Fort Collins, Colo.:

Dear Sir—I am in receipt of your communication of date May 20, 1893, in which you say: "Your communication (mine) of the 12th does not exactly cover the point in question. Our county commissioners seem to think that it is not necesary for me to be on duty all the time, as the statute, Sec. 6, p. 8, 5th biennial report state engineer, reads, "When such duties are required". Or, who is to be the judge of "when such duties are required?"

In answer thereto, I desire to say, that if your first communication had set out the precise inquiry contained in that of the 20th ult., my opinion then rendered, in a general way, would have been framed so as to cover the point upon which it seems you desire information.

All of the several sections of the legislative act in question, and especially sections 2 and 6 thereof, must be read and construed together to ascertain the legislative intention. The water commissioner is required to perform certain duties by virtue of the provisions of said section 6, and in the performance of the statutory duties imposed the commissioner is subordinate to the superintendent of irrigation, his immediate superior officer, but in all cases the orders of the state engineer are of ultimate and supreme force. The board of county commissioners cannot interfere with your official duties as water commissioner. They cannot regulate these duties or measure the discharge thereof as to time or limit or enlarge any of the stat-

utory requirements. The only function the county commissioners can discharge in relation thereto is to audit and allow your statutory compensation. What the county commissioners may think is necessary or unnecessary in relation to the performance of your official duties cuts no figure. They have no supervision or control over you in your official capacity as a water commissioner. Said section 2, in part, reads:

* * * "Each water commissioner shall keep a just and itemized account of the time spent by him in the duties of his office, and shall present a true copy thereof, verified by oath, to the board of county commissioners of the county, in which his district may lie, and said board of commissioners shall allow the same.

* * * If you have kept a "just and itemized account of the time spent" by you in the discharge of your official duties, and a verified copy thereof is presented to the county commissioners, they must "allow" it, and it must be paid, provided there is an appropriation from which it can be paid. Of course if you did not perform any certain part of the services alleged in the verified copy, they would have the right and it would be the duty to cut down the amount pro tanto. So long as your services do not exceed the statutory time and they were rendered in compliance with the statute, the county commissioners cannot complain or interfere.

Section 6 is couched in plain and determinate language, and it regulates, to the extent of the requirements therein set forth, your statutory duties. The time of commencement of your duties is expressed by the words "after being called upon to distribute water." It means, and by no interpolation of words, but by proper construction of language "after being called upon" by water consumers "to distribute water," or by the superintendent of irrigation or state engineer. The time you shall devote to the discharge of your duties is your "entire time" measured from the time you were called upon to distribute water to the time when the necessities of irrigation cease, and

made dependent upon such duties being required. The words "when such duties are required" lodge a discretionary power in your hands, subordinate of course to the supervisory control of the superintendent of irrigation and state engineer. It is contemplated by the statute that you will only perform these duties when required, and the requirement is predicated upon existing necessity and of which you are supposed to be the judge, but subject, as suggested, to the superior officers above named. As stated, the county commissioners have no statutory control over the manner or extent of performance of your official duties. If the necessity existed and the services were performed, that is all the law requires in that regard. Of course if any question should arise upon your itemized account before the county commissioners, and it were shown affirmatively and satisfactorily that you had put in unnecessary time, they would be warranted in disallowing it to that extent. But such evidence must be clear and convincing so as to raise a presumption of fraud in the account—otherwise, the commissioners must presume that you have exercised due discretion in the performance of your duties and allow the statutory compensation.

In so far as the balance of your communication is concerned with reference to the "law" of the state engineer, as printed in his biennial report, I have this to say: I have always found it unprofitable and a waste of time to discuss "law" with people who are not lawyers.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE PENITENTIARY PERMANENT FUND AND PENITENTIARY INCOME FUND.

1. The penitentiary permanent fund arises from the proceeds of sales of land donated to the state by congress by virtue of the provisions of section 9 of the enabling act. The penitentiary income fund arises from interest derived from the penitentiary permanent fund. So far as the purpose for which they may be used is concerned, both funds are practically the same.

2. The state reformatory, located at Buena Vista, is a branch of the state penitentiary, situated at Canon City, Colorado, and as such, in so far as the purpose of the grant is concerned, can be considered as a part of the latter institution.

3. The legislature, by the enactment of "Senate Bill No. 366" exceeded the powers conferred upon it by the enabling act, and the appropriations therein provided for the purchase of "tools," "supplies" and "furnishing" of the character named, are void. But the other provisions of the act are valid as the valid and invalid parts of the act are separable.

Attorney General's Office,
Denver, Colo., June 14, 1893.

Hon. F. M. Goodykoontz, State Auditor:

Dear Sir—In answer to the questions contained in your communication of the 23d ult., relative to the provisions of Senate Bill No. 366, as to whether the funds therein named can be used for the designated purposes, I desire to say:

That the penitentiary permanent fund arises from the proceeds of sales of land donated to the state by congress by virtue of the provisions of section 9, of the "Enabling Act." The penitentiary income fund arises from interest derived from the penitentiary permanent fund. So far as the purpose for which they may be used is concerned, both funds are practically the same.

Said section 9, of the enabling act reads:

"Sec. 9. That fifty other entire sections of land as aforesaid, to be selected and located and with the

approval as aforesaid, in legal subdivisions as aforesaid, shall be, and they are hereby granted, to said state for the purpose of erecting a suitable building for a penitentiary or state prison in the manner aforesaid."

The provisions of Senate Bill No. 366 are as follows:

"Section 1. That for the purpose of erecting and furnishing a cell house at the state reformatory located at Buena Vista, Colorado, there is hereby appropriated out of any moneys belonging to the penitentiary permanent fund, the sum of twenty thousand ($20,000) dollars."

"Section 2. That for the purpose of erecting and furnishing a workshop at said reformatory, there is hereby appropriated out of any moneys in the state treasury belonging to the penitentiary permanent fund not otherwise appropriated, the sum of fifteen thousand ($15,000) dollars."

"Section 3. That for the purpose of erecting and furnishing a house for the warden at said reformatory, there is hereby appropriated out of any moneys in the state treasury belonging to the penitentiary permanent fund, not otherwise appropriated, the sum of four thousand three hundred and seventy-four and 38-100 ($4,374.38) dollars."

"Section 4. That for the purpose of purchasing machinery, tools and supplies for said workshop at said reformatory, there is hereby appropriated out of any moneys in the state treasury belonging to the penitentiary income fund, not otherwise appropriated, the sum of ten thousand ($10,000) dollars."

"Section 5. That said appropriations shall be used exclusively for the purposes aforesaid and the warden is hereby required to open and keep account with each item of the appropriation, and the auditor is hereby authorized to draw warrants for the payment of the same upon vouchers certified by the pres-

ident of the board of commissioners and attested by the secretary thereof."

The state reformatory located, at Buena Vista, is a branch of the state penitentiary, situate at Canon City, Colorado, and as such, insofar as the purpose of the grant is concerned, can be considered as a part of the latter institution. The object of the grant is the "erecting a suitable building for a penitentiary or state prison." A cell house, a house for the warden and a workshop being accessory to and a necessary part of the institution are within the purpose of the grant, as they are of a permanent character. Machinery, if affixed to the building, is to be considered a permanent fixture, is also within the purpose of the grant, but tools, and supplies are not. If by the word "furnishing" personal and floating property, such as chairs, tables, carpets, etc., is meant, it is not within the purpose of the grant, but a perversion thereof. The appropriations insofar as the purchase of tools, supplies, and furnishings not accessory to the buildings, are invalid, as such articles are of a chattel character and not of a permanent nature and accessory to the buildings. The legislature as the trustee of the congressional donation or the instrumentality by which the purpose of the grant is to be carried into those contemplated in the provisions of said enabling act. If a surplus were to exist in these funds after the "erecting a suitable building for a penitentiary or effect cannot divert said funds to other uses than state prison" and the legislature should treat it as a surplus by the use of appropriate words in a legislative act, such surplus, it is probable, could be appropriated to other purposes connected with the penitentiary than the erection of a "suitable building."

It is my opinion that the legislature exceeded the powers conferred upon it by the enabling act, and that said appropriations for the purchase of "tools," "supplies," and "furnishing" of the character named, are void. But the other provisions of the act are valid and

warrants should be issued in accordance therewith, the valid and invalid parts of the statute being separable.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION.

When it appears to the superintendent of insurance, from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company doing business in this state are in an unsound condition, he should revoke the authority granted to such company to do business in this state.

Attorney General's Office,
Denver, Colo., June 15, 1893.

Hon. F. M. Goodykoontz, Auditor of State and Superintendent of Insurance:

Sir—In response to your letter of 3d ult., with reference to the Railway Official and Employes' Accident Association, I submit the following:

Section 2211, Mills' Ann. Stats., says that "when it appears to the superintendent of insurance from the report of the person appointed by him or other satisfactory evidence, that the affairs of any company doing business in this state are in an unsound condition, he shall revoke the authority granted to such company to do business in this state," etc., etc.

The preceding section (2210) provides that "the circulation of any statement, printed or written, which is untrue, or which tends to create in the public mind a false impression regarding the business responsibility of any company, shall be sufficient cause for official investigation by the superintendent,

and if it appears to him, on investigation, that such deception was maliciously practiced, he may, in his discretion, revoke the license of the company so offending."

Section 2240, Id., requires the superintendent of insurance to report the facts to the attorney general in cases where any corporation doing business in this state has exceeded its powers or failed to comply with any provision of law or is conducting business fraudulently and that officer shall apply to the district court for an injunction restraining such corporation from the further prosecution of the business.

Under these provisions of the law and the facts and papers submitted by you, I recommend that you visit this corporation, call the attention of the officers to the apparent violation of their charter, give them an opportunity to explain the same, if possible, and to show cause why they should not be proceeded against by the attorney general. If they are recalcitrant, and do not place themselves in a proper light, you are requested to report the fact to this office.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE APPORTIONMENT OF SCHOOL FUNDS.

In determining the residence for the purpose of taking school census, it matters not where the unmarried person of school age may be whose parents or guardian lives in the state, the residence of such person is fixed by the bona fide residence of the parent or guardian, and this must be determined by the census enumerator.

Attorney General's Office,
Denver, Colo., June 23, 1893.

Hon. J. F. Murray, Superintendent Public Instruction:

Dear Sir—In reply to the communication of Hon. James Condit, submitted to this office by you, would

say, that the language of "section 55" sufficiently reveals the "spirit and intent" thereof, and any attempt to further analyze it would be superfluous.

The portion of the section referred to is as follows: "The residence of any unmarried person of school age shall, in all cases, be held to be identical with the bona fide residence of the parent or guardian of such person, providing that such parent or guardian be a resident of the state."

Mills' Ann. Stats., Sec. 4018.

In determining the residence then for the purpose of taking school census, it matters not where the unmarried person of school age may be whose parent or guardian lives in the state, the residence of such person is fixed by the bona fide residence of the parent or guardian, and thus must be determined by the census enumerator.

Yours truly,

EUGENE ENGLEY,

Attorney General.

IN RE TAX SALES.

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1. The county commissioners have no authority to make an order governing the publication of notice of the delinquent tax list contrary to the provisions of the law contained in section 3883, Mills' Annotated Statutes.

2. In the absence of any agreement as to price, it is discretionary with county commissioners what compensation shall be allowed the publisher for printing the delinquent tax list, but such discretion must be reasonably exercised.

Attorney General's Office,

Denver, Colo., July 25, 1893.

Hon. Wm. Williams, County Commissioner Baca County, Springfield, Colo.:

Dear Sir—In reply to your communication of recent date, relative to the publication of notice of tax sales by the county treasurer, would say:

Section 3883, Mills' Ann. Stats., provides as follows:

"The treasurer shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks in a newspaper in his county, if there be one, and additionally in all counties of the first-class in a German newspaper, if there be one, the first of which publications shall be at least four weeks before the day of sale; and by a written or printed notice posted in a conspicuous place on or near the outer door of the office or building commonly used as the office of the treasurer, for not less than four weeks before the sale; and if there be no newspaper published in the county, the like notice shall be given by posting one written notice the above length of time in each election precinct in which any land to be sold is situate, and one on or near the door of the treasurer's office, as above provided."

Section 3835, Id., provides for the payment of publishing delinquent tax list as follows:

"The board of county commissioners, at their first meeting in July, shall allow the amount agreed upon, or if no agreement has been made, shall make a reasonable allowance to the publisher for printing the delinquent tax list."

In view of the foregoing, it is my opinion that county treasurers must comply with the directions contained in section 3883, supra, in publishing the delinquent tax list, and if only one paper is published in the county, the same must be published in said paper as directed. Any order of the county commissioners contrary to the provisions of said section 3883 would not only be null and void as to such notice, but would also vitiate all sales conducted thereunder.

By section 3835, Id., it will be seen that in the absence of any agreement as to price, it is discretionary with the county commissioners what compensation

shall be allowed the publisher for printing the delinquent tax list, but such discretion must be reasonably exercised.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE APPORTIONMENT OF SCHOOL FUND TO STATE NORMAL SCHOOL.

For the purpose of apportionment the state normal school must be considered a separate district and is entitled to receive its share per capita of the state school fund. Any county in the state having pupils of school age in attendance at the state normal school, must be charged with the amount per capita that such county would be entitled to receive on account of such pupils, and said amount must be credited to the state normal school fund.

Attorney General's Office,
Denver, Colo., June 28, 1893.

Hon. J. F. Murray, State Superintendent of Public Instruction:

Dear Sir—In answer to your communication of recent date would say:

Section 4121, Mills' Ann. Stats., provides as follows: "Said normal school is hereby constituted an integral part of the public school system of this state, and shall stand upon the same basis as to apportionment of state school funds as union high schools * * * *."

Section 4001, Id., relating to union high schools, provides that "after the first year or part of a year, so as above provided for, the said high school shall, so far as practicable, be rated as a separate district. It shall be entitled to draw from the general state and

county funds its quota for attendance," etc. In accordance with the above provisions of the law, for the purpose of apportionment the state normal school must be considered a separate district and is entitled to receive its share per capita of the state school fund. Any county in the state having pupils of school age in attendance at the state normal school, must be charged with the amount per capita that such county would be entitled to receive on account of such pupils, and said amount must be credited to the state normal school fund.

Your question should be modified by inserting the words "of school age" as you will readily understand that those who are not of school age can no longer receive a proportionate share of the public school fund.

In making your apportionment to the state normal school, you will base the same upon the number of pupils of school age in attendance.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE BRANDS.

When two or more similar marks or brands have been heretofore recorded in any county, the oldest record shall entitle the owner to the exclusive use thereof in such county.

Attorney General's Office,

Denver, Colo., June 28, 1893.

Hon. Nelson O. McClees, Secretary of State:

Dear Sir—In reply to your communication, per Mr. Lewis, clerk of brand department, would say, that

section 4240, Mills' Ann. Stats., provides as follows: "Sheep shall be marked distinctly with such mark or device as may be sufficient to distinguish the same readily, should they become mixed with other flocks of sheep owned in the state. This provision is all I find regarding the manner in which sheep shall be branded.

In answer to the second interrogatory, would say, that section 4241, Id., provides a penalty for recording duplicate brands, and further provides that "when two or more similar marks or brands have been heretofore recorded in any county, the oldest record shall entitle the owner to the exclusive use thereof in such county."

It is further provided by section 4245, Id., that whenever the secretary of state discovers already recorded a brand, the fac simile of which is submitted or filed with him for record, he "shall return such fac simile and fee to the party by whom the same was forwarded to him."

You will observe from the provision of section 4241, above referred to, that it would avail a party nothing to insist upon the recording of a duplicate brand as the oldest record would entitle the owner to the "exclusive use thereof," in the county in which such brand is recorded.

I think the party referred to in your communication would be willing to surrender his brand, upon the presentation to him of the law regarding the matter, and would prefer to correct the error in order to better protect his property.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FINES FOR THE PUNISHMENT OF CRIMES AND MISDEMEANORS.

Section 4034, Mills' Ann. Stats., provides that the clear proceeds of all fines collected within the several counties of the state for breach of the penal laws shall be paid over in cash by the person collecting the same within twenty (20) days after its collection to the county treasurer, to be by him credited to the general county school fund.

Attorney General's Office,
Denver, Colo., June 28, 1893.

Hon. H. W. Haver, County Superintendent Schools,
Yuma, Colo.

Dear Sir—In reply to your communication of recent date, would say:

Section 1441, Mills' Ann. Stats., provides that all fines imposed by virtue of any of the laws of this state for the punishment of crimes and misdemeanors shall, where no other provision is made, when collected, be paid into the treasury of the county, unless otherwise expressly directed. * * *

Section 1498 provides that all fines imposed by virtue of any of the laws of the state for the punishment of crimes and misdemeanors, and all forfeited recognizances, shall when collected be paid into the treasury of the county where the offense shall be tried for the use of such county.* * *

Section 4034 provides that the clear process of all fines collected within the several counties of the state for breach of the penal laws, shall be paid over in cash by the person collecting the same within twenty (20) days after its collection to the county treasurer, to be by him credited to the general county school fund. He must indicate the source from which such money was derived upon making the entry in his

books. A penalty is provided for violation of the provisions of this section.

While all of the above sections are still upon our statute books, section 4034 is the more recent enactment, and repeals by implication all former or parts of former acts in conflict therewith.

I think the case referred to by you falls within the purview of section 4034, Id., and the fine of $500 collected for an "assault with intent to commit great bodily injury," should be paid to the county treasurer, and by him credited to the general county school fund.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE EXPENSES OF LABOR COMMISSIONER IN ATTENDING CONVENTIONS.

The statutes do not authorize the payment of the expenses of the state labor commissioner in attending a convention of officials of bureaus of labor statistics in the United States, and the state auditor is without authority to allow any bill or claim for expenses so incurred.

Attorney General's Office,
Denver, Colo., June 28, 1893.

Hon. J. W. Brentlinger, Deputy Commissioner Bureau Labor Statistics:

Dear Sir—In reply to your communication of recent date, would say, that I find no authority in the act creating the bureau of labor statistics, and the provisions therein contained for its support and maintenance, that authorizes an expenditure of money for the purpose mentioned in your letter.

While attendance upon such a convention as mentioned by you might tend to aid the commissioner in the better performance of his duties and consequently inure to the benefit of the people of the state, it is not such a duty devolved upon the commisioner by law as to warrant the expenditure of state funds in its performance, and the state auditor would have no authority to allow any bill, or claim for expenses incurred, on account of attending such convention.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE POWER OF BOARD OF COUNTY COMMISSIONERS.

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1. Whenever there are no moneys in the county treasury to the credit of the proper fund to meet and defray the necessary expenses of the county, it is lawful for the board of county commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses, to the extent of eighty per centum of the total amount of the taxes levied.

2. Section 20, page 313, Ses. Laws, 1891, provides for the time and manner in which reports of county officials shall be made. The law is mandatory, and any official failing to report may be compelled to do so by mandamus proceedings.

Attorney General's Office,

Denver, Colo., June 28, 1893.

Hon. James A. Kimber, Chairman Board County Commissioners, Yuma, Colo.

Dear Sir—In reply to your communication of recent date, would say, that Sec. 801, Mills' Ann. Stats.,

provides as follows: "Whenever there are no moneys in the county treasury of a county to the credit of the proper fund to meet and defray the necessary expenses of the county, it shall be lawful for the board of county commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses, to the extent of eighty per centum of the total amount of the taxes levied." You will thus see that the eighty per centum is upon the total amount of taxes levied, and not eighty per centum of the debt that has accrued in excess of the annual appropriations referred to in your letter.

There is no special duty imposed upon the chairman of the board of county commissioners in reference to monthly reports of the several county officers, that is not imposed upon the other members of the board. The reports are simply directed to him as chairman and chief officer of the board, and when received must be acted upon in the same manner as other matters that come before the board.

Section 20, page 313, Sess. Laws 1891, provides for the time and manner in which reports of county officials shall be made. The law is mandatory, and any official failing to report may be compelled to do so by mandamus proceedings. It is within the province of the board of county commissioners to see that the provisions of the law regarding these reports are obeyed, and in my opinion it is their duty as guardians of county affairs, to see that the law is enforced, that the interests of the people may be conserved.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TAX SALES.

1. A purchaser at a tax sale is protected in his purchase up to the time a tax deed is passed, whether the property has been subsequently sold to other purchasers, or redeemed by the owner.

2. The owner of property in order to redeem the same from tax sales, must pay to the treasurer sufficient funds to cover the outstanding certificates of purchase, together with the interest and penalties due thereon as provided by section 2935, page 862, General Statutes, 1893.

Attorney General's Office,
Denver, Colo., July 10, 1893.

Hon. D. A. Callaway, County Treasurer, Montrose, Colo.:

Dear Sir—Your communication of recent date, regarding tax certificates, resolves itself into the following proposition:

When A has purchased property at tax sale and has failed to pay subsequent taxes thereon, and the same is thereafter sold to B, who fails to pay taxes, and is then sold to D for taxes, is A and B entitled to principle, interest, penalties or either, when said property is redeemed? This proposition necessitates our entering into some discussion as to the respective rights of the owner and subsequent tax sale purchasers in relation to the property sold.

As a first proposition, the right of the government to levy a tax and collect the same will not be denied. Taxes are not a lien upon real estate, unless expressly made so by statute. Liens are of purely statutory origin; without a statute there can be no lien, and unless taxes are declared by positive law to be a lien upon the lands against which they are assessed, no such effect can be claimed for them. In Colorado taxes are constituted a perpetual lien upon all real estate subject to taxation, until such taxes

and any interest, charges and penalty which have accrued thereon, shall be paid.

Black on Tax Sales, Sec. 182.

Mills' Ann. Stats., Sec. 3770—3771.

It is held in general that the objects to be attained by making taxes a specific lien upon real estate, are certainty and security in the collection of the public revenues, and the establishment of a convenient method of fixing and enforcing a liability upon the land itself. Taxes are therefore a charge upon the lands and not a personal charge against the owner. It matters not in the sale of land for taxes whether the owner is known or unknown, resident or non-resident, the land is held subject to the payment of such taxes. The purchaser at a tax sale is given a certificate by the treasurer, which certificate is official evidence of the inceptive title he has acquired by the fact of the sale. It also witnesses his right to receive the redemption money, if the same should be tendered to him. It does not answer all the purposes of a deed, but it bears the same relation to the inchoate title, as evidence and assurance, that the tax deed does to the complete and indefeasible title. The tax certificate does not by itself pass the title to the land; it does not convey such title as will enable the purchaser to maintain ejectment against the owner remaining in possession.

Mills' Ann. Stats., Sec. 3897.

Neither the legal nor equitable title to land sold for taxes vests in the purchaser until the execution and delivery of the tax deed; until that time the owner retains the right of possession and all other incidents of the title; but the purchaser has a statutory lien upon the land for the amount of his purchase money, with interest and penalties.

Blackwell on Tax Titles, Sec. 322.

The purchaser acquires the lien of the state, and may recover from the owner the taxes paid at the

sale, together with interest and penalties. Even when his title is declared to be defective he is entitled to recover all taxes paid by him and interest thereon.

Blackwell on Tax Titles, Sec. 995.

24 Kan., 16.

31 " 30.

The purchaser is subrogated to the lien of the state.

41 Ark., 149.

104 Ind., 451.

84 Mo., 569.

67 Iowa, 650.

35 Kan., 652.

Where land was sold to O for taxes of 1870, and the sale was invalid for irregularity, and the land was afterwards sold to R for the taxes of 1869, it was held that O had a lien on the land against R for the taxes of 1870.

24 Kan., 463.

The supreme court of Iowa rendered a decision, covering a parallel case in which the evidence showed that certain lots were sold for taxes in 1863 for the taxes of previous years, that they were subsequently sold for taxes in several different years. The position of the appellant in the supreme court was, that the subsequent tax sales divested the interest of the tax purchaser under the sale of 1863. The opinion of the supreme court upon this point is in the following language: * * * "In this position we cannot concur. Had any of the tax sales after 1863 been suffered to ripen into tax titles, the interest of the former tax purchaser would have been thereby divested. But, by redeeming from the subsequent sales and not from that of 1865, the appellant assisted the purchaser, under the sales of 1863, to obtain a tax deed under such sales. The mere sale of land for taxes does not abro-

gate or destroy the rights of a purchaser under a previous sale; at all events, when the purchases are by different persons. It is only where the subsequent sale ripens into a title that the interest of the first purchaser is destroyed.

A redemption from the subsequent sales protects the previous purchaser from such contingency. It simply does away with the effect of the sale redeemed from, and otherwise makes no change in the title."

The law of Colorado relating to redemption of property by the owner from tax sales is found in the general statutes of '83, p. 862, Sec. 2935. We have seen from the foregoing that each purchaser at a tax sale is protected in his purchase, up to the time a tax deed is passed, whether the property has been subsequently sold to other purchasers, or redeemed by the owner. It is, therefore, my opinion, that in this state, when the owner of property desires to redeem the same from tax sales, section 2935, General Statutes, above referred to, must be strictly complied with, and the owner must pay to the treasurer sufficient funds to cover the outstanding certificates of purchase, together with interest and penalties due thereon, as provided by said action.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE NOTARY PUBLIC.

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1. Judicial notice will be taken of the ordinary and commonly used abbreviations and equivalents of christian names.
2. It is discretionary with the secretary of state whether or not he will certify to a signature of a notary public where the same is at variance with the name of such officer appearing upon his commission.

Attorney General's Office,
Denver, Colo., July 11, 1893.

Hon. Nelson O. McClees, Secretary of State:

Dear Sir—In reply to your communication of recent date in which you ask if a notary public may use the initials of his name in signing documents, and also upon his seal, when his commission is granted in his full name, would say, that I find the weight of authority sustains such signature. Judicial notice will be taken of the ordinary and commonly used abreviations and equivalents of christian names.

Am. and Eng. Enc. of Law, vol. 16, p. 115.

In cases of election where a mistake has been made in printing the official ballot in which the name of the candidate was not correctly spelled, or where the initial only of the christian name used, and no middle initial or the incorrect one being given, the weight of authority, both in the courts and legislative bodies, is not to reject the vote for ambiguity, if from the ballot and the circumstances surrounding the election, the intention of the voter can be determined.

Am. and Eng. Enc. of Law, vol. 6, p. 346, and cases cited.

The same rule would apply in the case referred to by you, that is, the initials and surname of the signature, together with those upon the seal, being identical with those of the name upon the commission, and other facts and circumstances surrounding the signature, such as the date of the expiration of the commission in connection therewith, as required by our statute, would be sufficient to identify the officer signing as being the same person named in the commission.

As to the second part of your inquiry, I think it is a matter entirely within the discretion of the secretary of state whether or not he will certify to such a signature where the variance exists. He certifies only to what he knows. His certificate is a verifica-

tion, and if he is satisfied that the officer signing his name, using the initial of the christian name or names only, is one and the same person to whom a commission was issued and in which the full name is used, he may so certify under his hand and seal of state.

If the evidences are sufficient to convince him of this fact, he may refuse to certify as required, until the commission, the signature and seal correspond in toto.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE APPROPRIATION BILLS.

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1. Appropriation bills are legislative directions for the expenditure of public moneys and when applicable to the same fund have priority in the order of their precedence. Bills approved the same day and becoming laws simultaneously, take their pro rata share of the whole amount available.

2. The internal improvement permanent fund and the internal improvement income fund are one and the same for all practical purposes. They are both used for internal improvements and not otherwise, but when an act specifies from which of these funds an appropriation shall be paid, its provisions must be complied with. Any other mode of procedure would be a violation of the legislative intention.

Attorney General's Office,
Denver, Colo., July 13, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In reply to your communication of the 6th inst., relative to the several appropriation bills submitted, permit me to say, insofar as the acts themselves are concerned their priority as laws are regulated by the constitution. In the absence of an

emergency clause an act takes effect ninety days after its approval by the governor. The purpose and effect of an emergency clause is to make the act operative from the day of its approval by the executive. All acts approved on the same day, in the absence of proof of exact time of approval, are approved contemporaneously, and will take effect simultaneously, unless, in this particular the provisions of said acts differ.

53 Vt., 649.
4 Met. (Ky.), 53.
29 Ark., 99.

An appropriation bill is a legislative direction as to the manner in which the public moneys shall be expended or apportioned. Whenever there are funds in the state treasury from which the appropriations are directed to be taken, it is the duty of the treasurer to open an account as designated by the several bills, and place the specific amount appropriated to the credit of the particular fund or funds indicated. Where several bills provide for appropriations from the same fund, the amount should be apportioned in the order of their precedence, and where two or more bills become laws on the same day appropriating money from the same fund, they should each be credited with their pro rata share of the whole amount available.

For all intents and purposes the internal improvement permanent fund and the internal improvement income fund are one and the same fund, that is, they must each be used for the purposes of internal improvements and no other. But when the legislature has directed certain amounts to be appropriated from the permanent fund and others from the income fund, the directions must be complied with, and any other method of procedure, would be in violation of the legislative intention.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE TAX SALES.

1. A county may purchase property at a tax sale the same as an individual.

2. When deed is passed to the county, all claims and liens held by the county against the property are thereby relinquished.

3. While title to property remains in the county it is exempt from taxation.

Attorney General's Office,
Denver, Colo., July 14, 1893.

Hon. Lewis F. Mathews, County Clerk, Springfield, Colo.:

Dear Sir—In answer to your communication of recent date, relative to the assessment and sale for taxes of property in your county, would say, that whenever the taxes against the property mentioned become delinquent, and the county purchases the same at tax sale, if not redeemed by the owner or some person for him, before the expiration of three years from date of sale, the county is given a treasurer's deed, and thereby acquires as good a title to the property as can be granted by this means; provided, the requirements of the law relative to the assessment and sale of lands for taxes have been strictly complied with. The county having received a deed to the property as provided by law for the granting of tax deeds by the treasurer, and being the owner thereof, said property can no longer be assessed while the title remains in the county, because it is then expressly exempt by law from taxation.

Colo. Const. Art. X., Sec. 4.

The county may dispose of its property in such manner as will best subserve its interests.

When the county becomes the purchaser of property at a tax sale, or receives a tax deed thereto, no

money is passed because the county would simply be paying itself the amount. The tax deed is granted to the county in consideration of the claim it has upon the land for delinquent taxes due and unpaid thereon. In taking a tax deed, its claim and lien for taxes against the property is thereby relinquished.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FINES AND RECOGNIZANCES.

1. The funds derived from the recovery of forfeited recognizances should be paid to the county treasurer, and by him placed to the credit of the general county fund.

2. The clear proceeds of all fines imposed for breach of the penal laws should, when collected, be paid to the county treasurer and by him credited to the general county school fund.

Attorney General's Office.
Denver, Colo., July 14, 1893.

Hon. J. F. Murray, Superintendent Public Instruction:

Dear Sir—In reply to the comunication of Hon. D. H. Longenbagh, county superintendent of Monte zuma county, submitted to this office by you, would say that the case referred to is provided for by sec. 1498, Mills' Ann. Stats., and the amount of the forfeited recognizance, when recovered, should be paid to the county treasurer and by him placed to the credit of the general county fund.

Section 4034, Id., in which is provided that "all fines, penalties and forfeitures provided in this act may be recovered by action of debt, etc." and when

collected shall belong to the school district or county in which the same accrued, refers to the school law, and not to the penal laws of the state.

Fines collected for breach of the penal laws are disposed of under this last mentioned section.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE INTERNAL IMPROVEMENT PERMANENT FUND AND INTERNAL IMPROVEMENT INCOME FUND.

The statute authorizing the state treasurer to invest the moneys of the internal improvement permanent fund and internal improvement income fund in state bonds and warrants is secondary in its operation, and where the legislature disposes of these funds by acts making specific appropriations therefrom, the directions therein contained must be complied with.

Attorney General's Office.

Denver, Colo., July 14, 1893.

Hon. Albert Nance, State Treasurer:

Dear Sir—In reply to your communication of recent date, relative to the disposition of the internal improvement income fund, and your investment of same in state warrants, would say that where the legislature expressly directs the manner and for what purpose the moneys in the several funds shall be expended, you are required to obey its instructions. There is no conflict in the provisions of the laws referred to, because the section directing you to invest the moneys of the permanent and income funds in warrants of the state, is secondary in its operation

on account of the words, "unless otherwise disposed of by law," contained therein. When there is money in a certain fund from which apropriations have been made by acts of the legislature, you must first comply with the instructions therein contained and apportion the money as directed. If any balance remains in the fund after all sums appropriated therefrom have been deducted, or if the legislature has failed to "otherwise dispose" of the same, you may then invest the fund in bonds or warrants of the state as provided by law.

The second part of your inquiry is answered by the opinion of this office rendered to the state auditor, a copy of which is herewith respectfully submitted.

EUGENE ENGLEY,
Attorney General.

IN RE INSURANCE.

The superintendent of insurance has no authority to appoint an expert or agent in the state in which an insurance company has its home office other than in the state of Colorado, for the purpose of examining the books of such company.

Attorney General's Office.
Denver, Colo., July 19, 1893.

Hon. F. M. Goodykoontz, Superintendent of Insurance:

Dear Sir—In answer to your communication of recent date, would say, that in view of the recent decision of the court of appeals of Colorado, in case of Carlisle vs. Hurd, 31 Pac. Rep., 952, you would have authority to apoint an expert in the state in which an insurance company has its home office, other than

in the state of Colorado, for the purpose of examining into such company's books and assets, and reporting the same to you, as the act which clothes the superintendent of insurance and his deputy with authority to examine and proceed against insurance companies can necessarily have no extra territorial force. Under all the decisions these officers are without authority outside the limits of their own state, and any person appointed, as you suggest, would be powerless to serve the purposes of such an appointment.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE INSURANCE.

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1. Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss.
2. Insurance contracts are fundamentally for indemnity, and will be liberally construed to that end.
3. The National Benefit Company is an insurance company, and as such is subject to the laws of Colorado, and the rules and regulations of the insurance department prescribed thereunder.

Attorney General's Office.
Denver, Colo., July 19, 1893.

Hon. F. M. Goodykoontz, Superintendent of Insurance:

Dear Sir—In replying to your communication of recent date, relative to the "National Benefit Company," would say, that insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the accepted definition. Mr. Justice Lawrence, in the case of Lucena vs. Crawford, 2 Bos.

& Pul., New Rep., 300, after citing the definitions of Valin, Roccus and others, states the following: Insurance is a contract whereby the one party, in consideration of a price paid to him, adequate to the risk becomes security to the other that he shall not suffer loss, prejudice or damage by the happening of the perils specified, to certain things which may be exposed to them."

Insurance contracts are fundamentally for indemnity, and will be liberally construed to that end.

Insurance Co. vs. Hughes, 10 Lea, (Tenn.), 461.

May on Insurance has the following on the contract of indemnity: "It has its origin in the necessities of commerce; it has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields; and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand and promises indemnity. This principle underlies the contract and can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guarantee against loss or damage."

In view of the foregoing, it is my opinion that the "National Benefit Company" is an insurance company, and as such, is subject to the laws of Colorado and the rules and regulations of the insurance department prescribed thereunder.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE JUSTICES AND CONSTABLES.

1. There is no statute which authorizes the execution of process from justices' courts in a civil action by sheriffs or their deputies, as such.

2. No officer can execute process unless it is directed to him for service, or to the class of officers to which he belongs.

3. Constables only, can execute process from justices' courts in civil actions, except in the cases where a justice may depute another person to perform such service.

Attorney General's Office.
Denver, Colo., July 25, 1893.

Hon. H. M. Taylor, Justice of the Peace, Mancos, Colo:

Dear Sir—In reply to your communication of recent date, would say, that there is no statute in this state which authorizes the execution of process from justices' courts in civil actions by sheriffs or their deputies, as such. On the subject of the execution of process, Mr. Crocker says:

"No officer can execute process unless it is directed to him for service, or to the class of officers to which he belongs."

In treating of the powers and duties of constables, he says:

"They can only execute process from justices' courts in civil actions, except in the cases where a justice may depute another parson to perform such service."

Crocker on Sheriffs, Secs. 1025, 1029; also 6th Colo., 34.

The circumstances under which a justice of the peace may appoint a special constable, are provided for by sec. 2794, Mills' Ann. Stats., which says that "any justice of the peace may appoint a suitable person to act as constable in a criminal or other case,

where there is a probability that a person charged with an indictable offense will escape, or that goods and chattels will be removed before application can be made to a qualified constable, or whenever no qualified constable can conveniently be found in the township, and the person so appointed shall not as constable in that particular case, and no other, and any temporary appointment so made, as aforesaid, shall be made by a written instrument, under the seal of the justice, deputing on the back of the process, which the person receiving the same shall be deputed to execute."

In my opinion, therefore, no person other than the legally qualified constable of your precinct can serve civil process issued by your court; nor can you appoint a deputy sheriff, or any other person, to serve process in a civil case, unless the circumstances concerning the case are such as provided for by sec. 2794, Mills' Ann. Stats., above quoted.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE FREE KINDERGARTENS.

Under the Act of 1893 a Colorado school board may lawfully employ a kindergarten teacher having a diploma from some reputable kindergarten teachers' institute outside of the state of Colorado, and it is not necessary that such teacher shall first pass an examination directed by the kindergarten department of the state normal school.

Attorney General's Office.
Denver, Colo., July 28, 1893.

A. E. Bent, Esq., Lamar, Colo.:

Dear Sir—In reply to your communication of recent date, relative to the qualifications of teachers

employed in the kindergarten department of the schools of this state, would say, that the act of 1893, giving the school board of any school district in the state the power to establish and maintain free kindergartens in connection with the public schools of said district, contains the following provision: "That teachers of kindergarten schools shall have a diploma from some reputable kindergarten teachers' institute, or pass such examination on kindergarten work as the kindergarten department of the state normal school may direct." This is the only provision in relation to the qualifications of teachers that we find in the law, so there are two criterions by which the right of a person to teach in this department may be determined, one of them being the possesion of "a diploma from some reputable kindergarten teachers' institute," and the other, the fact of having passed an examination directed by the kindergarten department of the state normal school. The law does not specify that under the latter provision, the person shall receive a certificate, but we may infer that a certificate would naturally follow a succesful examination, as evidence of that fact. Neither is the diploma limited to "some reputable kindergarten teachers' institute" in the state of Colorado, but a diploma granted by such an institute in any other state will fully answer the requirements of the law. It is within the province of the school board hiring the teacher, to determine whether or not such diploma when presented, is from a reputable institution. If they are undecided in the matter, they may apply to the proper school authorities of the state for information upon this point, but they are not compelled to do so, and may decide this question, as well as engage the teacher, upon their own responsibility. The provision of the law which says that "said kindergartens shall be part of the public school system, and governed as far as practicable in the same manner, and by the same officers as is now, or hereafter may be provided by law for the government of the other public schools of this state," does not in any way impair

the right of a school board to engage a teacher having the necessary qualifications under the law, as there are many other questions to be considered in conducting the kindergarten departments, that are not covered by the act establishing them, but may be governed by the general school law of the state and the proper officers designated to execute them.

The application of the act of 1893 is not necessarily general and as a result of said act, only a few such departments may be established, but when the same are so established, the act specifically states what qualifications the teachers shall possess, and any teacher having either of the qualifications mentioned may be employed by the school board as a teacher in the kindergarten department.

In view of the foregoing, it is my opinion that a Colorado school board may lawfully employ a kindergarten teacher who has a diploma from the kindergarten department of the state normal school of Kansas, and that it is not necessary that such teacher shall first pass an examination on kindergarten work under the kindergarten department of the state normal school of Colorado.

Respectfully,

EUGENE ENGLEY,
Attorney General.

CERTIFICATES OF INDEBTEDNESS.

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1. They must be issued directly by the state, be based upon the credit of the state and be intended to circulate as money, before they can be held to be "certificates of indebtedness."

2. State bank notes are not "bills of credit" as intended by the constitution, although the state should own the bank.

Attorney General's Office.

Denver, Colo., July 29, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Dear Sir—This office is in receipt of several communications, some of which are official, requesting an opinion upon the power of the legislature to enact appropriate legislation for the establishment of a state depository of silver bullion and the issuance of certificates thereon assignable by delivery, and receivable by the state in payment of state taxes; and also as to the extent of the power of the state in creating a bank. The purpose of the inquiry is, as I understand it, to furnish if possible, a medium, in part owing to the contraction of the volume of money, to better transact business and relieve the financial depression now existing in the state. The advisability or practicability of remedial legislation by the state along the line proposed is a matter I shall not discuss herein, but shall confine the inquiry to the legal aspects of the question. Legislation of the kind proposed, to be effective, must stand the test of a judicial interpretation of the federal constitution.

Section 10 of art. 1, (constitution of the United States), in part, reads: "No state shall * * * * coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts * * * *."

The question as here presented, turns upon the meaning of the words, "emit bills of credit."

The first case in which the supreme court of the United States passed upon the question of the right of a state to emit bills of credit, that I have been able to find, is that of Craig vs. Missouri 4 Pet., 409.

This case was decided in January, 1830. Chief Justice Marshall delivered the opinion of the court, which was dissented to by Justices Thompson, Johnson and McLean.

On the 26th of June, 1821, the legislature of the state of Missouri passed an act entitled "An act for

the establishment of loan offices." By its provisions, the auditor and treasurer were directed to issue certificates to the amount of $200,000, in the following form:

"This certificate shall be receivable at the treasury or any of the loan offices of the state of Missouri in the discharge of taxes or debts due to the state for the sum of $....., with interest for the same at the rate of two per cent. per annum from this date, the..... day of....., 182..—"

These certificates were receivable at the treasury and by tax gatherers and other public officers in payment of taxes or other moneys due the state or any county or town therein, and by all officers, civil and military, in the state, in discharge of salaries and fees of office. The certificates were to be loaned out to citizens of the state.

The commisioners of the loan offices were authorized to make loans to the amount of $200 on personal security. The salt springs of the state were to be leased out and the lessees were required to receive these certificates in payment for salt; and all the proceeds of the said salt springs, the interest accruing to the state, and all estates purchased by officers of the said several offices, and all the debts then due and thereafter to become due to the state were pledged and constituted a fund for the redemption of the certificates issued under the statute, and the faith of the state was pledged for the same purpose.

The auditor and treasurer were required to withdraw annually from circulation, one-tenth part of the certificates.

Chief Justice Marshall says (page 431): "The clause in the constitution which this act is supposed to violate, is in these words: 'No state shall emit bills of credit.' What is a bill of credit? What did the constitution mean to forbid? In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a state engages to pay money at a future day, thus including

a certificate given for borrowed money. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood.

"At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium, was made to a considerable extent, and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution we were driven to this expedient and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and 'bills of credit' signify a paper medium intended to circulate between individuals and between government and individuals, for the ordinary purposes of society. Such a medium has always been liable to considerable fluctuation. Its value is continually changing and these changes, often great and sudden, expose individuals to immense loss, are the source of ruinous speculations and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a state government for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office do they perform? Certificates, signed by the auditor and treasurer of the state, are to be issued by those officers to the amount of $200,000, of denominations not exceeding ten dollars nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office in the state of Missouri, in discharge of taxes due to the state. The law makes them receivable in discharge of all taxes, or debts due to the state or any county or town therein; and of all salaries and fees of office to all officers, civil and military, within the state; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the state for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees would give them currency. They were to be put into circulation, that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. They had not been termed 'bills of credit,' instead of 'certificates,' nothing would have been wanting to bring them within the prohibitory words of the constitution. And can this make any real difference? Is the proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of

a name ? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself."

The three dissenting justices argued the points of the case exhaustively in their separate opinions.

This decision was afterward upheld in 1834, in Byrne vs. Missouri, 8 Pet., 40.

In Briscoe vs. Bank of Kentucky, 11 Pet., 256, the constitutionality of state banks was upheld. The notes of the bank of the commonwealth of Kentucky were held not to be bills of credit issued by a state. In that case the court say: "To constitute a bill of credit, within the constitution it must be issued by a state on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state and is so received and used in the ordinary business of life. The individual or committe who issues the bill must have the power to bind the state; they must act as agents, and of course, do not incur any personal responsibility nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a state cannot emit." (Id., page 317).

In November, 1820, the legislature of Kentucky passed an act establishing "The Bank of the Commonwealth of Kentucky." The establishment was "in the name and in behalf of the commonwealth of Kentucky." The president and directors were to be chosen by the legislature; they were made a corporation with all the usual powers; the bank was to be exclusively the property of the commonwealth; it could issue notes; the capital was $2,000,000 which was to be paid in by all moneys afterwards paid into the state treasury for the vacant public lands of the state, and by such of the capital stock of the bank of Kentucky as was then owned by the state. It was

to receive deposits and make loans under certain restrictions and limitations.

Subsequently an act was passed increasing the capital stock to $3,000,000; the dividends were to be paid to the state and the notes of the bank were to be issued in the common form of bank notes. It was required that the notes of the bank should be received on all executions by plaintiffs.

The bank had loaned Briscoe a sum of money and took his note for the amount. It afterward brought suit against him and he set up in defense that the act of 1820 and the subsequent act under which the bank was created and doing business were in conflict with the constitution of the United States; that the notes issued by the bank were "bills of credit" issued by the state of Kentucky and hence that the contract, for the enforcement of which the bank sued, was void.

The report of the case covers nearly a hundred pages and the array of counsel includes the names of Hardin and Clay.

Justice McLean delivered the opinion of the court to which Justice Story dissented. The court admitted that the definition of the term "bills of credit," as used in the constitution, is, if not impracticable, a work of no small difficulty and goes on to give a resume of these definitions as given by the court and dissenting judges, and it seems to favor the definitions given by the two dissenting judges in Craig vs. Missouri, supra, (page 447), although the court say that there are classes of bills of credit not embraced in these definitions or any of the others referred to.

These two definitions of the dissenting judges are as follows: "A bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill" and "to constitute a bill of credit within the meaning of the constitution, it must be issued by a

state and its circulation as money enforced by statutory provisions. It must contain a promise of payment by the state, generally, and when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state; not that it will be paid on presentation, but that the state at some future period, or a time fixed or resting on its own discretion, will provide for the payment."

The majority of the judges in the same case (Craig vs. Missouri), say: "Bills of credit signify a paper medium intended to circulate between individuals and between government and individuals, for the ordinary purposes of society."

None of these definitions seem to meet with the full appprobation of the court in the Kentucky case. The last is too broad; the first too narrow; and the court further say that "no definition short of a description of each class, would be entirely free from objections, unless it be in the general terms used by the venerable and lamented chief justice (Marshall). The definition, then, which does include all classes of bills of credit emitted by the colonies or states is, a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money." (page 313).

The court held that the act incorporating the bank of the commonwealth was a constitutional exercise of power by the state of Kentucky and that the notes issued by the banks were not bills of credit within the meaning of the federal constitution.

Briscoe vs. Kentucky, 11 Pet., 256, citing:

Bank of the United States vs. Planters' Bank, 9 Wheat., 904.

Craig vs. Missouri, 4 Pet., 410.

Bank of the Commonwealth of Kentucky vs. Wister, 3 Pet., 318.

Affirmed in:

Woodruff vs. Trapnell, 10 How., 205.
Darrington vs. Bank of Alabama, 13 How., 12.
Curran vs. The State of Arkansas, 15 How., 317.

In the Bank of the United States vs. Planter's Bank, supra, the court say: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. * * * As a member of a corporation, a government never exercises its sovereignty. * * * The state does not, by becoming a corporator, identify itself with the corporation."

And to the same effect the court held in Bank of the Commonwealth vs. Wister, supra.

In Darrington et al. vs. the Bank of Alabama, 13 How., 12, the court held that although the state which created the bank is the only stockholder and pledges its faith for the ultimate redemption of the bills issued by the bank, yet such bills are not bills of credit within the meaning of the constitution. The court say: "A bill of credit emanates from the sovereignty of the state. It rests for its currency on the faith of the state pledged by a public law. The state cannot be sued ordinarily on such a bill, nor its payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process."

In Veazis Bank vs. Fenno, 8 Wall., 533, the court upheld the constitutionality of the act of congress of

July 13, 1866, by which a tax of ten per centum on the amounts of the notes of any state bank was levied.

In the Virginia coupon cases, Antoni vs. Greenhow, 107 U. S., 769, and 114 U. S., 269, the act of the legislature of Virginia, in providng for the issue of bonds and coupons was upheld. These coupons were made receivable for all taxes due the state. In reference to them, the court say: "They are not bills of credit in the sense of this constitutional prohibition. They are issued by the state, it is true, They are promises to pay money. Their payment and redemption are based on the credit of the state, but they are not emitted in the sense a government emits its treasury notes, or a bank its bank notes, a circulating medium or paper currency as a substitute for money. And there is nothing in the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate in the common transaction of business as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is, that they are made receivable in payment of taxes and other dues to the state." (Poindexter vs Greenhow, 114 U. S., p. 284.)

From a review of these decisions, it is evident that there is practically no limitation on the power of the states in the chartering of banks. The greatest embarrassment in the way of state banks is the ten per cent. tax on their issue. The state may own the bank and dircet that its paper be received for dues to the state, and may give to the bank all franchise it may see fit, as long as the federal constitution is not infringed. The state may organize a state bank and authorize the issue of money based on bullion deposited in the vaults of the bank, and on mortgages and good personal security. A constitutional objection might be raised—I do not say successfully raised—

to the issue of money based on deposits of bullion alone, upon the ground that such legislation would be class legislation. There can be no constitutional objection to the state establishing depositories for the storage of bullion and issuing certificates representing bullion stored therein. These certificates may be made assignable by delivery. Representing, as they will, if issued, a commodity that fluctuates in value, the certificates will fluctuate accordingly; hence, they can in no sense be called paper intended to circulate as money. They will be sold in the open market and these sales when made, will only be a token of the sale of so many ounces of bullion or bars of metal. Their value will be controlled by the same rules and causes that control the value of any other personal property. They are, in effect, nothing more than warehousemen's receipts, stating on their face that the holder will be entitled to the delivery to him of so many ounces of bullion of a certain fineness, on presentation of the certificate of the proper officer of the government. The government would charge a per cent. of the value of the bullion, when deposited, to cover the warehouse expenses, including the salaries of the officers in charge of the business. This per cent. may be made payable in current funds. The certificates may be issued upon aliquot parts of the specific amounts of bullion deposited, and made receivable for dues to the state.

If the national government does not restore silver to the status of twenty years ago, or does not remove the tax on state banks, I can see no way out of our difficulties, except at great and unequal loss to the people of the state. Encumbered as certificates of deposit would necessarily be, by the fluctuations in the market value of the bullion itself, and the constant expense (however small) of keeping it stored, they might find but a feeble and uncertain circulation. If we establish a state bank, we must pay ten per cent. upon its entire

issue of bills for the privilege. As between the two—the issue of certificates by the state, and making them receivable by the state for all dues to the state and the establishment of a bank—the latter may be the most feasible.

Neither the certificates nor the notes of the bank can be made a tender for private debts. The state may pledge its entire revenue to protect the issue of the bank and I see no reason why the collaterals held by the bank should not be as safe as the government bonds deposited by the national banks. The governments, both state and national, are worth nothing if the property within our borders is worth nothing. Our developed and taxable property runs up to hundreds of millions. It is not within the scope of human intelligence to reckon the value of our undeveloped, and as yet undiscovered, treasure. We can do what we please with it so long as we confine ourselves within the limits prescribed by the federal constitution. It can all be made a pledge—a visible, tangible guaranty—to protect our homes and our credit; and backed by the energy of the people who dwell upon our mountains and plains, it can be made a rampart behind which we may be safe from the money changers of Europe. Unless our property is preserved by the government which our forefathers established, and which we have acquired by the labor and privations incident to a pioneer life, we must, in obediance to the paramount law of self-preservation, proceed to turn aside the flood of ruin that is now upon us.

We have done our part in making the United States the greatest and richest country in the world, and we have done it under an implied contract with the government that we should receive and retain the results of our work; that the wealth we have created, partly for ourselves and partly for the whole country, should retain its value after it was acquired. We have the plain right to ask that the constitution of the country shall be interpreted in reference to gold and silver coin, as it was understood and intended to be

interpreted by the men who framed it. If this be not done, and done at once by the congress of the United States, there will be nothing left for us but to pledge our property, our honor and our lives to a currency based on our own resources, and that will enable us to save our homes.

All of this we can do and still keep within the bounds of the constitution as interpreted by our courts.

It has been impossible within the time limited to make an exhaustive examination of these questions, but I believe the decisions quoted fairly illustrate them.

EUGENE ENGLEY,
Attorney General.

IN RE APPROPRIATION FOR, AND CONSTRUCTION OF, THE SAGUACHE RESERVOIR.

1. The record of the transactions of the board of construction cannot be held as conclusive. The board of construction is a body vested with powers granted by the state, to be exercised in behalf of the state. The individuals composing it are trustees for the state.

2. The lapse of time cannot affect the rights of the state and the duties of its agents in the premises. It cannot be maintained that the agent or trustee, by laxity in discharging the duties imposed by his trust, can impair the rights of his principal.

Until the act of 1891, providing for the construction of the Saguache reservoir, has been repealed, its provisions are in force, and if the board should find it to be, in the language of the statute, "expedient and for the best interest of the whole people of the state of Colorado" to construct this ditch, and so order, there is nothing in the way of the said construction.

Attorney General's Office.
Denver, Colo., July 29, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Dear Sir—In response to your letter of July 28, in reference to the state reservoir on Saguache creek, I submit the following:

The record of the transactions of the old board of construction cannot be held as conclusive. Even a judgment of a court of record, protected as it is by statute, by rules of practice, by immemorial usage and by reason of public policy, may be set aside when it is shown that the same is erroneously made, or that the court had no authority or power to render it.

The board of construction is a body vested with powers granted by the state, to be exercised in behalf of the state. The individuals composing it are trustees for the state. The transactions had by it in carrying on the business for which it is constituted, must be ratified either by the whole board, or by a quorum assembled after proper notice of a meeting has been served on each member.

It is a long established principle that trustees cannot bind the trust separately in matters of private nature. The rule in reference to a transaction of a public nature—as in the case of the said board of construction—is that a majority may act; but this rule is imperatively predicated on the fact that all must be present to deliberate, or, what is the same thing, must be duly notified and have an opportunity to be present.

In this case, the governor, state engineer and chairman of the board of county commissioiners of Saguache county, constitute the board. Before the board, then, can act authoritatively, it must appear, at least presumptively, that all three men were present, or that all had received due notice of the meeting and have had an opportunity to deliberate on the questions considered thereat.

It appears that a meeting of the board was held on July 14, 1892, at which business of vital importance, not only to the objects for which the act was passed, but to the existence of the board itself, was transacted. It appears that the chairman of the board of county commisioners of Saguache county was not present at this meeting and he has filed his affidavit to the effect that he received no notice of it.

This raises the question as to whether he was in fact so notified, and if he was not, I am compelled to hold that all transactions of the board at that time were had without warrant of law, and that the entry of the same on its journals is, in effect, a memorandum of transactions that never occurred; and any question that was presented to the governor and state engineer at that meeting could not be settled by them; and the same are now living questions, yet to be considered by the board when legally assembled.

The lapse of time cannot affect the rights of the state and the duties of its agents in the premises. It cannot be maintained that the agent or trustee, by laxity in discharging the duties imposed by his trust, can impair the rights of his principal. It was the desire of the state government that this reservoir should be constructed and for this purpose its legislature passed the act of 1891 and created the board to carry out its purposes. Hence, the fact that the board has transacted no business since the said July 14, can in no wise affect the rights of the state or impair the duty of the board to carry out the purpose of its creation.

Until the act of 1891 has been repealed, its provisions are in force, and if the board should find it to be, in the language of the statute, "expedient and for the best interest of the whole people of the state of Colorado," to construct this ditch, and so order, there is nothing in the way of the said construction.

The powers of the board as set out in the statute, are stated with few limitations. From a study of the entire act, it is evident that the legislature understood but little of the territory on which it was expected this reservoir or reservoirs were to be located. There might be only one, or there might be two, as the board might decide. The location was to be "within or near Tp, 43, N. R. 2 E., N. M. P. M., or Tp. 43, N. R. 3 E., N. M. P. M., or both."

The report of the engineer in regard to the practicability of the construction was not made binding

on the board. Upon receipt of his report, the board could make such further examination and investigation as they might deem necessary, and could determine whether the expenditure was expedient, and whether they should go on with the work, which included the determination as to whether there should be one or two reservoirs, and also that the board should "adopt plans and specifications therefor."

From the broad language of this statute it is evidently the intention to confer unusual and extraordinary powers on this board. In the exercise of their discretion in the matter of a location, they were only restricted by the boundaries of a territory described as being "within or near" two entire townships. In the matter of the report to be made to them by the engineer, they could disregard his recommendations, both as to location and as to the expediency of the expenditure. In short, the statute only regarded the engineer as an agent of the board as to the matters to be embraced in his report, and his acts in the premises were only advisory. They could use him to make surveys and estimates for the purpose of guiding their judgment. They were not bound by his report as to the practicability of any one location, or his view of the expense connected therewith, but could abandon the location reported on and select another, provided it should be located within or near the townships mentioned; and as to what is meant by the term "near," that is a matter to be determined, not only by a consideration of actual distance, but by the conformation of the country in which the reservoir is located, by the objects for which the reservoir was to be constructed, which was the irrigation of territory lying at a greater or less distance below it; by the relative amount of land that would be irrigated by waters of the reservoirs located at different sites; by the relative cost of construction of canals leading from different reservoirs; and by the nature of the soil or bed of the reservoirs or canals. All these things fall within

the "examination and investigation" mentioned in the statute, and within the discretion of the board, restricted only by the amount to be expended and the boundaries if the territory within which the work was to be constructed.

I am, therefore, of the opinion that if this new location, twelve miles distant from the site first selected, can fairly be held, according to the foregoing considerations, to be near the said township, that it will be selected as directed by the statute. And as to whether it is so fairly within the limits prescribed, I think is a matter largely, if not exclusively, within the discretion of the board, and it is doubtful if any one but the state itself can be heard to object to it.

EUGENE ENGLEY,
Attorney General.

IN RE COLORADO STATE LOAN AND INVESTMENT COMPANY.

It is the nature of the contract, as indicated by the terms of the certificate or bond, that determines the liability of a company under the insurance laws of Colorado.

Attorney General's Office.
Denver, Colo., July 29, 1893.

Wm. S. Bristol, Esq., Secretary Colorado State Loan and Investment Co.

Dear Sir—In reply to your communication of recent date, relative to the bonds issued by your company, would say, that by inserting the clause referred to, you would come under the insurance laws of this state. The question of substituting the word "certificate" for "bond" would make no difference to your

obligations. It is the nature of the contract, as indicated by the terms of the certificate or bond, that determines your liabilities under the insurance laws of Colorado.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE TAXES.

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1. County commissioners have no authority to extend the time for the payment of taxes beyond that provided for by statute.

2. County treasurers may make delinquent tax list, and hold tax sales after the dates mentioned in the act of 1891 without affecting the validity of the proceedings thereunder.

Attorney General's Office,
Denver, Colo., July 31, 1893.

Hon. Phillip Dawson, Chairman Board of County Commissioners, Silver Plume, Colo.

Dear Sir—In reply to your communication of recent date, relative to an extension of time for the payment of taxes, I am constrained to hold that the county commisioners have no authority to extend the time, as that question is expressly provided for by statute and must govern. (Sess. Laws 1893, Sec. 2, p. 433.)

I am of the opinion, however, that the relief sought by such extension may be found under the law as it now stands. The only thing to be feared by the non-payment of taxes within the time prescribed, is the loss by distress and sale of the property taxed. While the law states that on the first day of August

the unpaid taxes of the preceding year shall become delinquent, and shall be subject to sale thereafter, it is not necessary that such sale shall be held upon the day named in the statute, but the county treasurer may make up the delinquent tax list and hold the sale within a reasonable time thereafter, without in any manner impairing the rights accruing thereunder.

Referring to the act of 1891, entitled "Revenue," that part of section 3 of said act relative to distress and sale of property is directory, and the treasurer may take a reasonable time before making such sale. Section 6 provides that the delinquent tax list shall be made before the twentieth day of August in each year, " Provided, however, that if such list should not be made until after the twentieth day of August, the sale held thereunder shall not be void by reason thereof * * *." Section 8 provides that "if from any cause, real property cannot be duly advertised and offered for sale on or before the first Monday of October, it shall be the duty of the treasurer to make the sale on any subsequent day in which it can be made, allowing time for the publication of notice, as provided in this act."

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE TAXES AND INTEREST.

In the matter of delinquent taxes interest follows the principal.

Attorney General's Office,
Denver Colo., August 1, 1893.

Hon. T. B. Collier, County Treasurer, Trinidad, Colo.

Dear Sir—In reply to your communication of recent date, relative to delinquent city taxes col-

lected by you and interest accrued thereon, would say that interest follows the principal and the city of Trinidad is entitled to the benefit of all interest accruing upon delinquent taxes when such taxes are paid.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF STATE COAL MINE INSPECTOR.

Where an official has given a good and sufficient bond for the faithful performance of the duties of his office, and is peremptorily removed, in the absence of any provision to the contrary, the equities of the case will sustain his right to a reasonable time for the proper adjustment of the records of his office, in order that the same may be surrendered to his successor in such manner as will fully release him from his obligations under the law.

Attorney General's Office,
Denver, Colo., August 4, 1893.

John McNeil, Esq., Ex-State Inspector of Coal Mines,
Denver, Colo.

Dear Sir—In reply to your communication of recent date, relative to payment for services in the office of coal mine inspector, would say it is my opinion that you are legally entitled to compensation for services rendered, after the order of removal was issued and up to the time your successor qualified and took possession of the office. While the order of the governor was issued on July 6, without any qualification as to the time the same should go into effect, judging from the language and demeanor of the governor toward you, it was evidently his intention that

the order should not become effective until your successor had been appointed and had taken possession of the office. Where an official has given a good and sufficient bond for the faithful performance of the duties of his office, and is peremptorily removed, in the absence of any provision to the contrary, the equities of the case will sustain his right to a reasonable time for the proper adjustment of the records of his office, in order that the same may be surrendered to his successor in such manner as will fully release him from his obligations under the law.

I, therefore, see no reason to deny you compensation for services rendered during the interim of the order of removal and the appointment and qualification of your successor.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FEES OF CLERKS DISTRICT COURTS.

The county commissioners are required to pay the fees in criminal cases where the defendant is convicted and cannot pay them, or when he is acquitted, unless the same are taxed against the prosecuting witness by order of court.

Attorney General's Office,
Denver, Colo., August 4, 1893.

Hon. P. H. Shea, Clerk of the District Court, Yuma, Colo.

Dear Sir—In reply to your communication of recent date, relative to the collection of your fees as district clerk, would say that the county commissioners are required to pay the fees in criminal cases

where the defendant is convicted and cannot pay them, or when he is acquitted, unless the same are taxed against the prosecuting witness by order of the court. The claim referred to by you should be paid by the county commissioners.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE REGENTS STATE UNIVERSITY.

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1. Section 4611, Mills' Ann. Stats., prohibits the regents of the state university from incurring a debt beyond their ability to pay from the annual income of the university, for the then current year.

2. The words "for the then current year" in said section are construed to mean the current fiscal year which ends on the 30th day of November.

3. The regents cannot incur an indebtedness against the university and base its payment upon the anticipated income of the succeeding year.

Attorney General's Office,
Denver, Colo., August 7, 1893.

Hon. S. A. Giffin, Secretary Board of Regents,
Boulder, Colo.

Dear Sir—In reply to your communication of recent date, would say, the evident intention of Sec. 4611, Mills' Ann. Stats., is to place a limitation upon the board of regents in their expenditure of money. I take it that the words, "the then current year," mean the then current fiscal year, which ends on the thirtieth day of November of each year.

If the uncollected taxes for this year amount to $20,000 the total income for this year may be esti-

mated at $28,500, as the $8,500 appropriated by the act of 1893 may be considered a part of your income for the year, and the regents would have the right to incur an indebtedness to this amount.

I think this section prohibits your incurring any indebtedness in anticipation of the succeeding year's income, but the salaries of professors for the month of November would not come within the statutory inhibition even if the same are paid after the first of December, provided they are paid from the income of the present fiscal year.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TAXES AND ASSESSMENTS.

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1. The terms "real estate," "improvements," and "personal property," as used in the statutes pertaining to revenue and assessments, are defined in section 3762, Mills' Ann. Stats.

2. The property of railroads is subject to the law the same as that of an individual, and may be sold in the same manner for delinquent taxes.

3. County commissioners have the power "to rebate, annul or set aside" assessments upon such evidence and showing as the board may require.

Attorney General's Office,
Denver, Colo., August 8, 1893.

Hon. P. E. Beeney, County Treasurer, Washington County, Colo.

Dear Sir—In reply to your communication of recent date, I submit the following:

Section 3782, Mills' Ann. Stats., defines the terms "real estate," improvements" and "personal prop-

erty," as used in the statutes pertaining to revenue and assessments, in the following language:

"The term 'real estate,' includes, first, all the lands within the state to which title or the right to title has been acquired from the government of the United States; second, all mines, minerals and quarries in and under the land, and all right and privileges appertaining thereto; third, improvements."

"The term 'improvements,' includes, first, all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not."

"The term 'personal property,' includes everything which is the subject of ownership not included within the term 'real estate.'"

The property of railroads is subject to the law the same as that of any individual and may be sold in the same manner for delinquent taxes.

Section 3795, Id., provides that county commissioners at any regular meeting shall have power "to rebate, annul or set aside" assessments upon such evidence and showing as the board may require.

If the county commissioners rebate any part of the taxes and certify that fact to you, would advise you to give receipt for the amount of money actually received by you, and make a memorandum of the balance, based upon the action of the board ordering the rebate.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE TOLL ROADS AND HIGHWAYS.

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1. The easement enjoyed by the public in a turnpike road is vested in the public as much as that of a common highway.

2. When the charter of a toll road company is forfeited, or expires by limitation, the right of such company to exact

or collect toll is lost, but the easement vested in the public is not affected thereby, and the company cannot prevent the public from traveling over such road without interfering with vested rights and making themselves liable as trespassers upon a public highway.

3. No toll road company can be incorporated under the general incorporation acts of this state, and locate their road upon any toll road previously existing, nor upon any public highway used and traveled as such, only as it is necessary for their road to cross such toll road or highway.

Attorney General's Office,
Denver, Colo., August 9, 1893.

Hon. J. S. Updegraff, County Clerk, Gilpin County, Colo.

Dear Sir—In reply to your communication of recent date, relative to the incorporation of toll road companies, would say that Sec. 563, Mills' Ann. Stats., expressly provides in what manner and for what purpose toll road companies may be incorporated. The evident intention of this section is to enable persons to associate under the incorporation acts for the purpose of constructing a toll road. In this section we find the following provision: "That nothing in this act shall be so construed as to authorize any corporation, formed under the provisions of this act, to locate their road, railroad, ditch or flume, or any part thereof, upon any toll road previously existing, nor upon any public highway heretofore, and at the time of the organization of such corporation, used and traveled as such, except it be necessary to cross such toll road or public highway * * *."

Authorities will bear out the doctrine that a toll road or turnpike road is a public highway, established by public authority, for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at

the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway. The easement enjoyed by the public in a turnpike road is invested the public as much as that of a common highway. When the charter of a toll road company is forfeited or expires by limitation, the right of such company to exact or collect toll is lost, but the easement vested in the public is not affected thereby. The toll road company cannot prevent the public from travelling over such road without interfering with vested rights, and making themselves liable as trespassers upon a public highway.

It is my opinion that no toll road company can be incorporated under the general incorporation acts of this state and locate their road upon any toll road previously existing, nor upon any public highway used and travelled as such, only as it may be necessary for their road to cross such toll road or public highway.

Respectfully,

EUGENE ENGLEY,
Attorney General.

FILING OF CERTIFICATES BY INSURANCE COMPANIES.

The act of 1889 repeals the act of 1887, requiring insurance companies on the assessment plan to file certificates in the office of the secretary state.

Attorney General's Office,
Denver, Colo., August 9, 1893.

Hon. Nelson O. McClees, Secretary of State.

Sir—In response to your letter of the 5th inst., concerning the filing of certificates of incorporation of insurance companies, I submit the following:

The general incorporation law requires certificates of all domestic corporations to be filed in your office.

By sec. 500, p. 638, Mills' Ann. Stats., foreign corporations of all kinds are required to file in your office copies of their charter, but by the act of 1889, (Sess. Laws, Sec. 5, p. 200), they were relieved of this duty and only required to file the same with the superintendent of insurance.

It is true that the act of 1887 (Sess. Laws, Sec. 8, p. 287), requires insurance companies doing business on the assessment plan, to file certified copies of their charters in your office, but the act of 1889, above quoted, is intended to apply to all insurance companies, and relieves assessment companies of the necessity of so filing. This is made plain by comparing section 5 of that act with the section of the act of 1883, which it amends (Sec. 4, p. 220, Sess. Laws 1883), and also when we consider that the act of 1889 repeals all parts of acts inconsistent with it.

I am, therefore, of the opinion that all insurance companies that have complied with the requirements of the insurance laws are not required to file certicates in your office.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE MESA COUNTY DITCH.

1. The statute provides for the construction of the ditch by the penitentiary board, and the drafting of convict laborers for that purpose.

2. The certificates, by the sale of which means are to be provided, provide for no time at which they are to be paid and refer to no particular fund.

3. The provision allowing the board to receive as cash for certificates, labor and supplies, does not refer to the means by which the principal part of the work is to be done.

4. Legislative action is necessary in order to secure effective aid.

Attorney General's Office,
Denver, Colo., August 9, 1893.

Hon. Davis H. Waite, Governor of Colorado:

Dear Sir—In response to your letter of 26th ult., concerning the Mesa County state ditch, I find the following: Section 4 of the act of 1891 (Sess. Laws, p. 336), in making directions for the construction of the ditch, says that "in order to construct the same, the said board of penitentiary commissioners shall have the power and authority and it shall be their duty to select from the able bodied convicts confined in the state penitentiary, as many as are not otherwise employed, none of whom shall be under life sentence, and transport the said convicts to a general headquarters for the construction of said ditch, where said board shall make suitable provisions for the safe keeping of said convicts, and said convicts shall be used under proper guard for the construction of said ditch."

Section 9 provides that the board may select one of their number to take charge of said construction.

Section 10 empowers the warden to appoint a deputy to take charge of the convicts employed on the work.

Nowhere do we find in the statute any provision for the expenditure of cash, except in payment for right of way, tools, teams, etc., for the construction as set out in sections 5 and 6.

In section 6 we find the following words: "or may receive at cash valuation, groceries, vegetables, teams, tools, labor and other things necessary in constructing said ditch, or subscription for certificate as provided in section 3 of this act."

This last clause must mean that in case any person has made a subscription for certificates, he may pay for the certificates or a portion of them in labor, etc.

These subscriptions are presumably to be made by persons who own land to be irrigated by the ditch, although the statute does not in terms exclude any class of subscribers. If only the said land owners could subscribe for said certificates, it is more than likely that the ditch would not be constructed. Yet, the statute evidently contemplates that the farmers in the neighborhood would be the only class who would subscribe "groceries, vegetables, teams, tools, labor and other things necessary, etc."

Conceding that any person or number of persons could subscribe any amount they please to this fund, they must pay up their subscription in cash or in labor and supplies. It is hardly probable that any person will purchase these certificates outright for cash, as an investment. If this is true, the only purchasers will be those who will pay in labor and supplies. When they have received their certificates, they will have received a very indefinite compensation. The statute is silent as to the form or conditions of the certificates. In this respect, it differs essentially from the act of 1893, which provides the dates at which the certificates of indebtedness for the construction of state canal No. 1 shall mature, and also the fund from which they shall be paid. This defect in the act of 1891, concerning the Mesa County

ditch, is, in my opinion, a very serious one. The act appears to have been drawn, either with little care, or with a view to allowing the board too much latitude; a latitude which would result from the defects of the statute itself. Again, only the penitentiary board can issue these certificates, and, being directed specifically by the statute to draft laborers from the penitentiary, which presumably can furnish all the men they might require at any one time, it would probably raise a serious question of law as to whether they are authorized in putting in a large body of non-convict laborers to work. The free laborers would be compelled to take these certificates in payment for their work, which they could not do without the almost certain result of being compelled to sell them to speculators. This class of men are always the sufferers when payment is made in time paper. It might be said that the owners of the land under the ditch could subscribe for these certificates, pay for them with labor, and pay cash to the men who furnish the labor; but this is not probable. They have no money to pay for the labor. If they had they would combine and build the ditch without state aid.

This condition of things must be presumed to have been in the mind of the legislature when they passed the act; and this consideration leads me to the conclusion that the legislature has endeavored to point out the source from which the greatest part of the labor to be used in the construction of this ditch must be drawn, namely, the penitentiary, and that it was intended that only inconsiderable portions of the labor should be performed by free labor; and that portion was to be furnished by farmers or other owners of land lying under the ditch; men who could pay in any of the articles mentioned for such an amount of certificates as would be represented by their individual holdings.

I am, therefore, of the opinion that it would require legislative action in order to obtain any consid-

erable benefit from the employment of non-convict labor on the said ditch.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FINES.

Unless otherwise specifically provided for by law, the fines collected for breach of the game and fish laws should be placed to the credit of the general county school fund.

Attorney General's Office,
Denver, Colo., August 2, 1893.

Hon. W. R. Callicotte, State Game and Fish Commissioner:

Dear Sir—In reply to your communication of recent date, please find enclosed opinion of this office rendered Hon. H. W. Haver on June 28, 1893, covering the same question.

In view of the said opinion, you will see that unless otherwise provided for by law, the fines collected for breach of the game and fish law should be placed to the credit of the general county school fund.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE PARDONS.

1. Section 7, art. 4 of the constitution provides that the governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except in case of impeachment, subject to such regulations as may be prescribed by law, relative to the manner of applying for pardons.

2. The act of 1893 does not in any way abrogate the rights or powers of the executive in the matter of pardons vested in him by the constitution, and the powers and duties of the state board of pardons created by said act are only advisory.

Attorney General's Office,
Denver, Colo., August 2, 1893.

Hon. Wm. H. Broadhead, Secretary State Board Pardons:

Dear Sir—In reply to your comunication of even date herewith, I beg leave to submit the following:

Section 7, art. 4 of the constitution provides that the governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except in case of impeachment, subject to such regulations as may be prescribed by law, relative to the manner of applying for pardons. The manner in which applications for pardons may be made is provided for by section 1506, Mills. Ann. Stats. There is nothing of the act of 1893 creating and establishing a state board of pardons, which conflicts with the provisions of said section 1506, or with the provisions of the constitution. Section 2 of said act, quoted by you, does not in any way abrogate the rights or powers of the executive in the matter of pardons, granted him by the constitution. If an application has been made in accordance with section 1506, the state board of pardons cannot

in any way interfere with the powers vested in the executive by the constitution. It is simply their duty under said act to investigate all applications for executive clemency and make such recommendations thereon as in their judgment will seem meet and proper. Their powers and duties under the act of 1893 are only advisory.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE INSURANCE OF STATE INDUSTRIAL SCHOOL.

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1. Sess. laws 1893, page 46, sec. 7, appropriates the sum of fifteen hundred dollars, or as much thereof as may be necessary for the purpose of insuring the buildings of the state industrial school. The proviso recites "that in case of loss or damage by fire the amount realized therefrom be placed to the credit of the state industrial school, to be used for the erection of new buildings and repairing the damage done."

2. It makes no difference whether the money reached the hands of the treasurer before the act passed or afterwards.

Attorney General's Office,
Denver, Colo., August 23, 1893.

To W. J. Jackson, Esq., Secretary Board of Control State Industrial School:

Sir—In response to your letter of this date, concerning the disposition of the money paid to your board as indemnity for loss by fire, I submit the following:

Section 7 of the act approved April 8, 1893 (Sess. Laws, p. 46), appropriates the sum of fifteen hundred dollars, or so much thereof as may be necessary for

the purpose of insuring the buildings of the state industrial school. This section must be construed in connection with the other parts of the act and the title. These make all the appropriations provided by the act apply to the two years ending November 30, 1894. It was evidently intended by the legislature that the said sum of $1,500 should be applied to the payment of such premiums as may have matured at the time the act was passed, and such as should mature before November 30, 1894. The proviso in said section 7 recites "that in case of loss or damage by fire, the amount realized therefrom be placed to the credit of the state industrial school to be used for the erection of new buildings and repairing the damage done."

There can be no mistaking the intent of this proviso. Amounts realized from payment of losses by fire shall "be placed to the credit of the state industrial school." It is a definite legislative appropriation of the moneys arising from this source. It makes no difference whether the money reached the hands of the treasurer before the act was passed or afterwards.

The statute directs the treasurer to place all such sums to the credit of the school. If, before the act was passed, the treasurer should have paid into the general or any other fund, any sum realized as a fire loss, it became his duty, as soon as the act took effect, to transfer the amount to the credit of the school. If, on the other hand, any such money should come into his hands from such source, after the passage of the act, the statute, with equal effect, directs that he place it to the same credit. It then becomes a cash fund subject to the immediate draft of the board for the purpose of "repairing the said damage."

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE TRAVELLING WAY AROUND HOISTING SHAFTS IN COAL MINES.

It is obviously the duty of mine owners to provide such traveling ways as will permit the miners to travel the same in an erect position, and which would enable them to go from one side of the shaft to another with speed and safety.

Attorney General's Office,
Denver, Colo., Sept. 14, 1893.

D. J. Reed, Esq., State Inspector of Coal Mines:

Sir—In response to your letter of 24th ult., regarding the travelling way around the hoisting shafts in coal mines, I submit the following:

In determining the duty of mine owners concerning the safety appliances and devices required by law to be constructed and used in their coal mines, we must examine the entire law concerning the same and determine its spirit and intent.

It is plain to even a casual observer that the legislature of the state has endeavored, by the most precise and explicit directions found in all parts of the mining law, to lay down such rules as may secure the safety and comfort of the men employed in the coal mines. Experience has shown that such legislation is made indispensible on account of the nature of the work done in the mines, and the inability of each individual miner to provide for his own safety. It is also plain that the legislature has intended to cast the responsibility of the proper conduct of mining operations on the owners. It must be presumed that the legislature intended that the owners of the mines should act cautiously and with reflection in carrying out not only the express directions of the law, but in the prevention or suppression of any unnecessary source of danger not expressly prohibited by the law. It also follows as a natural sequence, that where the legislature has directed anything to

be done to secure the safety of the men employed in the mine, that it intended that thing to be done in a manner that fully answers the purpose for which it is done. To say that the ends of the law would be met by providing a devious, narrow, low or inconvenient travelling way around the hoisting shaft would be to say that the object of the law may be avoided by a mere subterfuge. The object of the law was to provide for a safe and convenient passage way; not one that the men could squeeze through with more or less difficulty. The construction of the latter kind of way would inevitably produce the result that the men would take the risk of going over or under the hoisting apparatus. It will not do to say that the miners ought not to do this. Experience shows that miners will take risks rather than be subjected to delay and inconvenience. The law makers here recognized this as one of the characteristics of the men who work in mines. Hence, if mine owners endeavor to provide an inconvenient travelling way in their mines, they do what must inevitably lead to a practice on the part of the miners that is dangerous to life. One of the principal objects of our mining laws being to protect the lives and secure the health and comfort of the miners, it is obviously the duty of the mine owners to provide such travelling ways as will permit the miners to travel the same in an erect position, and which would enable them to go from one side of the shaft to another with speed and safety.

By the law, you are the officer empowered to see that its provisions are fairly and liberally carried out, and the mine owners must be bound by all proper directions made by you within the scope of your authority. If the travelling ways start from and end at a point so remote from the shaft as to induce the men to go over or under the hoisting apparatus in preference, it becomes your duty to have the same altered so as to conform to the law.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE RECEIVERS.

1. As a general rule courts do not appoint as a receiver of a corporation an employe; particularly one affected with alleged mismanagement.

2. A receiver will be removed upon application with good showing.

Attorney General's Office,
Denver, Colo., Sept. 16, 1893.

Hon. F. M. Goodykoontz, Superintendent of Insurance:

Dear Sir—In response to your letter of the 29th ult., I submit the following:

When it becomes necessary for the courts to place an insurance company or any other corporation into the hands of a receiver, it is as a general rule, not proper to appoint any one as receiver who is or has been manager, clerk, cashier or other officer or employe of the concern; particularly one who may be affected with the mismanagement of it, when such is charged. The courts, however, usually make this appointment when requested by the complainant, and upon his representation that the person named is for some reason stated, peculiarly qualified for the position. The appointment, in the first instance, is seldom contested. The receiver, however, is only an officer, and has been called the right arm of the court and will be at any time removed upon an application with a good showing.

I advise that you petition the court, representing the condition of things in the premises, and ask that yourself or deputy be substituted as receiver in this case.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TENURE OF OFFICE.

A justice of the peace, appointed to fill an unexpired term, holds office until his successor is elected and qualified.

Attorney General's Office,
Denver, Colo., Sept. 18, 1893.

Hon. J. D. Hart, Justice of the Peace, Trinchera, Colo.

Dear Sir—In reply to your letter of 10th ult., I submit that under our constitution and statutes, you hold your office until your successor is elected and qualified. If the people fail to elect your successor, you hold until such event occurs and it makes no difference whether you hold by election or appointment, or for an entire term or to fill a vacancy.

People ex. rel., Reid, XI. Colo., 138.

Buton vs. Buck, 6 Kas., 302.

Respectfully,

EUGENE ENGLEY,
Attorney General.

ELIGIBILITY OF DELEGATES TO POLITICAL CONVENTIONS.

Political conventions have the sole right to determine who are eligible to sit as delegates therein, and their proceedings in this regard cannot be inquired into by the courts.

Attorney General's Office,
Denver, Colo., Sept. 20, 1893.

Hon. Horace Campbell, County Treasurer, Saguache, Colo.

Dear Sir—In answer to your inquiry of recent date, will say: A political convention has the sole right to determine who are eligible to sit as delegates therein and that right cannot be disturbed by the courts; the proceedings thereof in this regard are not subject to review by any constituted tribunal unless it be by the people when by their votes they approve or disapprove of convention methods or the character and qualification of nominees.

EUGENE ENGLEY,
Attorney General.

IN RE OFFICIAL PUBLICATIONS.

Publications of calls for warrants by the treasurer, and of school superintendents' apportionments, may be made in any paper in the county, notwithstanding there is a contract between the board of commissioners and another paper. If published by any other paper than the one with which the board has contracted, the question becomes only one of breach of contract.

Attorney General's Office,
Denver, Colo., Sept. 22, 1893.

G. H. Robbins, Esq., Clerk of Board of County Commissioners, Julesburg, Colo.

Dear Sir—In response to your letter of 10th ult., I submit the following:

The statute does not provide for the publication of the treasurer's call for warrants or district apportionments by the county superintendent of public

schools, to be made in any particular paper, although that paper may have made a contract with the board of county commisioners, providing for such publications. If the publications are made as required by the statute, it is sufficient to give the notice intended by the statute. If published by any other paper than the one with which the board has contracted, the question then becomes one merely of breach of contract between the board and the paper designated as the official paper.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE CANAL No. 1.

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1. The legislative act of April 17, 1893, provided for new constituent elements of the board of construction.

2. It is a well established rule of construction that statutes referring to the same subject must, if possible, be construed so as to give vitality to both.

Attorney General's Office,
Denver, Colo., Sept. 22, 1893.

Hon. C. B. Cramer, State Engineer:

Dear Sir—In response to the questions submitted by you, I have to say:

On April 8, 1893, the legislature passed an act, taking effect at once, by which forty thousand dollars ($40,000) was appropriated for the purpose of continuing the construction of the state canal No. 1.

All of said money was to be expended under the direction of the board of commissioners of the state penitentiary, acting as a board of construction of said canal.

The money appropriated was to be used for the purchase of materials, tools and explosives, the employment of extra overseers and guards, and for the location of the line of the said ditch, and for no other purpose; and for the purpose of ascertaining the exact use to which any particular part of said money had been or was about to be applied, itemized accounts were to be filed for the information of the auditor.

On April 17, 1893, the same general assembly passed an act, taking effect at once, whereby a "board of control of state canal No. 1, and reservoirs connected therewith" was created.

This board consists of the lieutenant governor, state engineer and warden of the penitentiary, with the secretary of the state board of land commissioners as secretary.

This board is charged with the duty of securing the early completion of said ditch, etc., etc.

This act goes on to prescribe the duties of the board, the secretary, the attorney general, the auditor, the treasurer and the board of land commissioners in the premises.

The act of 1889 (Sess. Laws, p. 285), which was the first law enacted in regard to said ditch, gave the control of the location and construction of said ditch to the board of penitentiary commissioners, and their authority was recognized by the act of 1891 and of 1893, April 8.

The act of April 17, 1893, however, took away the control of the survey, location and construction of said ditch from said board of penitentiary commissioners and placed it in the hands of the board composed of the lieutenant governor, state engineer and warden of the penitentiary.

But while the act of April 17 provided for new constituent elements of the board, it left the board itself a complete legal entity with all the powers con-

ferred upon it at any time by law, which had not been abrogated.

It is a well established rule of construction, that statutes referring to the same subject must, if possible, be construed so as to give vitality to both. A later statute repeals a former if in conflict with it; but if any part of the former statute is not necessarily repealed by the later, it will be allowed to stand. Thus, in the case before us the board remains a board for the purpose for which it was created, to as much intent under the act of April 17, 1893, as under the act of 1889 or of 1891, of April 8, 1893.

When we carefully examine the act of April 17, we find that that portion of the canal lying east of the east line of township 18, south of range 70, is to be constructed on a different plan from that portion lying west of it. The former only is referred to by the act last mentioned, and it is to be constructed by contractors who have bid for the work in the usual way, and who are to be paid in certificates of indebtedness. But all that part lying west of the east line of said township and unfinished, is to be constructed under the act the act of April 8. Hence, it is not within the power of the board to use any of the forty thousand dollars ($40,000) provided by the act of April 8, for any part of the work lying east of the said township line, but the present board will have full power to apply any of the said fund towards the payment for that incomplete portion of the said construction lying west of said section line.

To this extent the act of April 8 has not been affected and the appropriation is still alive as far as the last mentioned part of the work is concerned. The new board succeeds to the functions of the old as far as the handling of the appropriation is concerned, and as far as any part of it is to be applied to the part of the work last mentioned.

EUGENE ENGLEY,
Attorney General.

IN RE BOARD OF CONTROL OF STATE CANAL No. 1.

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1. The board of control of State canal No. 1 has control of the balance of the fund appropriated to the board of construction, on April 8, 1893.

2. The said board of control can apply sufficient portion of said fund to the location of the canal.

3. The board of penitentiary commissioners have no control of any part of said fund. They are no longer a board of construction. They are succeeded by the board of control as now constituted.

Attorney General's Office,
Denver, Colo., Sept. 23, 1893.

Hon. C. B. Cramer, State Engineer:

Dear Sir—In reply to your letter of this date, submitting questions supplementary to those in answer to which I rendered an opinion to you on yesterday (the 22nd inst.), I submit the following:

The opinion of yesterday was based on a careful analysis of the act of April 17, 1893.

Section 2 of said act (Sess. Laws, p. 442) was carelessly drafted or enrolled. The first sentence is made to end with the word "therewith," and the next to begin with the word "from;" whereas, they are both parts of the same sentence and must be so read. This can be done readily by making a comma of the period following the word "therewith."

The next inaccuracy is found in the description of township eighteen. The words "south of range seventy (70) west," should have been written immediately after the words "township eighteen."

In this section, when reconstructed in the manner pointed out, we find the first explicit directions concerning the duties of the present board. The state engineer is to prepare plans and specifications upon and according to the survey already established

by the state engineer, and now on file in his office, pertaining to the construction and completion of state canal No. 1, and reservoirs connected therewith."

The language used shows clearly that the legislature believed that the surveyor's work connected with the construction of the said canal, at least of that portion lying east of said township line—had been completed; and that the state engineer had only to prepare plans and specifications "upon and according" to the same, and when I prepared the opinion of the 22nd inst., it was upon the same assumption.

It appears, however, from information at this time furnished by you, that said survey was not complete, and that you have been compelled to make further surveys before the "plans and specifications" required by said section can be prepared; and one of the questions submitted by you refers to the fund from which this work is to be paid.

As I held in the former opinion, the personnel of the board of construction was changed by the act of April 17, supra. If there was any law theretofore existing which gave the board of construction, as it was then constituted, the power to apply any fund to the the purpose of construction, that power was transferred to the board as it was constituted by the act of April 17th, now in force, subject to the restrictions of the last named act.

The act of April 8, placed at the disposal of the board the sum of forty thousand dollars, for the purposes therein mentioned. The act of April 17, did not do away with this appropriation. It only altered the constitution of the board and restricted the power to apply the fund. No part of the labor performed in the actual construction of that part of the canal lying east of the east line of said township, can be paid for out of said fund. This becomes apparent when we read the different parts of the act together. All the payments to be made, under the act of April 17, for

material and labor, are to be paid for by certificates of indebtedness (Sec. 6). These payments are to be made under the terms of a contract made between the board of control and a contractor, and prepared by the attorney general (Secs. 4 and 5). This contract is based on the lowest bid, after the secretary has advertised for bids made in accordance with "such plans and specifications," (Sec. 3). These "plans and specifications" are prescribed, and are to comprehend only that part of the state canal extending from "a point where line of said canal crosses east line of said township * * * * to the end of said canal as now projected and surveyed" (Sec. 2).

But when we come to examine the last sentence in section 2, we find the provisions for the survey are different from those referring to the actual construction. It is therein made the duty of the state engineer "to make any survey which may be necessary to the thorough preparation of such plans and specifications."

This provision indicates, that, while it was contemplated by the legislature that said survey had been completed and filed, yet experience might show the necessity of supplementary or additional surveys, and I am informed by you that this necessity has been found to exist on account of the destruction and removal of surveyors' monuments and other causes.

Accordingly, other surveys have been made by you or under your direction in order to secure the "thorough preparation of such plans and specifications."

In answer to your first question, therefore, I find:

The board of control created by the act of April 17, 1893, has the control of the balance of the fund of $40,000 appropriated by the act of April 8, 1893, restricted by the act of April 17.

In answer to your second question, I find:

The said board of control can apply a sufficient portion of the fund appropriated by the act of April 8

to the location of the canal east of said east line of Tp. 18, S. R. 70 W. This power is necessarily implied from the last sentence of section 2 of the act of April 17.

In reply to your last question I find:

That the board of penitentiary commissioners have had no control of said fund nor any part of it since April 17, 1893. They have not been a "board of construction" since the date last mentioned. The "board of control as now constituted, has fully succeeded to the old "board of construction." They differ only in name.

Referring to the opinion transmitted to you on yesterday, I am

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF RESERVOIRS AND RIGHTS OF WAY.

Reservoirs and rights of way to the same, while used by the owners for the purpose of securing the irrigation of their lands, cannot be taxed.

Attorney General's Office,
Denver, Colo., Sept. 23, 1893.

C. S. Richardson, Esq., Denver, Colo.

Dear Sir—In answer to your letter of 25th ult., I submit the following:

No lands belonging to the state can be taxed. Mills' Ann. Stats., Sec. 3766.

Ditches, canals and flumes owned for the purpose of irrigating the lands of the owners, likewise cannot be taxed. Id., Const. Art. 10, Sess. Laws 1887, p. 481.

While the statute and constitution use only the words "ditches, canals and flumes," I think the proper construction of them will include reservoir sites. The object of these enactments was to encourage and foster the scheme of irrigation; and while a reservoir is not literally a ditch, canal or flume, it is a work necessary to the use of the same in many cases. Without reservoirs, a large number of the irrigating systems in the state, both great and small, would be impracticable, and would never have been constructed. It would seem absurd to conclude that a ditch made for the irrigating of a particular subdivision of land should not be taxed under this law, while a reservoir constructed for the very same purpose and being a part of the very same system of irrigation should be taxed.

The right of way over land is an easement. It is appurtenant to the lands owned by the owner of the ditch, and which are to be watered by it. The soil under the ditch belongs ultimately to the state. It will revert to the state when the use of it as the site of a reservoir is abandoned by the owners. It would be as reasonable to tax the soil under the ditch as the soil under the reservoir.

The soil over which the right of way to the reservoir has been granted also belongs to the state. The only thing that could be listed as property for taxation, is the property which consists of the right of way itself. How can this be valued? On abandonment by the ditch owners, it would merge into the general title of the state and be extinguished. If, however, this right of way should be considered a valuable franchise or perquisite, and consequently property, we must consider that it derives its only value from its connection with and dependency on the irrigation scheme, designed for the lands belonging to the owners of the ditch heading in the reservoir. If, then, the reservoir may be considered the head of the ditch, and not taxable, it is manifest that the use of a mere approach to it ought not to be taxed. If this franchise

or easement is valuable, its value would accrue to the lands irrigated by the ditch, and the consequent revenue to be derived by the state and county by taxation of the latter would be increased pro tanto.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE SUPERINTENDENTS OF IRRIGATION.

Both the expenses and salaries of the superintendents of irrigation must be paid by the several counties interested.

Attorney General's Office,
Denver, Colo., Sept. 23, 1893.

P. A. Amiss, Esq., Superintendent of Irrigation
Del Norte, Colo.

Dear Sir—In response to your letter of 29th ult., will say that the language of section 2457, Mills' Ann. Stats., can only admit of one interpretation and that is, that both the expenses and salary of the superintendent of irrigation must be paid by the several counties within which he has rendered services.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FISHING IN STREAMS STOCKED FROM STATE HATCHERIES.

No one is forbidden by law from fishing in streams stocked with trout from the State hatcheries, provided it is done within the period prescribed by statute.

Attorney General's Office,
Denver, Colo., Sept. 25, 1893.

C. A. Seaman, Esq., Lyons, Colo.

Dear Sir—Referring to your letter of 6th ult., I will say that there was an act passed in 1885, making it unlawful to fish in waters that had been stocked from the state hatchery, for a period of two years after they had been so stocked, but it was repealed in 1891. There is now no distinction made between such streams and all others.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE TENURE OF OFFICE OF ROAD OVERSEER.

1. Where a road overseer has been appointed by the board of county commissioners under a statute which provides that he shall hold his office for two years, and has given bond and assumed the duties of his office, he holds the office for the said term of two years, notwithstanding the statute provides that the board shall appoint annually.

2. The prime object in construing a statute is to ascertain the intention of the legislature, and, if necesssary to carry that out words will be ignored or receive a different meaning from that usually given them.

Attorney General's Office,
Denver, Colo., Sept. 26, 1893.

J. H. Yeoman, Esq., General Road Overseer, West Cliff, Colo.

Dear Sir—In regard to your letter of 7th inst., inquiring as to your tenure of office, I submit the following:

The incumbency of the office is more important than the method of filling it. The law does not favor a construction that would nullify a statute, particularly when the effect would be to deprive an office of its tenant.

The tenure of office being fixed by law, a provision in the same law directing the appointing power to fill the office by an appointment before the expiration of the term must be disregarded. In this connection, the term "annually" must be considered as meaning "biennially." Christy vs. Bd. Supervisors, 39 Cal., 3. The road overseer gives bond to cover his two years.

Sec. 2, act 1891, (p. 304), requires the overseer to report to the board of commissioners "at each regular meeting in each year." We must adopt a construction that will allow the whole law to stand, for then the overseer will be allowed his full term of two years. As the board is permitted the right to appoint annually, that includes the power to appoint every two years.

The whole act must be construed together in order to ascertain the intention of the legislature in passing it. This intention is the principal thing to be sought after in examining a statute. In obedience to this cardinal rule, parts of an act—particularly single words—will sometimes be eliminated.

"* * * * Where a word in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it."

Suth. Stat. Con., Sec. 240.

In drafting the bill upon which the act referred to by you was founded, a mistake was made in writing the word "annually." It was evidently intended by the legislature that the office of road overseer should be held for two years by the incumbent.

"Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted and supplied."

Id., Sec. 260, and authorities cited.

With these principles in view, I find that when you have been regularly appointed, and have accepted the appointment of road overseer, and given the bond required by law, and entered upon the discharge of the duties of the office your term is for two years, and you cannot be ousted, except for failure to discharge your duty properly.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE PARDONS.

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1. The board of commissioners of the state reformatory may allow a convict to go upon parole.

2. The said board has no right to pardon a convict.

3. The governor only can issue a pardon for an offense against a penal law, except as hereinafter pointed out.

4. The act of 1893 makes the board of pardons only advisory to the governor.

5. The board of pardons should investigate all applications for pardon of convicts in the reformatory.

6. The board of control may discharge a boy from the industrial school.

7. The said board cannot discharge a girl unless all the members of the board concur and the governor approves.

8. But these acts do not take away from the governor any part of the power given him to pardon all offenders.

Attorney General's Office,
Denver, Colo., Sept. 27, 1893.

Hon. J. Warner Mills and John H. Gabriel, Board of Pardons:

Gentlemen—In response to your letter of 23d inst., concerning the powers of the board of commissioners of the state reformatory, etc., I submit the following:

The said board has the power to establish rules under which prisoners may be allowed to go upon parole.

Sec. 4157 Mills' Ann. Stats.

The said board has no right to pardon a convict.

By section 2 of the organic act (Mills Ann. Stats., p. 75, sec. 153), the governor of the territory of Colorado was given the power to "grant pardons for offenses against the laws of said territory."

By section 7 of art. IV., of the constitution of the state, it is provided that the governor "shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except impeachment, subject to such regulation relative to the manner of applying for pardons."

Section 1506, Mills' Ann. Stats., provides, "that all applications for commutation of sentence or pardon for crimes committed, and after conviction, shall be accompanied by a certificate of the warden of the penitentiary of the state of Colorado, showing the conduct of such applicant during his confinement, etc."

By section 2 of the act of March 21, 1893 (Sess. Laws, p. 357), it is made the duty of the board of pardons to investigate all applications for executive clemency and lay the facts before the governor, with its recommendations as to the action to be taken. These constitutional and statutory provisions are the laws now in force upon the subject. From them it is apparent that the governor, and he only, can issue

a pardon for any offense against any penal law of the state, except as hereinafter pointed out.

In investigating the propriety of extending pardon to a convict in the reformatory, it is to be presumed that the governor will consult the warden and defer to the recommendations of the state board of pardons; but his power to pardon, being grounded in the constitutional provision cited, cannot be taken away, or qualified by statute in any other way than by an enactment relating to the "manner of applying for pardons." That is to say, the power of the governor to grant pardons is absolute. The exercise of this ultimate right cannot be interfered with by the legislature except in the manner pointed out by the constitution, or by a statute specifying details of the business before the application reaches the hands of the governor. The constitution clearly intended this important function to be confided to the chief magistrate. It only contemplated that the legislature should have the power, whenever it should see fit, to regulate the applications for pardon, to provide that certain forms should be observed, or certain channels followed, in and by which applications should be prepared and transmitted to the governor. It is possible that the legislature might, under this constitutional proviso, be empowered to pass an act whereby it should be made unlawful for the governor to extend a pardon unless the regulations it might see fit to prescribe as to the "manner of applying" had been observed; but I am not called upon to decide this question, and cannot be, under our present statute.

The act of 1893 was evidently drawn by a non-professional hand. It was intended doubtless by the particular legislator who framed that bill, that it should prescribe methods of application which would affect the action of the governor in the premises, but he failed in his purpose. The effect of the act mentioned is to make the board of pardons only advisory to the governor. In contemplation of law, all the

board can do is to save the governor labor and time by collecting facts to which he may assign great or little weight when he comes to exercise his discretion in granting or refusing his pardon.

The weight of the recommendation made by the board, as provided in section 2 of the act, will be such a weight as the governor may consider warranted by his knowledge of the character of its individual members. That recommendation is given no legal weight whatever by the act. A comparison of this act with acts of a germane character in other states will demonstrate this. In some of the states the law is such that the business of granting pardons is absolutely under the control of the board of pardons; but in Colorado, the statute creating that board has made it only a collector of facts to lay before the governor with such a recommendation as they may think it worth while to make.

I believe it to be the duty of the board to make investigation of all applications for pardons by convicts in the reformatory, for this is about all it has to do under the law, except to meet once a month, work without pay, consume the appropriation for expenses and make an annual report.

These being the functions of the board under the law—or rather in the absence of a law—the power of the governor cannot be limited by their action, in the granting of reprieves, commutations or pardons.

In reply to your second general inquiry, I find that section 2182, Mills' Ann. Stats., gives the board of control of the state industrial school full power to discharge a boy from the school. This discharge must be predicated on a finding that the boy has become so far reformed as to justify the act of the board, but the whole matter is committed to their discretion. The governor of the state has nothing to do with the exercise of this discretion. When the constitutional provision referred to was passed, it had no reference to the status of children committed to the industrial school It is

plain that the legislature, when they provided for the incarceration of children, did not consider them as being tainted with so much moral guilt as persons of maturer years, who may have committed the same offenses. Confinement at the industrial school is intended to be more reformative than punitive. The offenses there punished are not considered as grave as those committed by adults.

Industrial schools are the product of modern social science and advancement in the art of law making. If these reflections are just, it must be held that the legislature did not intend to burden the head of the executive department of the government with the consideration of these petty offenses, except as specifically pointed out.

And that such a construction was intended to be put on this law by the legislature, we are persuaded from a consideration of the fact that the law itself makes a difference between boys and girls, with reference to the authority for their discharge.

Section 2182 gives the board the right to discharge a boy absolutely.

Section 2192 requires that all the members of the board must consur in the discharge of a girl and that the governor also must approve.

But while the board may pardon boys without other restriction than their own discretion, and girls with the approval of the governor, this does not affect the independent constitutional right of the governor to pardon "all offenses except treason." The legislature cannot take this power away from him.

It is probable that the convention when it framed the constitution, only intended to provide for the cases of adults or persons of full moral responsibility; hence the legislature can assume the power to provide for the pardon of children; but this does not take away from the governor any part of the power given him, and this power extends to all persons capable of violating a penal statute. Hence, he can par-

don every person committed to the industrial school, without regard to sex and without consultation with the board of control.

While I believe that in one sense, the act of 1893, in prescribing the duty of the board of pardons, only contemplated cases of confinement in the penitentiary, yet the language of the act is so broad that I believe it to be the duty of the board of pardons to investigate and report on "all applications for executive clemency "that reach them, however perfunctory such service may be. I do not hold, however, that it is incumbent on the board of control of the state industrial school to apply to the governor when they resolve to discharge a boy.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE CANAL No. 1.

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1. All the surveys connected with the location of state canal No. 1 and its connecting reservoirs are to be paid for out of any fund at the disposal of the board of control; but the legislature did not contemplate the construction of a reservoir eighty miles above the head of the canal under a general power. Such power must come from a special act.

2. No funds are available to pay for the survey of the same.

Attorney General's Office,
Denver, Colo., Sept. 27, 1893.

Hon. C. B. Cramer, State Engineer:

Dear Sir—In an opinion rendered some days ago, I held that a reservoir constructed as a part of an irrigation system was to be governed by the same

law regarding taxation as the ditches and flumes constructed as part of the same system.

In answer to the question submitted in your letter of the 12th inst., I consider that the same principle will apply to the money appropriated for the construction of the system.

By the act of April 17, 1893, (Sess. Laws, Chap. 152), the board of control is "charged with the duty of the early completion of state canal No. one and reservoirs connected therewith."

The various reservoirs connected with the said canal are located by the state engineer and constructed by the board having charge of the work.

In two opinions lately submitted to you, I held that the money appropriated by the act of April 8, 1893, (Sess. Laws, chap. 26), was to be applied for the purposes mentioned in said act, by the present board of control, who have superseded the old board of construction, and have exclusive control of the construction, maintenance and operation of the said canal and its connecting reservoirs.

Section 3 of said act directs that the sum of $40,000 shall be used only for the purchase of materials, tools and explosives, the employment of extra overseers and guards required in the construction of said canal, and for the more definite location of the line of the same.

A fair construction of this act and the act of April 17, 1893, leads me to the conclusion that the survey work connected with either of the divisions of the canal must be paid out of any fund standing to the credit of the canal on the treasurer's books.

When I say "divisions," I refer to the condition of things brought about by the act of April 17. This act directs certain proceedings to be had in connection with so much of the work of construction as lies east of the east line of township eighteen (18) south of range seventy (70). It provides for the construction of that part of the ditch by contract work; but it

leaves the upper division, or all that part of the work lying above and west of said township line, to be constructed on the plan originally adopted, that is, by convict labor. It appears that the legislature changed its mind between April 8 and April 17, and instead of constructing the canal on a single system, as contemplated by the act of April 8, and all statutes prior thereto, it decided to adopt a different system for the lower portion. It also changed the complexion of the board of construction, changing its name and constituting it of different officers.

I therefore find that all surveys made are to be paid out of said fund on vouchers approved by the board of control.

A "more definite and economical location" might require new surveys entirely on portions of the line of the canal and of the sites of the reservoirs adjacent. But I am of the opinion that the expense of location of a reservoir at Twin Lakes could hardly fall within the purview of the statutes mentioned. It is true that the flood waters of Lake creek—which would furnish the store of a reservoir constructed at or near the lake—would be applied on the state lands lying under said canal No. 1, in case the reservoir should be constructed, but the whole theory and practice of the storage, carriage and application of waters for irrigation has been hitherto so little understood by the people of the state and the general assemblies, that I do not think the latter when it passed the various statutes providing for the construction of said canal, had in contemplation the construction, under a general power, of a reservoir eighty miles from the head of the canal it was intended to feed. Experience and a more thorough knowledge of the science of hydraulics may demonstrate that the construction of the reservoir mentioned might fairly be comprehended under a general power to construct "reservoirs connected" with the canal, but not as that science is now understood.

I am borne out in this conclusion by the fact that the last legislature passed an act (House Bill 69) providing for the construction of this reservoir, which was vetoed by the governor on constitutional grounds relating to the time at which the bill was passed, and the absence of the signature of the presiding officer of the senate.

From the fact that it was thought necessary to make the construction of this reservoir the subject of special legislation, I am constrained to believe that the general assembly did not consider that the board of control had the power to survey or construct it under a general authority to construct "reservoirs connected" with the canal.

I therefore find that there is no fund at the disposal of the treasurer to pay for the survey mentioned.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE PRECINCT NOMINATIONS.

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1. Precinct conventions are contemplated by law, at which nominations of precinct officers are to be made and certified.
2. The county clerk can refuse to file a nomination of precinct officers made by a county convention.

Attorney General's Office,
Denver, Colo., Sept. 29, 1893.

J. W. Sanborn, Esq., Greeley, Colo.

Dear Sir—In reply to your letter of the 21st, I submit the following:

Section 5 of the act of 1891 (p. 143), contemplates nominations for a state, county or other political division or district for which nominations may be made.

Section 18, Id. (p. 151), in providing for the form of ballots says that there shall be printed on the back

of each ballot this endorsement: "Official ballot for * * *" and after the word "for," shall follow the designation of the election precinct or political division for which the ballot is prepared * * *."

From this it appears that a different ballot is to be prepared for every precinct in the county in which candidates for office have been nominated. The clerk can only prepare ballots in accordance with the nominations on file in his office The first section quoted indicates that if any precinct desires to elect a justice or constable, the voters therein belonging to any party must hold a convention and nominate them, certifying the nominations through their presiding officer and secretary, to the county clerk, as provided by section 4 of the said act.

It is possible that nominations of justices and constables made by a county convention, in obedience to the request of the delegates of the several precincts, and certified by the presiding officer and secretary of said county convention, would pass unchallenged. The voters in any precinct might, at a meeting held therein for the purpose, authorize delegates then chosen by them, to have the nominations for justice and constable in that precinct made by the county convention to which the said delegates are sent, and such action might pass unchallenged; but it is easy for the same meeting to certify the nominations directly to the clerk as to certify a request to the county convention to do the same thing, and all questions concerning the legality of the proceedings would be avoided by the certificates being made out by the precinct conventions directly, and not through the intervention of another body. If the county clerk should refuse to file a certificate of nomination of a justice of the peace made by a county convention and not by a precinct convention, he could not be compelled to do so. The courts would refuse a writ to that effect.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE EXPENSES OF GENERAL COURT MARTIAL.

The expenses of a general court martial are to be paid out of the general fund of the state and not out of the military fund.

Attorney General's Office,
Denver, Colo., Oct. 16, 1893.

Hon. F. M. Goodykoontz, Auditor of State:

Dear Sir—In response to your inquiry of 14th inst., concerning the funds from which the expenses of a general court martial are to be paid, I submit the following:

The military fund consists of the poll tax levied in the several counties. It is paid to the treasurer of state and constitutes a fund to be drawn on, according to law, for the expenses incurred in the maintenance and control of the state militia.

Section 3087 provides that all accounts and claims payable from the military fund are to be paid by orders drawn by the adjutant general and approved by the governor.

It becomes necessary then, to decide whether the expenses of a general court martial are an account or claim payable out of that fund.

Section 3090, Mills' Ann. Stats., provides that "general courts martial, for the trial upon charges and specifications, of commissioned officers, shall be ordered by the commander in chief." Their mode of procedure is established by the military board in a code.

In sections 3078-3079 we find that provision is made for the payment of the troops when serving under orders of the governor, or of a sheriff, mayor or judge, to prevent or suppress riot or insurrection, or

to repel or prevent invasion, or during encampment. In the first case, they are to be paid the several sums mentioned in section 3078, out of the general fund of the state. In the second case, they are to be paid the several sums mentioned in section 3079, and no fund is designated, but the payments are to be made by the inspector general on vouchers audited after certification by the commanding officer, and action thereon by the state military board.

Section 3114, Id., provides that "officers ordered on courts martial, either from general or brigade headquarters, or witnesses in attendance thereon, shall be entitled to pay under section 12 of article 5 of this act, and mileage in going to and returning therefrom."

Section 12, article 5, referred to is found at page 398 of the session laws of 1889 and is the same as section 3078, Mills' Ann. Stats., supra.

From the foregoing it appears that the officers and witnesses serving on and attending a general court martial are to be paid out of the same fund as officers and enlisted men while in the field engaged in preventing or suppressing riot or insurrrection, or in repelling or preventing invasion, which is the general fund of the state.

Respectfully,

EUGENE ENGLEY,
Attorney General.

COLLECTION OF SPECIAL SCHOOL TAX.

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1. It is lawful to collect special school taxes on range stock in districts where they are located.

2. The treasurer can hold funds received in payment of taxes, other than special school tax, and levy for the school tax.

Attorney General's Office,
Denver, Colo., Oct. 19, 1893.

Hon. P. H. Draper, Deputy District Attorney, Baca County, Springfield, Colo.

Dear Sir—In your communication of recent date you request the opinion of this office:

1. "Is it lawful to collect special school taxes on range stock in district where they are located?"

2. Can a treasurer lawfully receive the tax (state and county), excepting the special school tax, and collect the special school tax by a distress warrant?"

I answer your first question in the affirmative, assuming that all precedent requirements of the statutory law have been in all essential particulars complied with by the proper officials. (See sec. 4032, Mills' Ann. Stats.)

Your second question is answered in the affirmative and upon the precise facts presented to this office in said communication. Insofar as the last inquiry is concerned, your statement of facts is this: "The Prairie Cattle Company has sent to the treasurer here a check to pay their taxes for last half of last year's tax, except special school tax on personal property."

Accept the check, give a tax receipt for the partial payment and levy by distress warrant for the balance of tax due.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE FILING CERTIFICATES OF NOMINATION.

Where a political party in Huerfano county nominated, last year a ticket, called the "Democratic Ticket," the lowest vote for any candidate thereon was 440 and the total vote of the

county was 1462, the county clerk should file a certificate of nomination of that party this year, if otherwise lawfully made and presented.

Attorney General's Office,
Denver, Colo., Oct. 20, 1893.

Hon. Chas. O. Unfug, Walsenburg, Colo.

Dear Sir—In answer to your inquiry of recent date, relative to filing of convention certificates, I desire to say:

That the second clause of section 3, page 143, Sess. Laws 1891, reads: "A convention within the meaning of this act is an organized assemblage of voters or delegates representing a political party, which at the last election before the holding of such convention, polled at least ten per centum. of the entire vote cast in the state, county or other political division or district for which the nomination may be made." I can discover no ambiguity in the language employed as above quoted. The legislative intention is plain. The statute referred to is a complete answer to your interrogatory. You present to this office as the precise facts upon which you ask an opinion, the following, viz: That at the general election (last year) in your county the total vote polled was 1,462, of which number the lowest vote cast for a "Simon Pure White Wing Democrat" was 440. I assume that you mean what was known as the "Democratic Ticket" in the use of the words "Simon Pure White Wing." I also assume from your language that you intend to convey the information that a "Democratic Ticket" was voted at the general election in your county last year, and that the lowest vote cast for any candidate thereon was 440. If this be true, the conclusion is irresistible and inevitable that a "political party," or one claiming to be such, nominated a ticket last year, having the political name of "Democratic Ticket," which ticket received ten per centum of the entire vote cast in the county,

if the lowest vote for any candidate thereon was 440. Without taking into consideration the average vote for candidates on the ticket, the statement as presented shows that the lowest candidate received a fraction over thirty-three per centum of the entire vote cast in the county, while the statute requires but ten per centum to entitle the next convention of the political party to have its convention certificate filed by the county clerk. If your statement to this office presents the precise and determinate facts, the county clerk of Huerfano county should file the certificate of nominations of the convention without question on that score. The statute is not enacted to destroy political parties, or repress the expression of political opinion through the instrumentalities of political organizations, but to regulate the holding of conventions as to time, and the manner of certifying and filing nominations, printing, publishing and distributions of ballots, etc., etc.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE NATURALIZATION PAPERS.

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1. A certified copy of the naturalization papers of a person applying for registration is the best evidence of the fact of his naturalization.

2. If the certified copy has been lost the applicant may make oath to that fact, and if he takes the statutory oath, will be entitled to registration.

3. But if the fact appears that he has neglected or refused to procure a certified copy in the place of the one lost, it raises a presumption that he does not consider the elective franchise of sufficient value to warrant the trifling expense of procuring a copy of the said paper.

Attorney General's Office,
Denver, Colo., October 19, 1893.

Board of Registration, La Veta, Colorado:

Sirs—In response to your letter of 17th, concerning the registration of a foreign-born citizen, I submit the following:

In the absence of a statute requiring a naturalized citizen to produce his naturalization papers, and especially where it is alleged that such papers have been lost, his own oath may be received upon the question of his right to register, and such oath proves prima facie the truth of the statements sworn to.

McCreary on Elections, Sec. 43, p. 27;

People v. McNally, 9 Abb. (N. Y.), N. Cas., 648.

People v. Gordon, 5 Cal. 235.

If the judges should ascertain by questioning the applicant, or otherwise, that the certificate was issued by a court having no jurisdiction of that subject, they may decline to administer the oath, or accept the vote.

McCreary on Elections. Sec. 252, p. 167.

"The rule no doubt is, that if the person offering to vote has not been legally naturalized, they may, at their peril, refuse to receive his ballot, or to administer the oath; but the offer on the part of the person desiring to vote to take the prescribed oath raises a presumption that he is a legal voter, and if the officers of election refuse his vote notwithstanding such offer, it would probably be held, in a proceeding against them for such refusal, that they must show affirmatively that such person was not entitled to vote."

McCreary on Elections, Sec. 252, p. 167.

The above principles equally apply to the case of a person who has only declared his intention.

But in the case cited by you it appears that the applicant "refuses to go to the trouble of procuring a certified copy" of his naturalization papers; and that he made oath two years ago that he had lost them, and that at some time he expected to procure them. This case shows that the applicant is of the opinion that the exercise of the elective franchise is not worth the trouble and trifling expense of procuring certified copies of his papars.

The papers were lost by a casualty for which neither the judges nor the public are responsible, and for aught that appears, by the negligence or carelessness of the applicant. At all events, the law has provided a cheap and expeditious remedy in such cases, and if the applicant refuses to avail himself of it, he must abide the consequences.

A certified copy of the naturalization papers, in this case, is the best evidence of the fact that the applicant has been naturalized, and as it appears that he has had ample time in which to procure this evidence, and has refused to do so, it cannot be said that he should be allowed to prove the fact by secondary and inferior evidence. The evidence of the latter kind can only be admitted upon proof that the best evidence cannot be procured by at least reasonable diligence.

In view of the case, I am of the opinion that the board of registration, who act in a judicial capacity in the premises, ought to refuse to allow the registration.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE ELECTIONS.

Attorney General's Office,
Denver, Colo., October 21, 1893.

George J. Blakeley, Esq., Elizabeth, Colo.:

Dear Sir—In reply to your communication of recent date relative to your eligibility for the position of superintendent of schools in your county, permit me to say that Art. 14, Sec. 10, of the constitution provides that "no person shall be eligible to any county office unless he shall be a qualified elector; nor unless he shall have resided in the county one year preceding his election.

In view of the facts stated in your letter, it must be held that you are not eligible for the position mentioned

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE ELECTIONS.

Any person to be a legally qualified voter must have resided in the state six months, in the county ninety days, and the precinct or ward ten days.

Attorney General's Office,
Denver, Colo., October 21, 1893.

P. C. Greene, Esq., Justice of the Peace, Arvada, Colo.:

Dear Sir—In reply to your communication of recent date relative to registration, would say: Section

1571, Mills' Ann. Stats., provides that in order for a person to vote in this state he must have resided within the state six months, in the county ninety days, and in the precinct or ward ten days.

The act as first passed in 1877 required only thirty days' residence in the county, but the act of 1881 amended it so as to require ninety days' residence in the county; and such is the law at the present time.

The compilers of the statutes of 1883 evidently made the mistake of quoting sections of the law of 1877 instead of the amendment of 1881, and the error was made in the pamphlets on this account.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE ELECTION CONTRACTS AND PLEDGES.

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1. A contract or pledge made to a convention by a candidate for nomination to an office, that he will, if elected, apply the fees of the office to a public or charitable purpose is contrary to public policy, and is in violation of the election law. Such a pledge would endanger his tenure of the office if he should be so elected.

2. The fees or salary of an office is contemplated by law to be an adequate compensation for the services performed and no more.

Attorney General's Office,
Denver, Colo., October 19, 1893.

Hon. B. F. Odell, Burlington, Colo.:

Dear Sir—Yours of the 16th inst., including synopsis of resolution proposed to be adopted by your convention, received, and in answer thereto will say,

that a contract of the kind to which you refer and made with a convention is contrary to public policy and void. Moreover, such a contract is a violation of the statutory law of the state (See Sec. 1, page 167, Sess. Laws 1891), and would endanger the possession of the office by the candidate if elected.

An office-holder, like any one else, may, ordinarily, dispose of his private money as he may see fit; but while he is a candidate for office he cannot contract in violation of law for the disposal of public moneys not yet reduced to possession in payment of salaries. Salaries and fees are contemplated by law to be an adequate compensation for the performance of public services, and no more. Therefore, I hold that your resolution is illegal, and that an acceptance of a nomination based upon a pledge, or the conditions of the contract therein set out would, if the question should reach the courts, prevent the candidate, if elected, from holding the office.

It is commendable on the part of any one to use his private means to assist in purchasing seed for needy homesteaders, or in establishing public libraries; but public funds cannot be subjected to convention contracts or pledges, in the manner contemplated by you.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE PHYSICIANS.

Under the statutes any person giving satisfactory evidence to the state medical examiners that he has been engaged in the practice of medicine or surgery continuously for a period of ten years, is, upon application, entitled to a license to practice in the state of Colorado.

Attorney General's Office,
Denver, Colo., October 23, 1893.

J. N. Hall, M. D., Secretary State Board Medical Examiners:

Dear Sir—In response to your inquiry of the 11th inst., as to whether the "ten-year clause" applies to non-resident physicians, would say, that when the act of 1881, regulating the practice of medicine in the state of Colorado was passed, section 4 of said act contained the following: "All persons who have made the practice of medicine and surgery their profession or business continuously for the period of ten (10) years, within this state, and can furnish satisfactory evidence thereof to the state board of medical examiners, shall receive from said board a license to continue practice in the state of Colorado."

This provision of said act was amended in 1885 by eliminating the words "within the state," and reenacting the balance; so from such actions we are led to believe that the legislature intended this provision to apply not only to those "within the state," but also those without the boundaries thereof. In view of this fact, it is my opinion that any person, whether resident or non-resident of this state, who has made the practice of medicine or surgery his profession or business continuously for the period of ten years, either in the state of Colorado or in some other state, and can furnish satisfactory evidence to that effect to the state medical examiners, is entitled to a license to continue practice in the state of Colorado.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE BOARD OF CONTROL STATE INDUSTRIAL SCHOOL.

Under the power vested in them by the statute, the board of control may meet as often as they choose and "audit bills" and issue "vouchers" to its employes, upon presentation of which to the state auditor, he must immediately draw his warrant upon the state treasurer for payment of same, out of any moneys appropriated for the purpose, provided the law has been complied with on all other particulars.

Attorney General's Office,
Denver, Colo., October 21, 1893.

Hon. B. F. Williams, President Board of Control State Industrial School:

Dear Sir—In answer to your inquiry: "Can the board of control of the state industrial school at Golden issue pay vouchers to its employes at the end of each month, or only quarterly; and if at the end of each month, is the state auditor required, upon presentation of same, to draw his warrant upon the state treasurer in favor of the claimant, out of any moneys appropriated for the care and support of the industrial school?" I desire to say: Sec. 2170, Mills' Ann. Stats., in part reads: * * * "The board of control shall meet regularly at the industrial school, on the third Wednesday in March, June, September and December, in each year, and at such other times and places as they shall deem advisable, to audit bills and transact all other necessary business. * * * All vouchers for the purchase of supplies or other indebtedness of the industrial school, shall be signed by the president and secretary of the board of control, and certified by the superintendent, and upon presentation of same to the auditor of state; he shall draw his warrant upon the state treasurer in favor of the

claimant, out of any moneys appropriated for the care and support of the industrial school."

The statute above quoted in unambiguous in grammatical construction and the use of language, and admits of no quibble as to the legislative intention. The law is mandatory that the "board of control shall meet regularly * * * on the third Wednesday in March, June, September and December, in each year," for the purposes named, among which is to audit bills, but lodges a discretionary power in the board to meet at "such other times" as they may see fit, at which "times" they may "audit bills." The words "or other indebtedness" relate to the words "all vouchers," and the intervening act "to audit bills." In other words, upon the "indebtedness" incurred "bills" are audited and "vouchers" issued by the board of control, and upon "presentation" of the "vouchers" to the "auditor of state, he shall draw his warrant upon the state treasurer in favor of the claimant, out of the moneys appropriated for the care and support of the industrial school." The wages of the employes of the industrial school until paid is an "indebtedness." Under the power vested in them by statute, the board of control may meet as often as they choose and "audit bills" and issue "vouchers" to its employes, and upon presentation of the vouchers to the auditor of state, he must immediately draw his warrant upon the state treasurer in favor of the claimant, out of any moneys appropriated for the care and support of the industrial school, provided that the law has been complied with in all other particulars. Within the law the board of control is supposed to have the management of the state industrial school, and the disposition of the funds thereof.

The foregoing opinion is in answer to the specific question submitted to this office.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE EXTENSION OF TAX ROLLS BY THE ASSESSOR.

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1. The work connected with the duty of assessment of property, such as extending the rolls, issuing warrant to the treasurer, etc,. is now to be done by the assessor under the acts of 1891 and 1893.

2. These acts are not contrary to the constitution.

3. Unless the constitution otherwise expressly provides, the legislature may increase, diminish or vary the duties of an office before the end of the term.

4. In the theory of our law, the payment for the performance of the duties of public office is considered an exact equivalent for the said performance—no more and no less.

5. In this view, as the clerk does not perform the service of extending the taxes, he has lost no emolument by the imposition of the duty on the assessor.

Attorney General's Office,
Denver, Colo., October 24, 1893.

Hon. J. T. Whitelaw, County Attorney, Silverton, Colo.:

Dear Sir—In reply to your letter of the 11th inst., I submit the following:

In an opinion submitted by this office on September 22d last, to the county clerk of Delta county, the duty of assessment of property, such as extending the rolls, issuing warrant to the treasurer, etc., is now to be done by the county assessor, under the provisions of the acts of 1891 and 1893.

By section 12 of the act of 1891 (Sess. Laws, p. 312), in counties of the fifth class, to which San Juan belongs, the clerks shall receive the sum of eighteen hundred dollars "as their only compensation for their services." This act took effect July 6, 1891, and was in force when your clerk was elected. The fees of an office are, under our theory of government,

considered an equivalent for the work done by the incumbent—no more and no less. In this case, the legislature has chosen to pay the salary of eighteen hundred dollars, as a sum in gross in compensation for the clerk's services of every description; only, this compensation must arise from the fees and emoluments of the office. If their fees and emoluments do not amount to eighteen hundred dollars, he cannot be paid that amount; but can claim a salary equal to the total sums received by him as fees and emoluments. In other words, his salary, in the last case, would consume all sums received by him as fees and emoluments.

As far as the assessor is concerned, the act of 1891 (H. B. 195, p. 290 sess. laws) imposes on him, and him alone, the duties of extending the taxes. As far as the clerk is concerned, he cannot claim that the act of 1891 last mentioned, as applied to his case, is unconstitutional; for he assumed the duties of his office after that act took effect, which was on January 1, 1892.

Unless the constitution otherwise expressly provides, the legislature has authority to increase, diminish or vary the duties of an office before the end of the term.

Throop Pub. Off. 19, citing many authorities.

Having been elected to the office of clerk in the fall of 1891, with the knowledge that the act of 1891 (sess. laws, p. 290, supra) was on the statute books, and that it provided for the exact day when it should go into effect, to-wit, on January 1, 1892; and having assumed the duties of the office more than a week after the said January 1, he cannot be heard to object that the effect of the law, not otherwise open to a constitutional objection, would be to take away an emolument of his office.

Sthur v. Hoboken, N. Y., L. 147.

Throop Pub. Off., Sec. 467.

The legislature, not being expressly forbidden to take away the duty of extending the tax roll from the clerk, the act of 1891, imposing that duty on the assessor, is constitutional; and as the pay for this work is considered as an equivalent for the services performed, the clerk cannot be said to have lost an emolument. While it is true that he does not get pay for the work, it is equally true that he has not performed it. As for the profit in the work—of any margin between the actual value of the services performed, and the higher value fixed for the performance by the statute—such cannot be contemplated. The work and the pay are considered as an equipoise to each other.

I am aware that this statute works a hardship on clerks of counties of the fifth class—but ita scriptum est, and we must bow to the expressed will of the legislature.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COUNTY POOR FUND.

The county poor fund must be provided for at the time the annual appropriation is made, in the last quarter of the preceding fiscal year, and can in no event, exceed more than three mills on the dollar of the personal and real property of the county.

Attorney General's Office.
Denver Colo., October 24, 1893.

Hon. W. N. Fagan, Chairman Board County Commissioners, Aspen, Colo.:

Dear Sir—In response to your request of 18th inst., regarding the power of the board of commissioners of your county, I submit the following:

The act of 1891 (sess. laws, p. 111) places distinct and unmistakable limits to the power of your board in the disposition of county funds. From that it appears that the fund for the support of the poor cannot exceed three millls on the dollar; and, further, this appropriation must be made at the same time the annual appropriation resolution is passed by the board. That annual appropriation exhausts the power of the board to appropriate any money, except as otherwise provided, during the next fiscal year. This annual appropriation may be made at any time during the last quarter of a fiscal year.

If your board has not already passed the annual appropriation for 1894, it may meet the extraordinary expense incurred by the poor fund of Pitkin county, by providing for a fund amounting to no more than three mills on the dollar of real and personal property in the county.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SUPERINTENDENT OF IRRIGATION.

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1. The irrigating statute of 1893 does not affect priorities. They are fixed and vested rights.

2. That statute was designed to control the action of companies, etc., owning ditches, in keeping a flow of water therein. Technically, the law does not recognize an "irrigating season."

Attorney General's Office,
Denver, Colo., October 25, 1893.

Wm. Mathews, Esq., Superintendent Irrigation,
Rocky Ford, Colo.:

Dear Sir—Referring to the letter of the state engineer enclosed by you, I will say that his opinion

concerning priorities is correct. There is no such thing in this state as an "irrigating season" technically known to the law. The act of 1893 (Chap. 108) was passed to control the action of the person or companies owning or controlling ditches. It requires them to keep a sufficient flow therein at a certain period of the year, in order that persons entitled to the use of water therefrom may be supplied to the full extent of their rights. It does not affect the priorities. This right of priority does not depend upon the season of the year, but is a fixed and vested right and under the control of the owner at all times.

Respectfully,

EUGENE ENGLEY,
Attorney General.

BARGAINS OR PROMISES TO SECURE ELECTION TO AN OFFICE.

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1. Bargains to the effect that a candidate, if successful, will serve for a sum less than the salary provided by law, are contrary to public policy.

2. It is enough if they pledge themselves to abide by the terms of their oaths of office, and to deal honestly with their constituents.

Attorney General's Office,
Denver, Colo., October 26, 1893.

Hon. Allen M. Lambright, County Attorney, Las Animas, Colo.:

Dear Sir—In reply to your letter of 23d inst., I will say that the opinion given by me heretofore, and referred to by you, was to the effect that a bargain made concerning the disposition of the fees of an office by a candidate, as a means of securing a nomination, was contrary to public policy.

In Throop on Public Offices, Sec. 76, in reference to cases where the successful candidate had, during the contest for votes, issued public and general appeals to the voters for support, promising, in case he should be elected, to accept from the county treasury a smaller sum than the salary attached by law to the office, or to devote a specified per diem of his salary to the benefit of the county, we find this expression: "It is conceded in such cases, that such offers are legally not distinguished from direct offers of pecuniary reward for a vote; and in some of the cases the transaction is also likened to the sale of the office."

But in a Wisconsin case it was held, on the question as to whether the candidate, if elected, can hold the office, that it is necessary to prove affirmatively, that a number equal to the majority certified in his favor were induced by such promises to vote.

State v. Purdy, Wis., 213.

This requirement, if adopted generally, would practically nullify the effect of the principle, and does not seem to be founded on proper considerations. But in accord with it we find a case in Iowa, and one in New York.

Carrothers v. Russell, 53 Iowa, 356;

People v. Thornton, 25 Hun., 456.

And in Oregon it was held that these voters must be shown to be tax-payers, or would, in some other mode be benefited by the performance of the promise.

State v. Dustin, 5 Oregon, 375.

While the people cannot be blamed for desiring to secure the services of a public office as cheaply as possible, the sounder and better view is to consider that the salary or fees are to be regarded as a just compensation for these services—no more and no less.

And when we consider the temptations that the hope of office may suggest to the minds of those seeking it, it may safely be assumed as a general rule, op-

erating on the average of mankind, that the sincerity of men who pledge themselves in advance to surrender a portion of the salary or perquisites attached to the office, may well be doubted. Could we be assured that such an offer springs from patriotism, or even public spirit, it would deserve commendation, and could safely be adopted in practice and permitted by law. But the small advantage offered the individual voter, it seems to me, is not sufficient to warrant the belief that he is for that reason enticed by the promise to vote for the candidate making it. It would rather seem that it is made to create, in the mind of the voter, a notion that the candidate is seeking the office for the public good—a notion that might have been grounded on possibilities belonging to the better days of the republic, but incompatible with our experiences in Colorado.

Hence, if the principle quoted is the true one, it is safer to leave these promises to be made by the candidates, out of the question. It is enough to require them to promise that they will abide by their oaths of office and deal honestly with their constituents. The provisions of our election law are stringent and comprehensive, and whatever views our courts might adopt in the enforcement of them, it is safe to follow a road that leads to no doubtful terminus, and to keep in the middle of it.

EUGENE ENGLEY.
Attorney General.

IN RE STATE REFORMATORY.

Water and sewer pipes may be paid for out of the building and improvement fund of the state reformatory, but they should be provided for in a report made by the penitentiary commissioners to the governor and approved by him.

Attorney General's Office,
Denver, Colo., October 31, 1893.

Hon. I. G. Berry, Warden State Reformatory, Buena Vista, Colo.:

Dear Sir—Replying to your letter of the 3d inst., I submit the following:

When the legislature provided a fund for the construction of a cell house for the state reformatory, it intended that the fund should be applied to the construction of a building suitable for the purpose. In the case of prisoners, it becomes far more important to provide regulations concerning the sanitation of the building in which they are confined, than in the case of other public buildings, where the occupants can come and go at pleasure. A supply of water furnished constantly, cheaply and with safety, by means of pipes, and sewer pipes to carry off the waste from the building, are essential features, and ought to be included in the plans and estimates of the penitentiary board. If they have not adopted such, you should bring the matter before them at as early a day as possible, so that they may embody them in a supplementary report to the governor. The reasons for this construction being for the safety and health of the prisoners, will no doubt be sanctioned by him, and the report approved. The report of the commissioners ought to detail the plan of the water and sewer pipes and appurtenant arrangements, together with the estimated cost. Only in this way can you safely draw on the reformatory fund, for the purpose designated, under the act of 1889.

EUGENE ENGLEY.
Attorney General.

IN RE TAXES.

Boards of county commissioners are without authority in law to rebate or refund the taxes upon property, whether such tax is based upon a valuation made by the state board of equalization or by the county assessor, unless some error has been made in the assessment or levy and collection of the tax.

Attorney General's Office,
Denver, Colo., November 2, 1893.

Hon. Edwin Shaw, County Clerk, Grand Junction, Colo.:

Dear Sir—In reply to your communication relative to the power of county commissioners to abate or refund taxes on valuation made by the state board of equalization, would say: Section 3777, Mills' Ann. Stats., provides that the board of county commissioners have the power to refund a tax in cases where any person has paid the same, and thereafter it is found to have been erroneous or illegal, whether owing to erroneous or impropper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities. Section 3795 gives the board of county commissioners the power to rebate, annul, or set aside assessments made by the assessor, upon such evidence and showing as the board may require.

There is no law giving county commissioners the right to refund or abate a tax voluntarily, or of their own free will; but all rebates, when made, must be based upon some error or illegal act having been committed in the assessment, levy or collection of the tax. If the tax sought to be rebated or refunded is based upon an assessment made by the state board of equalization, the board of county commissioners are without authority to make any rebate in the tax unless they are notified by the state board of some error hav-

ing been made in making the assessment. Without such knowledge or information the county commissioners cannot question the regularity or legality of the assessment made by the state board of equalization, and when the assessment is once certified to by said board, the county commissioners must accept it as being regular in all respects. If any error has been made in making the assessment, the state board may correct it, and the county commissioners would then have authority to adjust the tax in conformity with the correction. All rebates upon taxes must be based upon some mistake or error in some manner connected with, or pertaining to, the assessment of the property, or the levy and collection of the tax; and if these matters have been done correctly and according to law, the county commissioners cannot legally accept other than the regular tax, whether such tax is based upon a valuation made by the state board of equalization, or by the assessor of the county.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE LICENSE TO PRACTICE MEDICINE.

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1. The state board of medical examiners is authorized to examine all applicants for license to practice medicine in the state of Colorado and grant a certificate to those who have been engaged in the practice of medicine or surgery continuously for a period of ten years.

2. All evidences of qualification to practice medicine must be presented to the board for their consideration and they are the judges of the applicant's qualification.

Attorney General's Office,
Denver, Colo., November 3, 1893.

J. F. Shores, M. D., Manassa, Colo.:

Dear Sir—In reply to your communication of recent date, would say: The state board of medical

examiners, located at Denver, is the board authorized to examine all applicants for license to practice medicine in the state of Colorado. There is a provision in our statutes which authorizes the board to grant a certificate to those who have been engaged in the practice of medicine or surgery continuously for a period of ten years. All evidences of this fact must be presented to the board for their consideration, and they are the judges of the applicant's qualification.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE ELECTIONS.

When an elector desires to change his place of residence, some physical fact showing intention to locate at a certain place, must be presented in order for him to gain a residence and be entitled to vote at the new location. The claim of residence cannot be based upon a mere intention that existed in the mind.

Attorney General's Office,
Denver, Colo., November 3, 1893.

R. E. Peniston, Esq., Hinsdale County, Colorado:

Dear Sir—In reply to your communication of the 1st inst., would say, that in my opinion, while the law in Colorado as to residence, etc., is quite liberal, the parties referred to are not in a position to receive the benefit of the most liberal construction that can be placed upon it. In the matter of the elective franchise, no person loses a residence in one place until another is gained elsewhere, and the opposite is also true. Before a residence could be acquired by them at Lake City, some physical fact showing intention to take up a residence there ninety days before election

must be presented, and the claim cannot be based upon the mere intention that existed in the mind at the time of leaving Aspen.

Upon the precise facts presented in your letter, I think the board of registry properly refused registration of the parties, and the law will not entitle them to vote at Lake City in the coming county election.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE MARRIAGES.

Any judge or justice of the peace, clergyman or licensed preacher of the gospel in this state, is authorized to marry parties upon presentation to them of the license issued by a county clerk, as provided by law.

Attorney General's Office,
Denver, Colo., November 2, 1893.

Henry Clay Hopper, Esq., Justice of the Peace, Wetmore, Custer County, Colorado:

Dear Sir—In answer to your inquiry of recent date, as to the right of justices of the peace and preachers to marry couples when license has been granted in a different county from that in which the ceremony is performed, would say: Section 2996, Mills' Ann. Stats., provides that "any judge or justice of the peace, clergyman or licensed preacher of the gospel, may perform the ceremony of marriage in this state." Section 2997 provides that "any such minister or officer as aforesaid, to whom any such license, duly issued, may come, and not having personal

knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them."

The first section quoted is very broad, and is without limitation as to place or jurisdiction. The legislature must have anticipated such cases as you refer to when section 2997 was enacted, and this section gives any such minister or officer the authority to perform the marirage ceremony, provided the parties possess the license required by law. It is my opinion that if parties procure the proper marriage license from the county clerk, they may be married anywhere in the state, by any judge or justice of the peace, clergyman or licensed preacher of the gospel, who will accept such license as being genuine, and who will perform the ceremony it authorizes.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE TAXES.

There is no provision in the law which compels county treasurers to sell property for taxes within the year in which the same become delinquent, when a cause exists that necessitates postponement from the time specified.

Attorney General's Office,
Denver, Colo., October 30, 1893.

Hon. W. J. McNamara, County Treasurer, Pueblo, Colo.:

Dear Sir—In response to your inquiry of 18th inst., as to whether or not county treasurers are obliged to sell lands and lots for taxes the same year in which taxes become due and delinquent, would say, in a former opinion upon the question as to

whether or not the county commissioners could postpone tax sales, it was held by this office that county commissioners had no authority to act in the matter of postponement; but that under the law the county treasurer could publish the notice and hold the sale after the time specified, without in any manner affecting the title of the purchaser thereunder. That is, "if from any cause real property cannot be duly advertised and offered for sale on or before the first Monday of October," the law makes it the duty of the treasurer to continue the sale to some future day. This latitude is given in order that such departure in point of time will not operate to affect the validity of the sale and the title of the purchaser thereunder. The treasurer is presumed to obey the law in conducting tax sales, and the guarantee of a good tax title depends upon the observance of the several provisions relating to the levy and collection of taxes. Unless some valid reason exists why the sale cannot be held on the first Monday of October, it must be held on or before that day, and the treasurer is not vested with authority to postpone or defer the sale without cause; but, as to whether or not that cause exists, the treasurer, and he only, is to be the judge. He is, in a sense, a quasi-judicial officer in this respect, and when the time arrives for the advertisement and sale of real property, if he is unable to do it at the time specified, and postpones it, there are none to gainsay his right to do so. The law does not specify the "subsequent day," neither does it limit the time the sale may be held to any definite period after the day specified; but the matter is left entirely within the discretion of the county treasurer, and the only provision made is, that sufficient time shall be allowed for the publication of the notice provided for in the act. Sess. Laws 1891, p. 288, Sec. 8. The length of time to which a sale is postponed should be governed by the emergency that necessitated it, and should be no longer than is necessary to meet the cause that required it; but there is no provision in the law which

compels the county treasurer to hold the sale within the year in which the taxes become delinquent, provided there is good cause for its postponement.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE METHOD OF VOTING.

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1. A cross at the head of a ticket with or without emblem, is a valid vote.

2. A cross at the head of a ticket counts as a vote for every candidate thereon. If the ticket is incomplete, the voter may select candidates and vote for them upon some other ticket.

Attorney General's Office,
Denver, Colo., November 4, 1893.

Reuben Berry, Esq., Colorado Springs, Colo.:

Dear Sir—Yours of the 3d inst received, submitting the following propositions, viz:

First—"If a ticket has no emblem at its head, will an 'X' in the space above the ticket usually occupied by the emblem make the ballot valid?" and

Second—"If the ticket having the emblem has not the names of the nominees for precinct officers, and an 'X' be placed in the usual place at the head of the ticket, and an 'X' be placed opposite the names of the nominees for precinct officers, upon another ticket, would the vote be valid for the ticket with the emblem, and also for the precinct nominees?"

In reply thereto, would say that each of the methods indicated would be correct, and the ballots so marked are valid.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE PUBLISHERS' FEES.

1. In order to receive the full amount of fees allowed by statute, there must be the full measurement of one hundred words per folio; if less than a folio of one hundred words, the compensation must be in proportion.

2. As a general rule, the law does not recognize fractions of a day.

Attorney General's Office,
Denver, Colo., November 13, 1893.

Morton Jones, Esq., Lincoln County Ledger, Hugo, Colo.:

Dear Sir—In reply to your communication of recent date relative to publishers' fees for legal advertisements, would say that section 1423, page 437, general statutes 1883, governs in the matter of publishers' fees, and we find it provided that "For the first insertion of each folio of one hundred words, seventy-five (75) cents; for each subsequent insertion, forty (40) cents." The language of this section cannot be misconstrued. It not only provides the amount allowed per folio, but defines what a folio shall be, and if there should be a fractional folio in the measurement, there must necessarily be a fractional consideration in the compensation; that is, in order to receive the full amount allowed by statute, there must be the full measurement of one hundred words per folio; if less than a folio of one hundred words, the compensation must be in proportion.

The law does not recognize fractions of a day. This is the general rule; but if the law provided a certain per diem for each day of eight hours, I do not think a legal claim could be made for a full day's compensation for a day less than eight hours. The general rule is used in computing time.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE COMPENSATION OF SHERIFFS.

Under the law sheriffs are not allowed a commission for selling real property, but are given specified fees. In sales of personal property the law provides for a commission.

Attorney General's Office,
Denver, Colo., November 14, 1893.

Hon. A. F. Thompson, County Attorney, Otero County, Colorado:

Dear Sir—In reply to your communication of recent date, would say that the act of 1891 does not provide a commission for sheriffs in making sales of real property. Certain specified fees are allowed him in making sales of real property, and he can make no other charge. In making sales of personal property, he is entitled to a commissision as provided in the act.

Respectfully,

EUGENE ENGLEY.
Attorney General.

IN RE COMPENSATION OF SUPERINTENDENTS OF SCHOOLS.

By the act of 1891, the county superintendent of schools is entitled to five dolllars per day for each day actually and necessarily employed for the county, and ten cents per mile for each mile actually and necessarily travelled in the performance of duty, regardless of the number of organized public schools in the county.

Attorney General's Office.
Denver, Colo., November 14, 1893.

Hon. Will Ormiston, County Superintendent of Schools, Dolores, Colo.:

Dear Sir—In reply to your communication of recent date, would say that the compensation of the county superintendent of schools is provided for in section 14, page 312, sess. laws 1891. By this section annual salaries are provided for county superintendents in counties of the first and second classes, while in counties of all other classes they are to receive "the sum of five dollars per day, actually and necessarily employed for the county, and ten cents per mile for each mile actually and necessarily traveled in the performance of duty." This act also provides that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." (Sess. Laws 1891, page 315, Sec. 26.)

In so far as the compensation of county superintendents of schools is concerned, the act of 1891 repeals all prior enactments in conflict therewith, and in this act we find the proviso of the act of 1887 limiting the annual salary to one hundred dollars for each organized public school in the county, omitted. It must have been the intention of the legislature to repeal section 10 of the act of 1887, by enacting section 14 of the act of 1891; because, by the latter en

actment it provided a per diem without any limitation, and any former law limiting the per diem to a certain amount is inconsistent therewith. By the act of 1891, except in counties of the first and second classes, the county superintendent is entitled to five dollars per day for each day actually and necessarily employed for the county, and ten cents per mile for each mile actually and necessarily traveled in the performance of duty, regardless of the number of organized public schools in the county.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COUNTY COMMISSIONERS.

Under the statutes the term of a county commissioner who has been apppointed to fill a vacancy, runs until the general election following his appointment, and his successor, when elected, may take possession of the office as soon as he has qualified therefor.

Attorney General's Office,
Denver, Colo., November 16, 1893.

Hon. R. C. Nisbet, County Commissioner, Pueblo, Colorado:

Dear Sir—In reply to your inquiry of the 10th inst, would say: Section 790, Mills' Ann Stats., provides: "In case of a vacancy occurring in the office of county commissioner, the governor shall fill the same by appointment, and the person appointed shall hold the office until the next general election, or until the vacancy be filled by election according to law."

Section 807, Id., provides: "Every person appointed county commissioner shall hold his office until the general election, and until his successor shall be qualified."

In view of the foregoing provisions of the law, the term of a county commissioner who has been appointed to fill a vacancy, runs until the general election following his appointment, and his successor, when elected, may take possession of the office as soon as he has qualified therefor.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE PARDONS.

A pardon obtained by fraud is void, but it is considered as a deed and the governor cannot revoke it after its delivery. It may be set aside by the court.

Attorney General's Office.
Denver, Colo., November 18 1893.

J. S. Appel, Esq., President of Board of Pardons:

Sir—In reply to your letter of the 11th inst. I submit the following:

A pardon obtained by fraud or deceit is void, and the convict can be remanded. The pardon, however, cannot be revoked by the governor. It is considered as a deed, complete on delivery. But it can be set aside by the court.

The proper proceeding in the premises is to cause a bench warrant to be issued from the court in which the conviction was had, for the arrest of the convict, and a rule entered requiring him to show cause why he should not be remanded to the peni

tentiary. This will bring up the question of the fraud in obtaining the pardon, as the defendant in seeking to discharge the rule will plead his pardon—and this opens the issue of fraud to be tendered by the district attorney. Upon the hearing, if the fraud is made to appear, the rule nisi will be made final, and the prisoner returned to the penitentiary under the order of the judge.

I believe that the warden of the penitentiary or the sheriff of the county where the defendant was convicted, or any peace-officer, would be authorized in rearresting the prisoner on view, and in incarcerating him, pending the proceedings in the district court.

I recommend that you communicate at once with the district attorney of the proper district in reference to any case that may have been tried in his district.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE COMPENSATION OF COUNTY SUPERINTENDENTS OF SCHOOLS.

County superintendents of schools will be allowed compensation for attending the state association of county superintendents, provided the attendance at the meeting of the state association was by order of the state superintendent of public instruction.

Attorney General's Office.

Denver, Colo., November 22, 1893.

Hon. D. C. Fleming, Superintendent Public Schools,
Sterling, Colorado:

Dear Sir—In reply to your communication of recent date, relative to per diem and mileage of county

superintendents while attending state association of county superintendents, would say that such matters are covered in the case of Smith vs. Commissioners of Jefferson county, 10th Colo., 17. When the above case was decided the same provision as to compensation of county superintendents obtained as at present, except, perhaps, the present law is more liberal, having no limitataion according to the number of regularly organized public schools in the county.

As to the duties of county superintendents, the court in the case above cited say: "* * * The provisions of the statute vest in the county superintendent of schools a large discretion as to the services necessary to be performed by him in the discharge of his official duty * * * . Where a question of discretion is involved, neither the discretion of the county commissioners nor that of the court can be substituted for the discretion vested by the statute in this officer. * * * While honestly administering the affairs of his office, his discretion and judgment must determine the services necessary to be rendered in furtherance of the interests of the schools of his county, and not the discretion or judgment of the county commissioners or the courts."

In view of the above opinion of our supreme court, and from other expressions contained in the case, I think your charge for attendance upon the state association of county superintendents a proper one, and the county commissioners should allow the same, provided the attendance at the meeting of the state association was by order of the state superintendent of instruction, under the provision of the statute which requires the county superintendent "to obey the legal instructions of the state superintendent."

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE PAYMENT OF PRINTING ANNUAL REPORT OF WARDEN OF STATE REFORMATORY.

The printing of the annual report of the warden of the state reformatory must be paid for by the state out of money appropriated for that purpose by the general appropriation bill.

Attorney General's Office.
Denver, Colo., November 27, 1893.

Hon. J. G. Berry, Warden State Reformatory, Buena Vista, Colorado:

Dear Sir—In reply to your communication of recent date, relative to printing of your annual report, would say that the general appropriation bill passed by the ninth general assembly (sess. laws 1893, pp. 36 and 37) provides the sum of thirty-three thousand dollars for the printing of several matters, among which are "reports of state officers, departments and state institutions." I think your annual report would properly come under the above designation, and should be paid for out of the fund therein provided.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF COUNTY ASSESSORS.

The compensation of county assessors in counties of all classes, except the first and second, is left entirely within the discretion of the board of county commissioners, provided they do not exceed the limit of seven dollars per day, and a total of twenty-five hundred dollars per annum.

Attorney General's Office.
Denver, Colo., November 28, 1893.

Hon. J. C. Scott, County Assessor, Sterling, Colorado:

Dear Sir—In reply to your communication of recent date, relative to payment of the annual dues of $5.00 to the county assessors' state association, by the board of county commissioners, would say there is no law requiring the board of county commissioners to pay any sum of money whatever to said association. If the dues are paid at all, the county assessor must pay them. Compensation to the county assessor for services performed, and the payment of an annual fee to the assessors' state association are entirely different propositions. In all counties, except those of the first and second classes, the board of county commisisoiners may allow county assessors a sum not to exceed seven dollars per day, for each day actually employed for the county, provided such compensation does not exceed twenty-five hundred dollars per annum. The compensation of county assessors is left entirely within the discretion of the board of county commissioners, provided they do not exceed the limit of seven dollars per day, and a total of twenty-five hundred dollars per annum.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE MILEAGE IN TRANSPORTING PRISONERS.

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1. In transporting prisoners, mileage is only allowed one officer and no mileage can be charged upon the prisoners or guards accompanying the officer transporting them.

2. In addition to mileage, the officer is allowed actual expenses necessarily incurred.

Attorney General's Office.

Denver, Colo., November 28, 1893.

Hon. H. W. Potter, Sheriff, Otero County, La Junta, Colorado:

Dear Sir—In reply to your communication of recent date, relative to mileage allowed the sheriff for the transportation of prisoners, would say: In section 4, ses. laws 1891, p. 205, in re sheriff's fees, we find the following words: "*Provided*, That actual and not constructive mileage shall be allowed in all cases * * * ." Again, on page 207, same section, in re transporting prisoners: "For transporting prisoners, besides actual expenses necessarily incurred, per mile, in counties of the first class, ten cents; second class, twelve and one-half cents; third class, fifteen cents; fourth class, twenty cents; fifth class, twenty cents;. Provided, That such mileage shall be only by one officer, and no mileage shall be charged upon the prisoner or guards attending the officer in custody of the prisoners."

From the above it will be seen that it matters not how many prisoners are taken at one time, nor how many guards attend the officer transportating them, mileage is allowed to only one officer, together

with actual expenses necessarily incurred. No mileage must be charged upon prisoners or extra guards.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STATE TAX LEVY.

1. The legislature can constitutionally authorize the board of equalization to levy the tax to raise a fund for the payment of the interest on the capitol building bonds. In fixing the rate, the board does not exercise a delegated legislative power. The rate is a mere matter of computation, and in ascertaining it the board acts in a ministerial capacity.

2. A rate fixed by the board in pursuance of legislative direction is of as much dignity as if fixed by the legislature itself.

3. No greater rate for state purposes can be levied or extended than four mills on the dollar.

4. The four mills levy must be held to cover all taxation, whether for current expenses of government, interest on bonded indebtedness, or other purposes.

5. A tax to raise money to pay interest on a debt created to erect public buildings is not independent of legislative appropriations or tax levies. It is controlled by section 11, article X. of the constitution. It must be computed along with other rates, and the sum of the whole must not exceed four mills on the dollar.

6. The support of state institutions mentioned in the constitution is not of more consideration than the support of state institutions founded by act of the legislature in pursuance of powers granted by the constitution.

7. The support of the three departments of the state government and the interest on the public debt have a constitutional preference that must be protected.

8. The assessors must disregard any attempt to establish a levy of a greater rate than four mills on the dollar.

Attorney General's Office.
Denver, Colo., November 29, 1893.

Hon. William Williams, County Assessor, Montrose, Colo.:

Dear Sir—In response to your letter of inquiry of date 29th ult., concerning the extension of the taxes, I submit the following :

The general apropriation act for the ordinary and general expenses of the state government is passed by each general assembly. Its contents are prescribed by section 32, article V., of the constitution.

The tax for the support of the state mute and blind asylum was first provided for by the act of 1877.

G. L., p. 657; G. S., p. 734; Mills' Ann. Stats., Sec. 3256.

That act provided for the levy and assessment "in each year" of a tax of one-fifth of a mill on the dollar, limiting the sum to be applied to the support of the mute and blind asylum to $7,000, the surplus collected under the levy to be paid into the general fund of the state. This appropriation of one-fifth of a mill falls within the class of "continuing appropriations," referred to by the supreme court in a late decision.

In re Continuing Appropriations, Pac. Rep., Mar. 9, 1893.

The tax for the support of the state agricultural college was first provided for by the act of 1877.

G. L., p. 88, Am. 1879; Sess. Laws, p. 158; G. S. p. 122; Mills' Ann. Stats. Sec. 36, p. 406.

This is also a continuing appropriation.

The tax for the support of the state school of mines was first provided for by the act of 1891.

Sess. Laws, p. 220; Mills' Ann. Stats., Sec. 4080.

This is also a continuing appropriation.

The tax for the support of the state insane asylum was provided for by the act of 1879.

Sess. Laws, p. 89; G. L., p. 689; Mills' Ann. Stats., Sec. 2974.

This is also a continuing appropriation.

The tax for the inspection of stock was provided for by the act of 1888.

Sess. Laws, p. 236; G. L., p. 925; Mills' Ann. Stats., Sec. 4324.

This is also a continuing appropriation.

The tax for the support of the university was first provided for by the act of 1877.

G. L., p. 923; G. L., p. 1010; Mills' Ann. Stats., Sec. 4602.

This is also a continuing appropriation.

The tax for the support of the state normal school was first provided for by the act of 1891.

Sess. Laws, p. 338.

This is also a continuing appropriation.

This last act also re-enacts the provisions for the support of the agricultural college, the state school of mines and the institute for the mute and blind, and is also the last expression of the legislative will regarding taxation for these last four named institutions.

The special tax for the benefit of the university of Colorado was provided for by the act of 1893.

Sess. Laws, p. 465.

This is to be levied for the years 1893 and 1894 only.

The tax to raise the interest fund for the capitol building bonds, for the collection of which the state board of equalization provided a levy of five-thirtieths of a mill on the dollar, at their meeting of September 13, 1893, was created by the acts of 1883 and 1891, and the vote of the people thereon, as provided by section 5, article XI., of the constitution.

Sess. Laws 1883, p. 40; Id. 1891, p. 49.

The foregoing is an abstract of the acts of the state legislature upon the questions presented by your letter—territorial acts are not therein referred to.

On said 13th of September, the said board passed the annual levies for the year 1893. Following is a copy of the minutes of that meeting:

State of Colorado, Executive Office.
Denver, Colo., Wednesday, Sept. 13, 1893.

The state board of equalization met pursuant to adjournment. Present: Lieutenant Governor Nichols, Secretary of State McClees, Auditor Goodykoontz and Treasurer Nance.

The minutes of previous meeting were read and approved.

On motion of Secretary of State McClees, seconded by Treasurer Nance, it was ordered that the levy for state purposes for the year 1893 be and is hereby fixed as follows, to-wit:

For General Revenue.....	2 8-30	mills	on	the dollar.
" Mute and Blind.....	1-6	"	"	"
" University	1-5	"	"	"
" Agricultural College..	1-6	"	"	"
" School of Mines.....	1-6	"	"	"
" Insane Asylum	1-5	"	"	"
" Stock Inspection	1-15	"	"	"
" Capitol Building	1-2	"	"	"
" Normal School	1-6	"	"	"
" University, special	1-10	"	"	"

Messrs. Nichols, McClees, Nance and Goodykoontz voting in the affirmative.

On motion of treasurer Nance, seconded by auditor Goodykoontz, it was ordered that five-thirtieths of one mill in excess of the general levy be and the same is hereby levied upon and directed to be collected out of and from each and every dollar of the taxable property of this state for the year 1893, to raise a fund sufficient in amount to fully discharge the half-yearly interest accrued and accruing on the capitol building bonds.

Messrs. Nichols, McClees, Nance and Goodykoontz voting in the affirmative.

On motion duly seconded, the board adjourned to meet Thursday, September 14, 1893, at 10 o'clock a. m.

D. H. NICHOLS,
Acting Governor.

Attest: NAT. NATHAN,
Secretary.

It appears from this record that the attorney general was not present, but his absence did not affect the legality of the proceedings, as the meeting was prescribed by statute. In such cases a majority of the board can lawfully act.

The first question that presents itself is, as to whether the legislature transcended its powers when it directed the board to levy this last tax.

Section 15, art X., of the constitution provides as follows:

"There shall be a state board of equalization consisting of the governor, state auditor, state treasurer, secretary of state and attorney general. * * * The duty of the state board of equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the state," * * * and "to perform such other duties as may be prescribed by law."

The supreme court has recognized validity of the statutes conferring the power to assess railroad property on this board.

Gen. Stat., 2847; Carlisle vs. Pullman P. C. Co., 8 Colo., 320.

This power, were it not for that act, would have remained with the county assessors, where it was originally vested by the constitution. By that act of the legislature in the exercise of a constitutional grant of power, it was transferred to the state board of equalization. The supreme court in deciding upon the validity of the statute, based its decision on the clause last cited from sec. 15, art. X., of the constitution.

If, then, the legislature is empowered by the constitution to pass an act directing the board of equalization to assess railroad property, it can also pass an act authorizing the board to levy the tax for the interest on the capitol bonds, as they did in 1883 and in 1891.

It is true the supreme court has said that the legislature itself cannot assess any class of property, and that such assessment must be done by the proper officer.

Taxation of Mining Claims, 9 Colo., 635.

It is also true that the text writer highest in authority upon these questions has said: "The legislature, with the utmost propriety, may provide for a * * * state board of audit, whose adjudications against the state shall be final upon it; and may direct that the amounts awarded shall go into the general levy for the year * * * ; but to leave to * * * any state officer or board the power to determine whether a tax should be levied for the current year, or at what rate. * * * All this prescribes no rule and originates no authority. * * * This is clearly incompetent. The legislature must make the law, but it may prescribe its own regulations regarding the ministerial agents that are to execute it."

Cooley Con. Lim., 2nd Ed., pp. 62-63.

As shown above, the levy of the last mentioned tax is made by the board. The rate is not specifically fixed by the acts; but no levy upon any particular class of property is suggested in this case. The levy is to be made upon all the taxable property in the state. Neither does the legislature authorize the board, by the acts in question, to fix any specific rate. The rate itself is a mere matter of computation. It is fixed by the terms of the capitol bonds and coupons. Each bond shows on its face that the state is obligated to pay a certain sum of money at a certain time to the holder. Each coupon shows on its

face that a certain amount of interest on a certain bond is due at a certain time. Hence, the board of equalization, in order to determine the rate of this taxation, which shall be fixed in any year, has only to compare the interest falling due on that year with the taxable wealth of the state. And the same calculation is to be made when it becomes necessary to raise a sum to meet the principal of the bonds. Hence, their action in the premises is only ministerial, and the acts of 1883 and 1891 are not obnoxious to the objections presented by the authorities last cited.

Therefore, the state board of equalization, when it prescribes a rate of taxation in any year for the purpose of raising this interest fund, lawfully carries out the will of the legislature, which has acted in the premises under constitutional warrant. When it fixes this rate, enters it upon its minutes, and duly certifies its action to the proper officers of the several counties, its action becomes as binding upon all the citizens of the state as if the specific rate had been prescribed by the legislature itself. In other words, there is no difference in dignity between a rate so levied and, for instance, the one-sixth of a mill levied for the agricultural college by the legislature itself, or any of the other statutory levies for the state institutions.

Referring to the acts fixing the annual rates to be levied for the support of the state institutions, the supreme court say: "These laws remain in force and must be regarded as standing levies of the rates prescribed, and as authorizing an extension of the taxes therein provided for."

People ex rel., Thomas vs. Scott, 9 Colo., 422.

The same court lay down the proposition that neither the legislature nor any officer or board can lawfully levy or collect a tax for state purposes exceeding the rate of four mills on the dollar, unless

the question is submitted to a vote of the people, and by them decided in the affirmative.

Id. and In Re Appropriations, 13 Colo., p. 316.

Hence, where an appropriation is continuing, no further annual appropriation by the legislature is necessary to authorize the state board of equalization to levy such tax for state purposes. They go on and make the levy, if there is any statute in force authorizing it, without regard to the date of its passage. Hence, all the taxes certified to by the state board of equalization at its meeting on September 13th last, must be extended by you, unless it shall appear that they were otherwise not authorized by law.

The adoption of an amendment to the constitution, submitted by the eighth general assembly (Sess. Laws 1891, p. 90), has changed the effect of sec. 11, art. X. As the constitution now stands, the rate of taxation, for state purposes, shall never exceed four mills on the dollar; and since four and five-thirtieths mills have been certified to you, one or more of the rates have been levied without authority of law. The aggregate of the rates of taxation for general revenue and state institutions for the year 1893, as certified to you by the state board of equalization, is exactly four mills. After adopting these rates by a vote which is recorded as shown above, the board, by a further resolution, adopted and levied a rate of five-thirtieths of a mill for the interest on the capitol building bonds. This levy was likewise certified to you.

There can be no mistaking the effect of the last mentioned amendment of the constitution.

The board of equalization has certified to you a list of rates, which aggregate a greater taxation than is permitted by the constitution of the state.

The first ten of these rates are provided by the statutes which I have cited in the first part of this opinion. They are levied for the support of the state

government and the institutions expressly provided for by the constitution, or by statutes enacted in the exercise of powers conferred on the legislature by that instrument. The university, agricultural college and school of mines are specifically named in sec. 5, art. VIII., of the constitution, and those for the benefit of the insane, blind, deaf and mute are so named in sec. 1 of the same article; and the last section mentions "such other institutions as the public good may require;" and says they "shall be established and supported by the state."

The institutions first mentioned are specifically named in sec. 5, because they were in existence when the constitution was adopted; but sec. 1 makes it plain that the convention understood that the growth of the state would require other institutions, and the intention is equally plain to confer upon the legislature the power to "establish and maintain them."

Claims for the support of the state institutions are of the same dignity, whether these institutions were in existence at the time the constitution was adopted, or have been since established by the legislature under its authority. They all have received constitutional sanction.

We will now examine into the question of the relative dignity of the class of levies last referred to, and that for the raising of a fund for the payment of the interest on the capitol building bonds, which is the last in the list certified.

The list aggregating more than four mills, and all being levied by the legislature or its authority, it is plain that it becomes the duty of every officer, whose functions are concerned with the levy, collection and disbursement of the money accruing to the state, to do no act in furtherance of any plan which contemplates a violation of the interdict of the constitution.

In Re Appropriations, 13 Colo., p. 326.

And the supreme court has indicated that the duty of the clerk (who, at that time, had in charge

the duty of extending the taxes) is to change the rate directed to be levied beyond the constitutional limit to a rate that will fall within that limit.

People ex rel., Thomas vs. Scott, supra, p. 435.

It was contended by the relator in the case last cited, that a later act, directing a general levy to be made, which, when taken together with former levies for taxes for the state institutions, would amount to more than four mills, did, by implication, repeal the acts so levying the taxes for the state institutions. But this idea was repudiated by the court. The court say: "No reference is made therein (the later act) to the acts prescribing the rates levied for the state institutions." And the court maintained that these institutions must be sustained, and that the levies for them must stand, not being repealed expressly or by necessary implication by the later law. And they go further and say, in reference to the directions in the statute to the clerk to extend the several levies, "* * * if both directions were carried out literally, it would result in a state tax in excess of the constitutional limit, to-wit, five and seventeen-thirtieths mills on the dollar;" and then held it to be the duty of the clerk to cut down the general levy of four mills for state purposes by subtracting from it the aggregate of the levies for the state institutions, and then to extend these two classes in separate columns.

Id., pp. 433, 434, 435.

The effect of this decision is, apparently, that all general annual levies for the state expenses must be cut down so that when added to the levies for state institutions, the sum would not call for a levy of more than four mills. If applied to the present case it would mean that five-thirtieths of a mill must be deducted from the two and eight-thirtieths levied for general revenue, provided the levy for five-thirtieths for interest on the capitol bonds is allowed to stand.

It is difficult for me to apprehend the full nature of the reasons that induced the supreme court to decide, as it did in that case, that the clerk should "trim down" the general levy, in order that the levy for the state institutions might be preserved. The only reason I find advanced is that these levies for the state institutions had been fixed by the legislature, and there was no express repeal of any one of them. But in a later decision the court, referring to the appropriations and expenditures "necessary and proper for the support of the gevernment and its institutions in time of peace," say: "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 (art. X., sec. 2), though the rate of taxation therefor must not exceed the limitation specified in section 11 of the same article. 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 tax is optional."

In Re Appropriations, 13 Colo., 316.

And at page 327, id., we find the following language: "Considering the great care thus taken to secure and guard such appropriations, we cannot doubt that the ordinary expenses of the legislative, executive and judicial departments of the state are the expenses primarily intended to be provided for by sec. 2, art. X. It would be a deplorable condition of affairs, if, by making excessive appropriations, or by authorizing improvident expenditures, under

acts containing emergency clauses, the constitutional limit should be reached before the passage of appropriations indispensable for the support and maintenance of the several departments of the government whereby the latter appropriations should be rendered unconstitutional."

And at page 328 of the same case, the court say: " * * * that acts of the general assembly, making the necessary appropriations to defray the expenses of the executive, legislative and judicial departments of the state government for each fiscal year, including interest on any valid public debt, are entitled to preference over all other appropriations from the general public revenue of the state, without reference to the date of their passage, and irrespective of emergency clauses."

From these decisions it appears that, under no circumstances can the support of the three departments of state government be neglected. These must be maintained, or we fall into a state of anarchy; the government would perish, and its institutions and obligations with it.

But it also appears that the interest on the valid public debt must be protected to the same extent. That claim is classed by the supreme court with claims for the maintenance of the departments of the government. Hence, when the levy was made by the state board of equalization for five-thirtieths of a mill to pay the interest specified, the extension of a tax for that purpose became imperatively binding on the assessors of the various counties.

This ruling of the supreme court is sustained by reason and authority.

Any act that would have the effect to divert the revenue of the state to other purposes than the maintenance of the departments of government and the payment of its valid indebtedness, or to apply it to any purpose or institution to such an extent as to postpone the payment of the debt evidenced by the coupons of its bonds, would impair the obligation

of the contract made between the state and the holders of those bonds.

Hence, an attempt to do this by appropiating the revenue to other institutions by which it is consumed, is in violation of the constitution of the United States and ought to be disregarded. The supreme court has said that this debt, together with the necessary appropriations to defray the expenses of the executive, legislative and judicial departments of the state government, takes precedence of other appropriations, without regard to the date of their inception.

The next question is, whether you, as assessor, can so disregard it. If, as the supreme court has said, the clerks can reduce a levy of four mills for state purposes by deducting therefrom the rates for the state institutions—and that it is their duty to do so in a proper case—how can it be denied that it is within the power and is the duty of the assessors (who succeed to the functions of the clerk in this regard) to drop an entire rate or levy out of a list of several, if by so doing, the aggregate would be brought within constitutional limits? I can see no difference in principle between the two acts.

This reasoning would seem to lead us to the conclusion that one or more of the rates or levies for state purposes must be left out in the extension by you. But when we more critically analyze the decision of the court in People ex rel., Thomas, and compare it with the principles laid down in In Re Appropriations, supra, we find that there is no real conflict between the two, and that your duty in the premises is made plain. Care must be taken to preserve the distinction between the general revenue of any particular year and the fund provided by the general appropriation act of that year. The latter is set apart from the former by the legislature and constitutes the particular fund, concerning which the supreme court has made the emphatic declarations hereinbefore quoted. As soon as the legislature

has ascertained from the estimates submitted to it by the auditor of state and from whatever other sources it may choose to consult, what the probable cost of maintaining the three departments of government will be for the next two years, it proceeds to formulate and enact a general appropriation law, the object of which is to constitute a fund for the purpose last mentioned. This fund is what the supreme court refers to when it characterizes it as "chief among the necessary appropriations." No appropriation made by the legislature, whether made prior or subsequent to this general appropriation act, can affect this fund. It stands above all others, not excepting the fund for the payment of the interest on the public debt. But the general fund, after a sufficient amount has been set aside to carry on the expense of the departments and pay the interest on the public debt, amounts to a very large sum of money. During this year it will amount to several hundred thousand dollars. From this fund special appropriations are to be satisfied; and when the board of equalization on the 13th of September last, fixed the rate of taxation for the general fund at two and eight-thirtieths mills, it was calculated, doubtless, that that rate added to the rate then required by law for state institutions, would make the sum of four mills on the dollar. But the board was not aware of the superior nature of the demands of the capitol building bonds; so that in adopting the rate of two and eight-thirtieths mills for the general fund, it exceeded the constitutional limit of four mills by five-thirtieths of a mill. The legislature had already appropriated one and twenty-seven-thirtieths for the state institutions; hence, in levying this amount of two and eight-thirtieths mills for the general fund, the board, who are required by the statute to fix the rate, exceeded the four mills limit.

The action of the board at that time, however, is valid up to the constitutional limit; and you must carry out the purposes of the law in the discharge of your duties to that extent.

Hence, I find that it is your duty, in extending the taxes for state purposes for 1893, to deduct five thirtieths of a mill from the rate of two and eight thirtieths mills certified for general revenue, so that all the rate to be extended will be as follows:

General Revenue.....	2 3-30	mills	on	the dollar.
Mute and Blind.....	1-6	"	"	"
University	1-5	"	"	"
Agricultural College ..	1-6	"	"	"
School of Mines	1-6	"	"	"
Insane Asylum	1-5	"	"	"
Stock Inspection	1-15	"	"	"
Capitol Building	1-2	"	"	"
Normal School	1-6	"	"	"
University, special	1-10	"	"	"
Int. Capitol B'l'dg Bonds	5-30	"	"	"

If the amount derived from the two and three-thirtieths mills rate for general revenue should prove insufficient to pay the ordinary expenses of the executive, judicial and legislative departments, within the legislative appropriations for each of the two fiscal years, special appropriations, payable out of the general revenue will have to be scaled down in the order of priority in point of time; but this is a matter to be hereafter determined by the proper state officials or the courts; likewise questions of priority as between special appropriations, payable out of the general revenue and levies based upon legislative rates of taxation for state institutions, if such question should ever arise.

EUGENE ENGLEY,
Attorney General.

IN RE INCORPORATION OF TOWNS AND PUBLISHING NOTICE THEREOF.

1. The statute is sufficiently complied with if the notice of the county clerk, in the matter of incorporating towns, is published once in a newspaper published in the county.

2. A justice of the peace having been elected to fill a vacancy, may qualify and enter upon the duties of the office at once.

3. One having been elected for a full term and having qualified therefor, will take the office on the second Tuesday of Jaunary next after the election.

Attorney General's Office.
Denver, Colo., December 6, 1893.

W. S. Bayles, Esq., Argular, Colo.

Dear Sir—In reply to your communication of recent date, would say, in the matter of publishing the notice in incorporating a town after the petition has been duly presented to the county court, the court appoints five commissioners whose duty it is to call an election of the qualified electors residing within the territory embraced within the limits described and platted. The notice of election is to be published in some newspaper, published within said limits, if any there be, for three successive weeks, and by posting notices in five public places within said limits. If there is no newspaper within said limits, then the notice shall be given by posting eight notices within the same; said posting and first publication to be not less than three weeks preceding the election.

Mills' Ann. Stats., sec. 4365.

After the election has been held and a majority of the votes cast are in favor of incorporating, the clerk of the county court shall immediately on the return of the commissioners being filed in his office,

give notice of the result by publication in a ne paper, or if no newspaper be published in the cou by posting in five public places within the lin of the proposed city or town.

Mills' Ann. Stats., sec. 4366.

The statute expressly states in the publicat of the notices of election, that the said notices sh be published for three successive weeks, while in case of the notice of the clerk of the county co after the election has been held, it is silent as to number of times the said notice shall be publish We must infer from this that the legislature at time the act was passed, intended to make this d tinction, and in the case of the clerk's notice m tioned, I deem it to be sufficient to meet the requ ments of the statute if it is published only once.

In the matter of the justices of the peace, I t it from your communication that the precinct is titled to two justices of the peace. If the elect was regular, the justice of the peace elected to a vacancy may qualify and enter upon the duties the office at once, and the one elected for a full te of two years will enter upon the discharge of duties of that office on the second Tuesday of J uary next after the election, upon being qualif therefor.

Respectfully,

EUGENE ENGLEY,

Attorney General

IN RE EXPENSES OF COUNTY GOVERNME

If the appropriation for paying the "ordinary expenses" of county has been exhausted, and the commissioners have vided a contingent fund, warrants may be issued upon against said contingent fund for the payment of expenses cre in running the county government.

Attorney General's Office.
Denver, Colo., December 6, 1893.

Hon. Walter A. Garrett, County Clerk, Georgetown, Colorado.

Dear Sir—In reply to your communication of recent date, relative to issuing county warrants after appropriation has been exhausted, would submit the following:

Section 1 of an act in relation to county government (sess. laws 1891, p. 111), provides that "The fiscal year of each county in the state of Colorado shall commence on the first day of January in each year. The board of county commissioners of each county in this state shall, within the last quarter of each fiscal year, and at the same time that the annual levy of taxes is made, pass a resolution to be termed the annual appropriation resolution for the next fiscal year, in which said board shall appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such county for the next fiscal year, and in such resolution shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

Section 2 provides that neither the board of county commissioners, nor any officer of the county shall add to the county expenditures in any one year, anything over and above the amount provided for in the annual appropriation resolution of that year, except as is herein otherwise specially provided. The proviso referred to in this section pertains to improvements, the necessity of which has been caused by some unforseen contingency happening after the appropriation has been made; but even in this event there must be money in the treasury unappro-

priated, belonging to the proper fund out of whic payment for such an improvement can be made.

Section 3 provides that no contract shall be mad and no liability against the county created, unles an appropriation covering the same has first bee provided.

Section 4 provides for the levying of the tax an in this section we find a provision for the levyin of a tax in order to create a contingent fund to mee unforseen contingencies and casualties.

Section 5 provides for the manner in which th treasurer shall keep the accounts, and also that i shall not be lawful to use the moneys belonging t any fund, for the purpose of paying warrants draw or which properly should have been drawn upo some other fund.

The above and foregoing, together with the ac of 1893, referred to by you (sess. laws, 1893, p. 100 govern the collection and expenditure of revenue i counties. The latter act was passed for the purpos of creating a special fund by means of which an unliquidated and unpaid county warrants or orde outstanding might be redeemed. It does not creat a fund against which warrants and orders may b issued, but is for the purpose of paying those whic have been issued, prior to the creation of the fun It is one means of funding the outstanding oblig tions of the county.

The act of 1891 above quoted is very explicit i its provisions and leaves no room for doubt as t the intention of the legislature enacting it. Th sum and substance of its meaning is expressed in it title: "To require the affairs of the counties of th state to be conducted from the revenues derived fro taxation, and to prevent the expenses of any count from exceeding its revenues." The "ordinary e penses" of the county must be provided for so tha the wheels of government may be kept in motio but in all cases, expenditures must be held withi

the revenues. If the appropriation for paying the "ordinary expenses" of the county has been exhausted and the commissioners have provided for a contingent fund, I think that warrants may be issued upon and against said contingent fund for the payment of expenses created in running the county government.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TERM OF JUSTICES OF THE PEACE.

A justice of the peace may perform the duties of his office until his successor duly qualifies.

Attorney General's Office.

Denver, Colo., December 7, 1893.

C. H. Huston, Esq., Justice of the Peace, Towner, Colorado.

Dear Sir—In reply to your communication of recent date, would say, the constitution of Colorado provides that "every person holding any civil office under the state, or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified * * *." Const. art. XII., sec. 1.

Section 920, Mills' Ann. Stats., provides that "When the term of office of any sheriff, coroner, county judge, justice of the peace, constable, county clerk, assessor, county treasurer, county surveyor, or other county officers shall expire, as now provided by law, it shall be lawful for such officer, whether

re-elected or not, and his deputies, to continue to pe form all the duties of such office until his successo shall be duly qualified as required by law.

Your communication does not indicate whic of the justices-elect was elected as your successo but the law authorizes you to perform the duties o your office until your successor has duly qualified.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE VACANCY IN OFFICE OF COUNTY COM MISSIONER.

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1. If a security withdraws from the bond of a county co missioner, the commissioner must give a new bond in the san manner as provided in the case of other county officers, to b approved by the judge of the district court, and it must be do within ten days.

2. The failure of such officer to give a new bond as requir by statute, creates a vacancy in office which may be filled b appointment.

3. A vacancy in office may exist without any judicial determ nation of the fact.

Attorney General's Office,
Denver, Colo., January 5, 1894.

Hon. Davis H. Waite, Governor of Colorado.

Dear Sir—In response to your inquiry as t whether a vacancy exists in the board of county co missioners of Rio Grande county, caused by the fai ure of David O. Darnell, if he did so fail, one o said commissioners, to file a new bond upon the wit

drawal of Charles Ydren, as a surety, from the bond theretofore given, approved and filed, I submit the following:

The facts appear to be, viz: That on the third day of November, 1891, Darnell was elected one of the county commissioners of said county; on the 26th day of December, 1891, he took the oath of office; on the 31st day of December, 1891, his official bond was approved by the judge of the twelfth judicial district of the state of Colorado; on the second day of January, 1892, said oath and bond were filed in the office of the clerk and recorder of said county; on or about the fourteenth day of November, 1892, notice of Charles Ydren, a surety, that he was unwilling longer to be security on said bond, was filed in the office of said clerk; on or about the fifteenth day of November, 1892, said clerk notified Darnell of the said action on the part of Ydren; on or about the —— day of November, 1892, John Ewing, jr., signed said bond at the instance and request of Darnell, the intention being, it is presumed, that Ewing should become a surety in the place of Ydren; on or about the 27th day of November, 1893, fourteen citizens and taxpayers of said county, by petition, represented to his excellency, Davis H. Waite, governor of Colorado, that a vacancy existed in the board of county commissioners of said county, caused by the failure, so it was alleged, of said Darnell to file a new bond, upon notice by said clerk of the action of Ydren, and requested the governor to appoint Edward H. Shotwell to fill the alleged vacancy, said petition being accompanied by an additional petition, subscribed and sworn to, wherein the notices of Ydren and said clerk were referred to, a vacancy alleged, and certain sections of the statutes cited, certified copies of said notices being annexed to said petition; on or about the —— day of November, 1893, two other sureties gave notice that they were unwilling longer to be security on said bond, which notices were filed in the office

of said clerk and Darnell duly notified; on the fourth day of December, 1893, Darnell gave a new bond which was approved by the judge of said judicial district, and filed in the office of said clerk on the day last mentioned.

The foregoing, in brief, is a fair statement of the whole record, insofar as this office is now advised. I have endeavored, before writing this opinion, to obtain all the essential facts to the end that the law, as I conceive it to be, may be strictly and coldly applied, regardless of the personal desires of interested parties.

Does a vacancy exist in said office, and, if so, when did the vacancy occur?

In the application of the law to the precise facts, the principle must be kept in view that a vacancy in office is abhorrent to law, and the courts will declare against the existence of a vacancy, whenever they can, by any logic of reason, fairly conclude from all the circumstances, and a just application of legal principles, that no vacancy exists. If there be any constitutional or statutory provisions declaring what shall constitute a vacancy in office, the precise facts must fall within the reason as well as a possible construction of such provisions. An officer de jure, discharging the duties of an office wherein a vacancy exists, would be an absurdity in contemplation of law, and such a condition cannot be recognized in reason—for law is supposed to be the perfection of reason in the application of accepted rules of interpretation and construction. A person who is not an officer de jure may, locum tenens, perform the duties of an office wherein a vacancy exists until such vacancy has been filled by election or appointment, and the official acts of such person will be valid, as a general rule, as to the public. If Darnell is an officer de jure, no vacancy exists. If he is not an officer de jure, a vacancy exists.

Art. XIV., sec. 9, of the constitution provides: "In case of a vacancy occurring in the office of county

commissioner, the governor shall fill the same by appointment * * * *."

Sec. 790, Mills' Ann. Stats., reads: "In case of a vacancy occurring in the office of county commissioner, the governor shall fill the same by appointment, and the person appointed shall hold the office until the next general election or until the vacancy be filled by election according to law."

Sec. 924, Mills' Ann. Stats., says: "Every county office shall become vacant on the happening of either of the following events before the expiration of the term of office:

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Sixth—His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath and bond within the time prescribed by law.

* * * * * * * *

The statute last above quoted was enacted in 1877.

In 1868 the territorial legislature enacted the following sections (Mills' Ann. Stats., secs. 3305, 3306, 3307, 3308), which are still in force.

Sec. 3305. "Any person who now is or may hereafter become the security of any sheriff, coroner, county judge, justice of the peace, county clerk, constable, county treasurer, county surveyor or other county officer, shall have the power of releasing himself from further liability as such security for such officer, by filing in the office of the county clerk a notice that he is unwilling longer to be security for such sheriff, coroner, county judge, justice of the peace, county clerk, assessor, county treasurer, county surveyor or other county officer; * * *."

Sec. 3306. "When any notice shall be filed as aforesaid, with the county clerk, he shall immediately give notice thereof to such sheriff, coroner, county judge or other county officer, as the case may be, who shall thereupon file other security, to be approved by the board of county commissioners, if the same shall then be in session, or if a session thereof be commenced within ten days after notice shall have been given; but if said board be not in session, nor a session thereof to be commenced within ten days thereafter, then the said sheriff, coroner, county judge, justice of the peace or other county officer, as the case may be, shall within ten days file said bond with the county clerk; which said clerk shall in such case, judge of the sufficiency of said bond subject, however, to the decision and approval of said board of county commissioners at their meeting thereafter, as in other cases; * * *."

Sec. 3307. "If said clerk of the district court, master-in-chancery, sheriff, coroner, county judge, justice of the peace, constable, county treasurer, assessor, county clerk, county surveyor, or other officer, as the case may be, shall not in the time and manner aforesaid, file bond, to be approved as aforesaid, the said office shall become vacant, and the said vacancy shall be filled in manner as is now provided by law."

Sec. 3308. "If a new bond shall be given by any officer, as provided in the foregoing sections of this chapter, then the former securities shall be entirely released and discharged from all liability incurred by any such officer, in consequence of business which may have come to hand from and after the time of the approval of the said new bond, and the securities of the new bond are thereby declared to be liable for all official delinquencies of said officer, whether of omission or commission, which may occur after approval of the new bond as aforesaid."

Secs. 3310, 3311, 3312, of the same act, provide, among other things, that if any of such officers fail to give bond as required under the foregoing provisions, that he shall deliver to his securities forthwith, all books, moneys, etc., and that such securities may maintain replevin therefor; that if any such officers fail to deliver any such money, property, effects, etc., to their securities or shall act or attempt to act in the performance of the duties of such office, after failing to give a new bond, such officer shall be deemed guilty of a misdemeanor, etc.; also, that the provisions hereinbefore referred to shall not operate as a release of the securities of any such officers, for liabilities incurred previous to the filing of a new bond, etc.

It is apparent from the language of art. XIV., sec. 9, of the constitution, and sec. 790 of Mills' Ann. Stats., supra, that in case of a vacancy occurring in the office of county commissioner, the power to fill the same is vested in the governor and he alone can exercise that power until the next general election.

Sec. 924, supra, declares that every county office shall become vacant when the incumbent refuses or neglects to renew his official bond or deposit such bond "within the time prescribed by law." In the "sixth" subdivision of sec. 924, supra, relating to new bonds, the happening of either one of two contingencies or events may operate to create a vacancy upon a "refusal" or "neglect" of an officer, viz: to "renew" or "deposit" such bond within the time prescribed by law.

While sec. 924, supra, declares that every county office shall become vacant when the incumbent refuses or neglects to renew or deposit such bond "within the time prescribed by law," nevertheless, a statutory power must exist, requiring a county commissioner or any other officer to renew or deposit such bond, and fixing the time within which such bond must be renewed and deposited, that a vacancy may exist, by operation of statute, upon the failure

of such officer; otherwise, a judicial determination of the question would be the only avenue to a remedy for the protection of the public.

Secs. 3305, 3306, 3307, 3308, 3310, 3311, 3312, supra, relative to the release of sureties and the requirement of new bonds, embrace all county officers, including county commissioners. The words "other county officers" embrace every county officer not specifically enumerated in said sections, the legislative intention being to include all county offices then existing or that might thereafter be created, and all such officers as were then or might thereafter be required by statute to give official bonds.

At the time this statute was enacted, in 1868, no bonds were required of county commissioners.

In 1881 county commissioners were first required to give bond, the legislative act being in force on and after May 30 of that year. Said act required that the bond be approved by the judge of the district court, filed by the clerk of the county and recorded by him in the records of said county.

Secs. 3305, 3306, 3307, supra, and the act of 1881, supra, must be construed in pari materia.

As above stated, said secs. 3305, 3306 and 3307, in enumerating the officers who fall within their provisions, all use the phrase "other county officer." This can only refer to other county officers whose offices might thereafter be created by statute, or other county officers whose offices were then in existence, and might thereafter be required to give bond. Hence, as soon as the act of 1881 required all county commissioners to give bond, the effect of the prior law upon the bond to be given by the commissioner, is the same as the effect of the same law upon the bond of every other officer specifically mentioned in that law. If a security withdraws from his bond, a county commissioner must proceed to give a new one in the same manner as is provided in the case of

other county officers, to be approved by the judge of the district court, and it must be done within ten days as provided in sec. 3306, supra.

There is no merit in a possible contention that the provisions of secs. 3305, 3306 and 3307, supra, alone apply to the approval of new bonds of certain officers, by boards of county commissioners when in session, or temporarily by county clerks during the interim of such sessions. The time within which the new bond of any county officer must be filed with the county clerk is definite and certain, and is fixed by sec. 3306, supra, as a period of ten days, and the fact that the provisions of the act of 1881, requiring commissioners to give bond, designates the judge of the district court as the officer to approve such bond, does not exclude county commissioners from the operation of the provisions of said section 3306.

If a statute is valid it is to have effect according to the purpose and intent of the law-maker. The intent is the vital part, the essence of the law. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject and general purpose of the statute. The general rule is that the cardinal purpose or intent of the whole act, or acts in pari materia, shall control, and that all parts be interpreted as subsidiary and harmonious. They are to be brought into harmony, if possible. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals.

No new bond having been given by Darnell, within ten days after the receipt of notice that Ydren desired to be released, it must be held that a vacancy occurred in said office upon the expiration of the ten days.

The fact that Ewing signed the old bond, within ten days after the receipt of notice by Darnell, is merely the addition of a name to the bond and at

most makes him liable as if he had signed it when it was filed.

3 Bush. (Ky.), 41.

But in another case it was held that such a signature, after the filing of the bond, was unwarranted by law, and did not bind the additional surety for want of delivery.

32 Ark., 776.

The notice by Ydren that he was unwilling longer to be security on the bond of Darnell did not ipso facto release any one as surety thereon, or make it void and thereby create a vacancy. The bond would remain effective until a new one was given. And in this regard it is immaterial whether the sureties or any of the sureties are collectively worth the penalty of the bond. The vacancy occurred by reason that Darnell failed to perform a duty enjoined by statute, viz: to give a new bond within ten days after receipt of the clerk's notice.

The failure of an officer to give bond, required by statute, creates a vacancy in office which may be filled by appointment.

57 Cal., 620.

34 La., 273.

7 Kan., 330.

27 Ind., 496.

52 Miss., 665.

52 Ala., 66.

A vacancy in office may exist without any judicial determination of the fact.

4 Blackf., 116.

19 Ind., 354.

52 Ala., 504.

52 Miss., 565.

4 Wis., 777.

Darnell having forfeited the office by neglect to file a new bond within ten days, the vacancy caused thereby cannot be avoided by the new bond filed on the fourth day of December, 1893, more than a year after the vacancy commenced to run. The old bond is still in force. The new bond is merely cumulative, if it is worth anything at all.

The fact that no steps were taken during a period of more than a year to fill the vacancy by appointment, does not re-invest Darnell with the functions of a de jure officer. At the precise moment the vacancy occurred, Darnell changed from a de jure to a de facto officer, and so long as he continues to discharge the duties of the office, during the existence of the vacancy, he does so as a de facto officer or locum tenens.

No one is designated discriptione personae or discriptione officii in the statute to apprise the governor, as the appointing power, of the existence of the vacancy, and a petition of citizens or taxpayers at any time after the vacancy has occurred, is sufficient.

In view of the foregoing, I must hold that a vacancy exists in said office, that Darnell is discharging the duties thereof merely locum tenens, and that the governor may fill the vacancy by appointment.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE DISTRICT ATTORNEY'S FEES.

The legislative act approved April 20, 1891, amended sec. 7, of chapter XXXVIII., of the general statutes, as amended April 20, 1889, and established a new schedule of fees and fixed the annual compensation of district attorneys. This act is the last expression of the legislative will on the subject of fees and compensation of district attorneys, and must prevail wherever it conflicts with the act approved April 6, 1891.

Attorney General's Office,
Denver, Colo., February 9, 1894.

Hon. C. M. Campbell, Dep. Dist. Attorney, Boulder, Colo.

Dear Sir—In reply to yours of recent date, relative to compensation of district attorneys, and the suggestion of a conflict between the legislative acts of April 6 and April 20, 1891, I desire to say:

That prior to the passage of the acts in question, the law provided that district attorneys should receive from the state a salary of eight hundred dollars per annum, payable in monthly installments at the end of each and every month, together with certain fees, the fees to be paid by the several counties, wherein the cause was originally pending or services rendered, unless otherwise provided.

Secs. 1936, 1937, 1873, 699, 1471, Mills' Ann. Stats.

It will be observed that prior to the legislation of 1891, while the salary payable by the state was limited to eight hundred dollars per annum, and certain fees were allowed, the total compensation derived from both sources and added together was not limited by law to a specific sum. Owing to the inherent defects of the fee system, and the great abuses to which that system was subject prior to

1891, the legislature attempted to apply a remedy by the provisions of the act of April 6, of the last mentioned year. This law was entitled "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees, and to repeal all acts inconsistent therewith." It is commonly known as the "salary law." Whether all or how much of this act is germane to the subject expressed in the title, or whether any part of it is unconstitutional in that regard, is a matter not involved in this inquiry. Its provisions relate to compensation, per diem, mileage and traveling expenses as well as "salaries." A "salary" is a compensation but a compensation is not always a "salary." Certainly "mileage" and "traveling expenses" are not "salaries." Nor is per diem. While it would appear at first blush that the title of the act is narrow and misleading, a critical analysis, and reasoable construction, of the different provisions will probably disclose that they are attingent to the subject expressed in the title.

Sec. 2 of the act of April 6, 1891, provides, among other things, that the "annual compensation" of district attorneys in the several judicial districts of the state, including the salary paid by the state, shall be limited and regulated as follows: "In every judicial district presided over by one judge only, the district attorney shall receive in full compensation for his services, not to exceed the sum of four thousand dollars; and in every district presided over by more than one district judge, the district attorney shall receive, in full compensation for his services, not to exceed five thousand dollars." The grammatical construction as well as the punctuation of this clause of section 2, is awkward. It must be construed in pari materia with the last clause of sec. 1936, supra, and by reason of such construction, it appears that, under the provisions of said sec. 2 and said sec. 1936, the "annual compensation" of a district attorney in a judicial district presided over by one judge only,

would be a salary of eight hundred dollars per annum, payable by the state, together with the further sum of thirty-two hundred dollars, payable from the fees of the office, provided the fees amounted to that sum; and in judicial districts presided over by more than one judge, a salary of eight hundred dollars per annum, payable by the state, together with the further sum of forty-two hundred dollars, payable from the fees of the office, provided the fees amounted to that sum. The limitation runs to the total "compensation" of four thousand and five thousand dollars, respectively. The salary of eight hundred dollars is fixed and definite and subject to no diminution, but the additional part of the "compensation" is contingent and arises from the fees received. If the fees received, amount to less than thirty-two or forty-two hundred dollars, respectively, that part of the compensation is reduced pro tanto and to the specific sum of the fees. But, if any surplus derived from such fees should remain in the hands of the district attorneys after the payment of that part of their annual compensation, which is payable from fees, such surplus must be paid into the county treasury of the several counties in the manner provided by law.

Such was the condition of the statutory law, in regard to the compensation of district attorneys, when the act approved April 6, 1891, went into effect. There was no emergency clause in this act and it became operative ninety days after its passage. The last section of this statute provides that: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." But this act did not repeal or attempt to repeal the prior statute fixing the salaries of district attorneys at eight hundred dollars per annum, payable by the state, or to amend the same. It operated solely upon the fees of the office in fixing a limit to the sum of the compensation district attorneys should receive therefrom, and provided for the disposition of any surplus. It did not

change or attempt to change, by repeal or amendment, the statute of 1889 (Mills' Ann. Stats., sec. 1873), which established a schedule of fees. Section 7, of chapter XXXVIII., of the general statutes as amended April 20, 1889, remained in force.

The legislative act approved April 20, 1891, amended said sec. 7, of chapter XXXVIII., of the general statutes, as amended April 20, 1889, and established a new schedule of fees and fixed the annual compensation of district attorneys. Subdivision "Fifth" of sec. 1, of this act, provides that: "The annual compensation of each district attorney, inculding the salary paid by the state, shall not exceed the sum of four thousand dollars." This act like the one approved April 6, 1891, has no emergency clause. It is the last expression of the legislative will on the subject of fees and compensation of district attorneys, and must prevail wherever it conflicts with the provisions of the act approved April 6, 1891. As the law now stands, the annual compensation of every district attorney, regardless of the number of district judges presiding in the district or the class to which the district belongs, is four thousand dollars per annum, viz: A salary of eight hundred dollars per annum, payable by the state, and thirty-two hundred dollars, payable from the fees received under the schedule established by the act approved April 20, 1891, if the fees amount to that sum, and if there remains any surplus from such fees after the payment of said thirty-two hundred dollars, then such surplus must be paid into the county treasury of the several counties, within the judicial district in the manner directed by law. If the aggregate of the fees for any year amount to less than the sum of thirty-two hundred dollars, the compensation from that source will be reduced pro tanto to the specific total sum so received.

EUGENE ENGLEY,
Attorney General.

IN RE FERRIES.

Under the laws of this state, no exclusive franchise is given a ferry company so as to prevent the establishment of other ferries over the same stream. Nor does the law establish a territorial boundary of exclusion within which the first incorporated company shall have an exclusive privilege of operating a ferry. But vested rights over the particular course or line of the ferry cannot be interfered with.

Attorney General's Office,
Denver, Colo., February 14, 1894.

Hon. Nelson O. McClees, Secretary of State.

Dear Sir—In answer to your inquiry predicated upon the communication received by you from H. A. Spencer, in behalf of a certain ferry company, incorporated under the laws of Colorado, and relative to to matter of exclusive franchise, I desire to say:

That upon the precise facts presented to this office, the said ferry company is without legal or equitable remedy in the premises. Under the laws of this state, no exclusive franchise is given a ferry company over a water course so as to prevent other ferry companies establishing ferries over the same stream. Nor does the law establish a definite territorial boundary of exclusion as to subsequent incorporated ferry companies, and within which the first incorporated ferry company shall have an exclusive privilege of operating a ferry. Over the particular course or line of the ferry, from the initial to the terminal point on either bank of the stream, the prior and established corporate rights of a ferry company cannot be interfered with, and injunction would lie to prevent such injury.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE WEIGHTS AND MEASURES.

The weights and measures accepted and used by the government of the United States at the time when the provisions of chapter CXIV., of the general statutes of Colorado became a law, except as changed or modified by the provisions of that statute, constitute the lawful standard of weights and measures in this state. The provisions of this statute are mandatory as to the specific duties to be performed by the state treasurer, county commissioners and inspector of weights and measures, respectively.

Attorney General's Office,
Denver, Colo., February 14, 1894

Hon. Nelson O. McClees, Secretary of State.

Dear Sir—In response to your inquiry, based upon the communication to you by Hon. H. J. Danford, county clerk of Boulder county, relative to the law concerning weights and measures, I desire to say:

That the subject of inquiry, insofar as the law is concerned, is covered by the provisions of chapter CXIV. of the general statutes of Colorado. The weights and measures accepted and used by the government of the United States at the time when said legislative act became a law, except as modified or changed by the provisions of that statute, constitute the lawful standard of weights and measures in this state.

Under the provisions of sec. 4 of said act, it was made the duty of the state treasurer to procure as soon as possible from the proper department of the federal government, all necessary weights and measures for the use of the state, and as soon as received by him, to give public notice through two or more newspapers, for thirty days, to each and every board of county commissioners in the state, to obtain

copies or duplicates of said weights and measures. Whether or not the state treasurer has complied with the directions of the law in this regard, I am not advised.

The provisions of this statute are mandatory as to the specific duties to be performed by the state treasurer, county commissioners and inspector of weights and measures, respectively.

A compliance with the statute on the part of the state treasurer would seem to be a necessary prerequisite to set in motion the county commissioners, if he has not performed his duty under the provisions of sec. 4, supra.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE INSPECTOR OF COAL MINES.

If the use of safety lamps be necessary to the protection of the lives and health of coal miners in this state, the inspector of coal mines can enforce their use and compel a compliance with his orders on the part of the owners of coal mines, under the provisions of sec. 13, of the legislative act entitled "Coal Mines."

Attorney General's Office,
Denver, Colo., February 14, 1894.

Hon. Wm. Eickelberg, Deputy Inspector of Coal Mines.

Dear Sir—In response to your inquiry as to whether the inspector of coal mines can enforce the use of "safety lamps" in the coal mines of this state I desire to say:

That sec. 13, of the statute entitled "Coal Mines," provides that the inspector "shall direct and enforce any regulations in accordance with the provisions of this act, that he deems necessary for the safety and health of the miners."

The practical inquiry is usually what a particular provision, clause or word means. To answer it, one must construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part. A statute should be so construed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed. The presumption is that the law-maker has a definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if they have the intended effect, they will, at least, conduce to effectuate it. This intention affords a key to the sense and scope of minor provisions. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject matter and general purpose of the statute. Every part of the statute relating to coal mines must be so construed with reference to the purpose of the whole act as to effectuate, if possible, the legislative intention.

The title of the original act, approved February 24, 1883, as subsequently amended, is a clear direction to the legislative purpose. The subject of the particular legislation is therein expressed in unequivocal language. It reads: "An act to regulate the working and inspection of coal mines." It is a legislative attempt to regulate coal mining as a dangerous and hazardous occupation so as to protect the lives and health of people working in and about coal mines.

Keeping in view, therefore, the rules of statutory construction and the evident purpose of this legislation, as above outlined, it will be an easy matter to determine the import and significance of the words in the latter part of sec. 13, supra, that the inspector "shall direct and enforce any regulations in accordance with the provisions of this act, that he deems necessary for the safety and health of the miners." The word "accordance" as here used, must be held to mean, in the relation of the different parts of the language employed, as "agreeable with" or in "harmony with" other provisions of the same act so as to carry out the legislative purpose.

If the use of "safety lamps" be necessary to the protection of the lives and health of coal miners in this state, the inspector of coal mines can enforce their use, and compel a compliance with his orders in this regard by invoking the strong arm of the law.

EUGENE ENGLEY,
Attorney General.

IN RE COUNTY SURVEYORS.

The county surveyor cannot compel the county commissioners to provide him with such an office as he may select, but on the other hand, the county commisisoners, if requested to do so, must furnish him with such quarters as in their judgment and discretion are necessary for the proper conduct of the business of his office.

Attorney General's Office,
Denver, Colo., March 6, 1894.

Hon. C. D. Johnson, Clerk and Recorder, Delta, Colo.

Dear Sir—In reply to your communication of recent date, as to whether or not the county surveyor can compel the board of county commissioners to

furnish him an office room where he does nothing but transact his own private business, would say:

That the office of county surveyor is established by the constitution (Colo. const., art. XIV., sec. 8), and is therefore of equal dignity with any other county office.

The statutes require that each organized county shall provide, at its own expense, a suitable court house and a sufficient jail, and other necessary county buildings, and keep them in repair. Genl. Stats., p. 255, sec. 524. The statutes further provide that certain county officers shall keep their offices at the county seat. Sess. Laws 1885, p. 157, sec. 1.

While the law does not expressly state where the county surveyor shall keep his office, it is but a reasonable conclusion to say that it is intended he should have an office established at the same place and maintained by the same means as other county officers. The law has adopted a system applicable to every county in the state, arranged with reference to convenience and economy.

The business of each county—judicial, ministerial and executive—is to be transacted at the court houses, and offices provided by the county authorities at the county seats. If it were otherwise, the symmetry of the system would be marred and the regulating of county affairs interfered with.

The county surveyor cannot compel the county commissioners to provide him with such an office as he may select, but on the other hand, the county commissioners, if requested to do so, must furnish him with such quarters as in their judgment and discretion, are necessary for the proper conduct of the business of his office at the court house, if there is one in the county, and if there be none, then in some other place at the county seat that may be suitable and convenient.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE STOCK LAWS.

1. The statute of 1885, relating to the killing of stock is unconstitutional.

2. The question of the constitutionality of a statute is a matter that should be left entirely to the courts, and the attorney general should refuse to entertain such questions, unless circumstances arise in which the same are directly presented and their consideration cannot well be avoided.

Attorney General's Office,
Denver. Colo., March 12, 1894.

L. E. Sipe, Esq., Trinidad, Colorado.

Dear Sir—In reply to your communication of January 31, regarding the constitutionality of the stock law, would say, that I am not informed as to whether or not any court has passed upon the constitutionality of the law of 1893. The supreme court has not, but during the April term, 1893, the court decided that the stock-killing statute of 1885 was unconstitutional. (18 Colo., 600.)

As to whether or not in my opinion, the act of 1893, referred to by you, is constitutional, I am constrained to state that it is with great reluctance we ever enter upon the question of the constitutionality of a statute. This is a matter in my opinion entirely within the province of the courts to decide, and then they will do so only when the question is directly presented to them.

In the case above cited the court say: "The power of the courts to declare legislative acts unconstitutional should be exercised with that delicacy and consideration which are always due to a coordinate department of the government. So long as a legislative act is within the sphere of legislative power, that is, so long as it is not an encroach-

ment upon the province of some other department of the government, it will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured. The conflict between the legislative act and some specific provision of the fundemental law must, in general, be clearly apparent or the act will not be deemed unconstitutional. That a statute may, in the opinion of the court, be against the spirit of the constitution, or against the policy of the government, is not sufficient to warrant the court in declaring it unconstitutional. The courts cannot arrest unwise or oppressive acts of legislation so long as such acts are within constitutional bounds. Cooley on Constitutional Limitations (6th Ed.), chap. 7."

The act of 1893 was passed prior to the rendering of the decision upon the act of 1885 by the supreme court, so the act of 1893 could not have been passed for the purpose of obviating the objections contained in said decision. In some respects the two acts are similar, and it is possible the constitutional objections to the act of 1885 are also applicable to the act of 1893, but until circumstances arise in which the question is directly presented, and with the respect due the judicial department of the government, I must decline to affirmatively answer your question.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FEES OF COUNTY TREASURER.

Fees and commissions of county treasurers are charged upon moneys coming into their hands from taxes, fines, etc., but it is not intended by the law that a newly elected county treasurer shall charge a fee upon the money turned over to him by the retiring county treasurer.

Attorney General's Office.
Denver, Colo., March 13, 1894.

Hon. John Fisher, Ex-County Treasurer, La Junta, Colorado.

Dear Sir—In reply to your communication of recent date, relative to fees charged by you in 1890, upon the transfer of county funds, would say, that for the purpose of fixing the fees of county, precinct and other officers, the county of Otero was designated as a county of the second class. Sess. Laws 1889, sec. 10, p. 283.

At the time of receiving the money from the retiring county treasurer, the fees then established for county treasurers in counties of the second class were as follows:

Three (3) per cent. upon all moneys received by him for taxes of every kind, excepting school taxes, which shall be one (1) per cent., which per cent. may be increased by the county commissioners, but not above four and one-half (4 1-2) per cent.

For receiving all moneys other than taxes, two (2) per cent.

For every mile traveled in going to and returning to make settlement with the state treasurer and auditor, and to make deposits of state revenue, when required by the county commissioners, fifteen (15) cents per mile.

Mills' Ann. Stats., sec. 1913, p. 1134.

The above fees were paid the treasurer upon the receipt of moneys coming into his hands for taxes, fines, etc., and it is not intended by the law that a newly elected county treasurer shall charge a fee upon the money turned over to him by the retiring county treasurer. The statutory fees had been charged upon such money by the former county treasurer, when the same came into his hands as taxes, fines, etc., and the law does not contemplate the charging of another fee upon the change of officials.

The word "receive" as used in the statute is equivalent to the word "collect" in this regard, and the money remaining in the county treasury at the expiration of the term of county treasurer, has already been "received," insofar as the charging of fees is concerned. While the funds are transferred from the old official to the new, such transfer is merely a shifting or changing of the responsibility for their proper care and custody.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE ROAD TAX.

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1. Persons having served in the militia of the state or as firemen five years and not in active service, are not exempt from paying the road tax provided in section 5, p. 306, Sess. Laws 1891. This act does not relate to persons residing within the corporate limits of cities and towns.

2. Active members of the militia are exempt from labor on the public highways and from service as jurors.

Attorney General's Office.
Denver, Colo., March 13, 1894.

I. D. Hale, Esq., Gen'l Road Overseer, Rocky Ford, Colo.

Dear Sir—In reply to your communication of January 22, in relation to the payment of the road tax by members of the militia and firemen, would say:

I find no law exempting persons having served in the militia of the state or as firemen for five years, from paying the road tax provided in the act of 1891 (Sess. Laws 1891, p. 306. sec. 5). This section amends the old law which provided that the persons subject to the payment of the tax could, in lieu of such payment, perform a certain amount of labor. G. S. '83, sec. 2979, p. 873. By the new act the person required to pay the taxes is deprived of this discretion, the only qualifying clause being that the act shall not relate to persons residing within the corporate limits of cities and towns.

Active members of all companies, troops and batteries are, during their membership, exempt from labor on the public highways and from service as jurors.

Mills' Ann. Stats., sec. 3054, p. 1702.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE FEES OF COUNTY TREASURER.

The treasurer's fees are not charged at the time of the redemption of property from tax sale, but only at the time the taxes are collected, whether by sale or otherwise

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Attorney General's Office.
Denver, Colo., March 14, 1894.

Hon. J. L. Hodges, County Attorney, Glenwood Springs, Colo.

Dear Sir—In reply to your communication of recent date, relative to the charging of fees by the county treasurer, would say:

That in case land is sold for taxes by the treasurer, the amount paid by the tax purchaser is the sum of the taxes and charges thereon, including all costs and penalties. (Mills' Ann. Stats., sec. 3888, p. 2055.) The county is credited with the amount so received, less the treasurer's fees, the latter to be credited to the "county treasurer's commission and fee fund."

At the time of redemption by the owner, his agent, assignee or attorney, the amount required to be paid would be the amount for which the property was sold together with the rate of interest provided by law. The treasurer's fees are not charged at the time of redemption, but only at the time the taxes are paid, whether the same be paid by means of sale or otherwise.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE ELECTIONS.

1. The permanent registration law applies only to precincts included wholly or partially within the limits of cities of the first and second classes, and to all other cities, whether incorporated under general law or special charter, with a greater population than fifteen thousand inhabitants.

2. An unmaried woman of foreign birth, being an alien, must procure naturalization papers before she is entitled to vote, but marriage to an American citizen makes her a citizen also and she may then vote without naturalization papers.

Attorney General's Office,
Denver, Colo., March 17, 1893.

Hon. W. W. McNeff, Town Clerk, Louisville, Colo.

Dear Sir—In reply to your communication of recent date, relative to elections in Louisville, would say:

That the act of 1891 (Sess. Laws 1891, p. 143), commonly called the Australian ballot law, applies to every town and city in the state at all elections except elections for school officers held at any time other than a regular election for state, county or city officers, and to special elections at which no persons are to be voted for, for any city, county or state office.

The permanent registration act passed by the ninth general assembly, and providing for the permanent registration of women, applies only to precincts included wholly or partially within the limits of any city of the first or second class, or any other city, whether incorporated under general law or special charter, with a greater population than fifteen thousand (15,000) inhabitants. If the town of Louisville does not come within this provision, the women must be registered the same as men under the old law.

An unmarried woman of foreign birth and an alien, must have naturalization papers in order to be entitled to vote, but a foreign born woman being alien, married to an American citizen, whether native or naturalized, becomes thereby a citizen, and entitled to vote at all elections, provided the other qualifications regarding residence, etc., have been complied with.

EUGENE ENGLEY,
Attorney General.

IN RE NATURALIZATION.

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1. Since the adoption of the referendum statute conferring the elective franchise on women, the law governing the declaration of intention to become a citizen applies to an unmarried woman who is an alien and to the same extent as it does to a man who is an alien.

2. To entitle a married woman to vote, she must be a native or naturalized citizen, or the wife of a native or naturalized citizen, or declared her intention to become a citizen, if an alien, citizenship or a declaration of intention in this respect is the test.

3. If the husband and wife are alien born and neither has been naturalized, but the husband has declared his intention to become a citizen, the wife must also declare her intention to become a citizen before she is entitled to vote. In the matter of naturalization, the wife may act independently of her husband.

4. An alien born woman whose father was naturalized before she attained twenty- one years of age, may vote regardless of the fact that she has been married to an alien who is not entitled to vote, provided she removed to this country during her minority and is otherwise qualified.

5. A woman whose parents were citizens of the United States, though she was born out of the limits and jurisdiction of the United States, is a citizen and can vote in this state, if otherwise qualified.

6. Naturalization laws pertaining to male minor aliens are equally applicable to female minor aliens.

Attorney General's Office,
Denver, Colo., March 23, 1894.

Hon. Tom C. Davis, Sec'y P. P. Cen. Com., Coal Creek, Colo.

Dear Sir—In reply to your communication of recent date, relative to naturalization, would say, that if a husband has taken out his final naturalization papers, prior to an election, his wife is entitled to vote, provided she is twenty-one years of age and has complied with the law in relation to registration, residence, etc. The statutory four months period of time refers to a declaration of intention by one not a citizen to become a citizen, said declaration of intention to be made according to law not less than four months before the person offers to vote. Since the adoption of the referendum statute conferring the elective franchise upon women, the law governing the declaration of intention to become a citizen applies to an unmarried woman who is an alien and to the same extent as it does to a man who is an alien. If an unmarried woman who is an alien and of the age of twenty-one years, desires to vote at an election, she must declare her intention according to law, to become such citizen, not less than four months before she offers to vote, by taking out her first papers, and at the time of voting she must be otherwise qualified in respect to registration, residence, etc.

A foreign born alien woman married to an alien becomes a citizen upon the naturalization of her husband at the time he takes out his final papers, and it is not necessary that he should have been naturalized four months prior to an election in order to entitle her to vote, provided, as above stated, she is twenty-one years of age and has complied with the law relative to registration, residence, etc.

To entitle a married woman to vote, she must be a native or naturalized citizen or the wife of a native or naturalized citizen, or has declared her intention to become a citizen, if an alien. Citizenship,

or a declaration of intention in this respect, is the test. Naturalization of the husband confers citizenship upon the wife as well as the husband, if the wife be not native born or naturalized prior to the naturalization of the husband. If the husband and wife are alien born and neither has been naturalized but the husband has declared his intention to become a citizen, the wife is not entitled to vote until he takes out his final papers or until she acts independently of the husband and declares her intention to become a citizen not less than four months before she offers to vote. An alien born woman who is the wife of an alien who has declared his intention to become a citizen, need not wait until her husband becomes naturalized but may declare her intention to become a citizen not less than four months before she offers to vote and may then exercise the right of elective franchise, provided she is otherwise qualified.

An alien born woman whose father was naturalized before she attained twenty-one years of age, may vote, regardless of the fact that she has been married to an alien who is not entitled to vote, provided she removed to this county during her minority, and is otherwise qualified.

A woman whose parents were citizens of the United States, though she was born out of the limits and jurisdiction of the United States, is a citizen and can vote in this state, if otherwise qualified.

Any alien woman being under the age of twenty-one years, who has resided in the United States three years next preceding her arriving at that age, and who has continued to reside therein to the time she makes application to be admitted a citizen thereof, may, after she arrives at the age of twenty-one years, and after she has resided five years within the United States, including the three years of her minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165 of the United States Revised Statutes.

A daughter of parents duly naturalized, being under the age of twenty-one years at the time of such naturalization, becomes a citizen if she resides in the United States.

A married woman may become naturalized without the consent of her husband.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE FILING CERTIFICATES OF NOMINATION.

A convention of a political party, held for the purpose of making nominations for the city of Colorado Springs, for the spring election of 1894, may certify such nominations to the city clerk of Colorado Springs, and said clerk is authorized to accept the same for printing on the official ballot to be used in said city the election held in November, 1893, polled at least ten per election as the candidates of such party, if said political party, at centum of the entire vote cast in the political division of Colorado Springs.

Attorney General's Office,
Denver, Colo., March 24, 1894.

C. E. Sabin, Esq., Sec'y P. P. Co. Cen. Com., Colorado Springs, Colo.

Dear Sir—In reply to your communication of recent date, in which you state, "a political party had no ticket in the field at the annual city election in 1893, but had a ticket in the county election in November, 1893, and have now filed certificates of nomination for a ticket for city election to be held April 3, without a petition. Can this ticket be legally accepted and printed by the city clerk?" I desire to submit the following :

Section 3, sess. laws 1891, p. 143, provides: "Any convention of delegates of a political party which presented candidates at the last preceding election held for the purpose of making nominations to public office, and also voters to the number hereinafter specified, may nominate candidates for public offices to be filled by election within this state. A convention within the meaning of this act is an organized assemblage of voters or delegates representing a political party, which at the last election before the holding of such convention polled at least ten per centum of the entire vote cast in the state, county or other political division or district for which the nomination be made. * * *."

The decision of the question propounded by you rests upon the following proposition: Did the political party now desiring to file its certificate of nominations with the city clerk of Colorado Springs, poll "at least ten per centum of the entire vote cast" in the city of Colorado Springs "at the last election" before the holding of the convention at which the nominations mentioned in said certificate were made, that is, the election held in November, 1893?

Your letter does not give us any further information than that the political party "had a ticket in the county election in November, 1893." If said party polled "at least ten per centum of the entire vote cast" at said November election, in the "political division" for which the nominations are now made and sought to be filed with the city clerk, then the city clerk is authorized to accept said certificate and print the list of nominations therein contained upon the official ballot. If, on the other hand, the said political party at the county election held in November, 1893, did not cast the requisite ten per centum of the entire vote cast in the "political division" for which the nominations are now made, that is, Colorado Springs, then such nominations cannot be made by convention, but must be made by petition as provided in section 6, Id.

The law is ambiguous in many of its provisions, but that construction should be given which will meet the intent and purpose of the legislature in its enactment, and best subserve the rights of the people. This may be done by giving questions in doubt the most liberal construction that the statute will permit. Particularly should this principal govern in construing the law concerning elections in order that the rights of the individual voter may not be jeopardized, and the electorate be granted a full and free expression.

The language of the first sentence in section 3, supra, is perfectly clear and need not be misconstrued: "Any convention of delegates of a political party which presented candidates at the last preceding election. * * *." In the question at issue, this would mean the election held in November, 1893. The second sentence in said section defines what a convention is within the meaning of the act. It is not any assemblage, but an organized body of "voters or delegates representing a political party, which at the last election before the holding of such convention"—which language in the present instance again refers to the election held in November, 1893, —"polled at least ten per centum of the entire vote cast in the state, county or other political division or district for which the nomination may be made." In the question presented us, the nominations made are for the "political division" of Colorado Springs, so that if the said party polled ten per centum of the entire vote cast in the "political division" of Colorado Springs, at the last county election before the holding of the convention nominating officers for the city of Colorado Springs, that is, at the election held in November, 1893, then such nominations made by such convention may be certified to and accepted by the city clerk of Colorado Springs for printing

on the official ballot to be used in the city election, as the candidates of such political party at said election.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TIME AND MANNER OF CALLING AND HOLDING ELECTIONS IN CITIES AND TOWNS.

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1. The first Tuesday in April is the regular annual period for the election of municipal officers in towns and cities of this state, and all other officers whose offices may be provided for by the ordinances of such cities and towns.

2. If for any reason, officers of incorporated towns, incorporated under the laws of this state, have not been elected at the time and in the manner provided by law, any three of the board of trustees last elected at the regular annual election of the officers for such town may act as judges of election, for the election of new officers at a special election, to be called by them for such purpose.

3. In case the election is not held at the proper time, on account of the failure or wilful neglect of the officers authorized by law to call an election or to perform any other duty devolving upon them under the laws of this state, relating to the manner of conducting an election, such officers may be compelled to comply with the law by means of mandamus proceedings.

Attorney General's Office,
Denver, Colo., March 28, 1894.

Hon. Davis H. Waite, Governor of Colorado.

Dear Sir—In reply to the communication of Castella F. Boylan, transmitted to this office through you and referring to the matter of elections in the town of Monument, Colorado, would say, the law provides that the first Tuesday in April shall be the

regular annual period for the election of municipal officers in towns and cities of this state, and all other officers whose offices may be provided for by the ordinances of such towns and cities.

Mills' Ann. Stats., sec. 4475, p. 2323.

The section above quoted contains the following proviso: "* * * provided, that in all cases where, for any reason, officers of incorporated towns, incorporated under the laws of this state have not been elected at the time and in the manner provided by law, any three of the board of trustees last elected, at the regular annual election of the officers for such town may act as judges of election, for the election of new officers, at a special election to be called by them for such purpose; and the same power and authority is hereby given to said board of trustees, in relation to the calling and holding of such new election as such board would have, and has, in case such election had been held at the time, and in the manner now provided by law. And the officers so elected, at the election herein provided for, shall have the same powers and be vested with the same authority as if they were elected at a regular annual election."

This provision is very comprehensive and is, no doubt, designed to remedy any defect, or to meet any emergency that might arise in preventing the election from being held at the regular time prescribed by law—the first Tuesday in April.

In case the election is not held at the proper time on account of the failure or willful neglect of the officers authorized by law to call an election, or to perform any other duty devolving upon them under the laws of this state, relating to the manner of conducting an election, such officers may be compelled to comply with the law by means of mandamus proceedings.

In the case before us, if the nominations of the candidates upon the ticket denominated as the "Citizens' Ticket" were duly and regularly made, and

all the provisions of the law relating thereto complied with, and the town clerk of Monument refuses to accept and file the same for the purpose of having them printed upon the official ballot to be used in the town election on the first Tuesday of April next, he may be compelled to do so by mandamus proceedings. If, however, the law has not been complied with in relation to the making of such nominations, and in all other respects, up to the time of presenting the certificate of nominations to the town clerk, and the election cannot be held upon the regular day on this account, then three trustees of the town of Monument may call a new election to be held upon a subsequent day, as provided in the section above quoted. In the event of such trustees failing or refusing to call an election as therein provided, any elector of the town of Monument may proceed against them by mandamus and compel them to call and hold an election for the purpose of electing town officers.

Public officials cannot usurp the rights and privileges guaranteed to the people under the constitution and laws, and the courts are ever ready to punish a breach and compel the observance of the law in a proper proceeding.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE METHOD OF VOTING.

Under the provisions of the election law passed at the extra session of the ninth general assembly, an elector may vote for any person for office whose name does not appear upon the official ballot, by writing the name of the person for whom he desires to vote in one of the blank spaces left under the list of candidates upon the ballot.

Attorney General's Office,
Denver, Colo., March 29, 1894.

J. K. Bunting, Esq., Grand Junction, Colo.

Dear Sir—In reply to your communication of recent date, relative to the right of a voter "to write the name of an independent candidate in the blank line left after each list of candidates," would say:

That a part of section 13, sess. laws 1894, page 61, provides as follows: "* * * There shall be left at the end of the list of candidates for each different office, as many blank spaces as there are persons to be elected to such office, in which the elector may write the name of any person not printed on the ballot for whom he desires to vote as a candidate for such office." This provision was made in the new law in order to enable the elector to vote for any persons he might choose as a candidate for office, regardless of the fact whether such person had been nominated by any party or not. It was questionable whether the old law was constitutional or not, in that it did not provide means whereby an elector could exercise any liberty in his choice of candidates, but was restricted to those persons whose names appeared upon the official ballot. The provision was placed in the new law in order to avoid this possible constitutional objection.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF COUNTY ASSESSORS IN EXTENDING THE TAX ROLL.

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1. Prior to the act of 1893 the county clerk extended the tax roll of the county and was paid certain fees therefor. The act of 1893 made this a part of the duties of the county assessor, but the change of the law in this respect did not affect a change in the compensation allowed these officers, only in so far as the compensation was incidentally affected by such change of duty.

2. So far as the county clerk is concerned his fee or compensation is commensurate with the duty, and being denied the right to exercise or perform the duty, he is of necessity denied the right to charge and collect the fee.

3. County assessors in counties of the first and second classes are paid a salary quarterly out of the county treasury, and in all classes other than the first and second the compensation, as a per diem, payable quarterly, is based upon the time occupied by him in performing the duties of his office, regardless of their nature.

Attorney General's Office,
Denver, Colo., March 31, 1894.

Hon. D. A. Weaver, County Assessor, Fort Collins, Colo.

Dear Sir—In reply to your communication of recent date, relative to compensation of county assessors in the matter of extending the tax roll, would say, session laws of 1891, section 13, p. 312, provide as follows:

Sec. 13. "The county assessors in the several counties in this state shall receive the following compensation, to be paid quarterly out of the county treasury, to-wit: In counties of the first class, an annual salary of four thousand dollars; in counties of the second class, an annual salary of three thousand dollars; in counties of all other classes, a sum not to exceed seven dollars per day, for each day actually employed for the county, as may be allowed by the

board of county commissioners of the respective counties, but in no instance to exceed the sum of twenty-five hundred dollars per annum."

It will thus be seen that the county assessor is paid quarterly out of the county treasury a certain sum, regardless of the nature of his duties. The basis of his compensation in all counties other than the first and second classes, is the amount of time occupied in the performance of his duties. While the law added new duties to county assessors, it in no way changed the manner in which he should be paid.

County clerks are paid a salary, but such salary is dependent entirely upon the fees provided by law and received by him in discharging his duties. Unless he performs the act for which a fee is provided, he does not get the fee.

The legislature in transferring a portion of the duties of the county clerk to the county assessor, did not contemplate a change of the compensation allowed these officers only in so far as the compensation was incidentally affected by such change of duty.

The county clerk being deprived of the privelege of performing the service was also deprived of the fee provided him by law in connection therewith. So far as this official is concerned, the fee is commensurate with the duty. The one depends upon the other, and being denied the right to exercise or perform the duty, he is of necessity denied the right to charge and collect the fee.

County assessors in counties of the first and second classes, are paid a salary quarterly out of the county treasury, and in all classes other than the first and second, the compensation, as a per diem, payable quarterly, is based upon the time occupied by him in performing the duties of his office, regardless of the nature of such duties; consequently the extending of the tax roll being a part of his work as provided by law, he receives the same com-

pensation therefor as he would receive for any other work pertaining to his office, based upon the time employed by him in executing the same, subject however, to the limitations and restrictions contained in the section above quoted.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE EXEMPTION FROM WORK ON PUBLIC ROADS. LICENSES.

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1. A disability which is claimed by a citizen to exempt him from work on the public roads, must be real and not merely a disfigurement.

2. When a license expires, the licensee can claim no days of grace.

Attorney General's Office,
Denver, Colo., April 12, 1894.

W. E. Westwood, Esq., Clerk, Williamsburgh, Colo.

Dear Sir—Pressure of public business has prevented me from replying to your favor of December 15th, ult.

Where a person claims to be disabled from working on the public roads, his disability must, in order to make his claim available, be real, and not mere disfigurement.

The disabilities you mention are not such as are contemplated by law.

No days of grace are allowed a licensee when his license expires. Days of grace are contemplated by

the law merchant, and apply to negotiable paper alone.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE COUNTY ROADS.

Where the public has used a road running over the public domain for a period of time provided by law as a limitation to the bringing of actions for the recovery of real estate, and the road has been controlled and worked by the county for the same period, a person settling upon the land over which the road runs, after the lapse of said period, is barred from ousting the public from the easement so acquired, and prosecution will lie against him for obstructing or closing the road.

Attorney General's Office,
Denver, Colo., April 12, 1894.

Robert McIntosh, Esq., County Commissioner,
Slater, Routt Co., Colo.

Dear Sir—The general government allows travel across the public domain. When your board of county commissioners laid off the various public roads in the county, there was no doubt, a neglect on their part to pursue strictly the methods laid down by the statute of the state. Such was a very common mistake in nearly all the counties of the state. Without contemplating the contingency that settlers might come in and occupy the public domain, the various boards, in many cases, allowed the roads already in use to remain as they were, without any proceeding to adopt or condemn the right of way for the public, according to the provisions of the statute. While, how-

ever, the proceedings mentioned in the statute may not have been accurately followed, or may not in fact have been followed at all; yet, if the county of Routt has had control of the road referred to in your letter for the time stated; if the road has been kept up, cared for by the board of commissioners, and worked by the road overseer, during all that time, the settler coming upon the land at this time, must take it subject to the easement of the public over the land, on and along the highway, if the same is clearly distinguishable, and has been so constantly and exclusively traveled as to permit of no doubt as to the actual line or boundaries of the highway itself. It does not lie in his mouth to object that the highway was not regularly laid out according to law, the public having had exclusive, adverse, open and notorious use of the road for five years, and the county having assumed control of it as a highway and having caused it to be worked as such for said period of time, prior to the settlement of the claimant of the land over which the road runs, his right to object to the road is barred by our statute of limitations.

Am. and Eng. Encyc. Law, vol. 9, p. 367.

State vs. Boscawen, 32 N. H., 331.

In Re Krier's Private Road, 73 Pa. St., 109.

Dimon vs. People, 17 Ill., 416.

Greenl. Ev., vol. 2, 662.

G. S., sec. 2953.

I have cited the above authorities in order to assist your district attorney in the prosecution of offenders of the class you have mentioned. They act in high-handed and flagrant violation and contempt of the public right when they close or obstruct your highways, and ought to be prosecuted with all the power of the county. I advise you to preserve these citations, and in case you contemplate bring-

ing criminal proceedings, to refer the cases to your district attorney in advance, and enclose him a statement of the facts in each case, with a copy of these citations.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE COUNTY PRINTING.

1. If a board of county commissioners makes a contract with a printer to do the county printing, the county is liable for a breach of it by the board.

2. The measure of damages for such breach is the reasonable profit on any particular work which the contracting printer has been prevented from doing by the officer who employs some other workman.

3. If the treasurer has the delinquent tax list published by some one else than the contract printer, the latter will be entitled to pay for the work notwithstanding the printer who actually does the work has been paid for it; and the measure of the damage accruing to him, by reason of his not being permitted to do the work, will be the reasonable profit that would have accrued to him had he done it.

Attorney General's Office,
Denver, Colo., April 12, 1894.

O. W. Garrison, Esq., Golden, Colo.

Dear Sir—The pressure of public business has prevented me from giving the attention to your communication of December 18 last, which I desired. In response to the questions therein propounded, I submit the following:

The fifth subdivision of section 791, Mills' Ann. Stats., p. 751, in reference to the powers of the board of county commissioners, authorizes them "To rep-

resent the county and have the care of the county property and the management of the business and concerns of the county, in all cases where no other provision is made by law."

To make contracts for the printing to be done for the county falls strictly within the line of the duties of the board of commissioners. By the provisions of the section quoted, they can make such contracts unless some provision is made by some other act for the same.

Section 3883, p. 2054, Mills' Ann. Stats., directs that the treasurer "shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks, in a newspaper of his county, if there be one, * * * the first of which publications shall be at least four weeks before the day of sale."

Section 3884, Id., requires the printer to transmit to the treasurer an affadavit showing that the publication has been made, and forbids the payment of the printer's fees for publication, unless such affadavit has been transmitted as required by the section.

The act last quoted does not restrict the treasurer to any particular paper in which this delinquent list shall be published, and if the treasurer publish it in any paper other than the one in which the county board has contracted to do the county printing, the publication, nevertheless, if otherwise in conformity with the law, would be valid. The printer so publishing would be entitled to pay for his work, notwithstanding there be another printer standing by and offering to do the printing under the terms of a contract theretofore made between him and the board of commissioners for doing all the printing of the county.

The question then recurs to the claims of the printer who has contracted to do the county printing. If he stands ready to do the printing, and is not allowed to do it by the treasurer, he can claim

damage from the county for this refusal, and the measure of his damages will be the reasonable profit which would have accrued to him had he done this particular work.

If there has been no contract, such as is mentioned above, the simple selection of the county commissioners of any particular printer to do the work will not entitle him to pay, if the treasurer has the work done by some other person.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF TEACHERS.

Teachers of the public schools are to be paid for the term for which they are employed, without regard to the intervention of holidays.

Attorney General's Office,
Denver, Colo., April 12, 1894.

Lucas Brandt, Esq., Treasurer, School Dist. No. 2,
Loveland, Colo.

Dear Sir—Pressure of public business has prevented a reply to your favor of December 14th, ult. As to the compensation of teachers employed by a school board, that is fixed by the board for the term. The intervention of a holiday is not to be regarded in the computation, in accordance with the maxim de minimis non curat lex.

It is therefore proper to compute the pay of a teacher for his whole time, including holidays.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TREASURER'S COMMISSION.

The county treasurer can receive from the county no commissions in cases where the county buys in lands for delinquent taxes.

Attorney General's Office,
Denver, Colo., April 13, 1894.

Hon. H. M. Myers, County Treasurer, Springfield, Colo.

Dear Sir—The act of 1891, sess. laws, p. 2117, sec. 6, provides for commissions upon all "moneys received" by the treasurer for taxes. When the county buys in property for taxes, it pays no money to the treasurer as an ordinary purchaser does. The treasurer is a county officer, and in matters pertaining to his office he is a trustee for the county. Hence, unless there is express provision of the law by which he shall receive a commission from the county for making sales to the county itself of delinquent lands, he can receive none. I am not able to find any such provision.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT ROAD COMMISSIONER.

The board of county commissioners, as it is constituted on the first Monday in January of each year, has the power to appoint a general road overseer for the ensuing term.

Attorney General's Office,
Denver, Colo., April 13, 1894.

J. P. Erwin, Esq., La Veta, Colo.

Dear Sir—By the act of 1891, sess. laws, p. 304, the board of commissioners is required to appoint a general road overseer, at their January meeting. This means the regular January meeting which by the law is required to be held on the first Monday in January. (Mills' Ann. Stats., 784.)

All the members at that time qualified to act as members of the board have a right to vote for this officer at that meeting.

By the statute, the term of the county commissioner elected in your county last fall, began on the second Tuesday in January last. (Mills' Ann. Stats., 1581.)

From a comparison of the two sections quoted, it appears that the old board has the power to appoint a general road overseer for the ensuing term.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE FEES OF COUNTY SURVEYORS.

The fees and charges of county surveyors are not provided for, except in cases where the work is done by authority of the board of county commissioners, in which cases the compensation is fixed by the respective boards. Where work is done for private persons, the compensation is matter of contract.

Attorney General's Office,
Denver, Colo., April 13, 1894.

W. L. Gilmore, Esq., County Surveyor, Wray, Colo.

Dear Sir—In reply to your letter concerning the fees for surveying per day, I will state that if the surveying is done by a private person, his compensation is matter of contract. If done by a county surveyor, his compensation is not fixed for any work done except where he is required by the board of county commissioners to make copies of the original field notes and plats of surveys of all lands surveyed by the general government within their respective counties; and in that case, the respective boards fix his compensation.

Mills' Ann. Stats., 4314, 4315.

In case the county surveyor makes surveys for private persons, his charges are regulated by contract.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE SCHOOL LEVIES.

In case an assessor should alter a levy certified by a district school board, he is liable civilly and criminally.

Attorney General's Office,
Denver, Colo., April 13, 1894.

Henry Dierker, Esq., Secretary School District No. 34, Falcon, Colo.

Dear Sir—In response to your letter of February 11, ult., I desire to say: If the proceedings were regular in the matter of your school levy and properly certified, and the assessor has altered your papers, he has violated the criminal law of the state. It is a matter that falls strictly within the duties of the district attorney, and you should consult him or his deputies in the premises. If he is unwilling to act, there is nothing to prevent your board from employing counsel to press the matter. The assessor would also be liable for damages in a civil action. It is not within the line of duty prescribed by law for this office to take original action in the matter.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE WARRANTS ISSUED BY STATE CAPITOL BOARD.

1. The fund for the payment of the warrants drawn on the capitol building fund is raised by special levy made in September, 1893, by the state board of equalization, and extended by the assessors of the different counties.

2. It cannot be diverted from the purpose for which it was levied, except by act of the legislature, and none such has been passed.

Attorney General's Office,
Denver, Colo., April 16, 1894.

N. Q. Tanquary, Esq., Attorney at Law, Denver, Colo.

Dear Sir—Referring to your letter of February 13, ult., concerning the validity of the warrants for the building of the state capitol, I will state, that the state capitol building fund is amply protected by constitutional guarantee. It stands first in point of dignity, after the annual appropriations for the expenses of the executive, judicial and legislative departments are satisfied After the expenses for each year of the three departments have been paid, and a sufficient sum set aside to meet the semi-annual interest on the capitol building bonds, and a sinking fund to meet the principal of the bonds, as required by law, the special appropriations made by the legislature are to be met in the order of their precedence. The fund for the interest on the capitol building bonds, and the sinking fund mentioned, are provided for by a levy made by the state board of equalization, and extended by the assessors of the various counties, so that that fund is protected against any other appropriation. It is kept separate and used for the special purpose for which it was levied and collected The special apropriations made by the legislature are to be met in order of their passage.

A special levy of one half-mill was made by the state board of equalization in September, 1893, for the benefit of the capitol building fund. This, like any other fund specially levied, is kept separate and cannot be diverted to any other purpose than the one for which it was levied, except by act of the legislature, and none such has been passed. This is the fund which is set apart for the payment of the warrants you refer to, and all warrants drawn against it must be paid as soon as the money reaches the hands of the treasurer.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE SCHOOL DISTRICT ORDERS ON COUNTY TREASURERS.

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1. It is unlawful for the officers of any school district to issue warrants at any time in an amount in excess of the tax levy for the current year.

2. In the absence of any fraud or abuse of trust in the issuing of school orders upon the county treasurer, the directors of the school district issuing the same cannot be held personally liable when there are no funds in the county treasury to pay them.

Attorney General's Office,
Denver, Colo., April 16, 1894.

Hon. Wm. H. Burnett, County Superintendent of Schools, Kit Carson County.

Dear Sir—In reply to your communication of recent date, relative to the school order issued by the directors of District No. 38, of your county, would say:

Section 4033, Mills' Ann. Stats., provides that it shall not be lawful for the officers of any district to

issue warrants at any time in an amount in excess of the tax levy for the current year.

Section 4036, Id., provides as follows: "It shall be illegal for any school board to appropriate, or cause to be used, any money belonging to the general school fund, for the purpose of building, furnishing or erecting additions to any school house, or for the purchase or improvement of any school house, site or lot; provided, that if any portion of the aforesaid school fund remains to the credit of any district after the payment of all expenses necessary to the support of a public school for the period of ten months in any one year in said district, it shall be lawful for the district board to use such balance for any of the purposes provided for in section fifty-one of this chapter."

One of the provisions of said section fifty-one, makes it the duty of the school board "to provide for school furniture and for everything needed in the school house, or for the use of the school board."

The order in question was issued for the payment of money out of a special fund, to the Cleveland School Furniture Company. If the said special fund was exhausted at the time the order was issued, the order would still be valid and could be paid out of the general school fund, under the provisions of section 4036, supra, provided a balance remained in said general school fund after paying all expenses necessary to the support of the public school in said district No. 38, for a period of ten months of the current year. If, however, the said order was issued in excess of the total tax levy for the expenses of school district No. 38, for the current year, and there were no funds available from any other source to meet the same, after first paying all other orders of prior date and number, then and in that case, such order would be illegal and void.

The president and secretary signing the order are members of the board of directors of school district No. 38; as such they are public agents, and all

persons were required to take notice of the extent of their authority and all limitations thereon, for the reason that their authority and the limitations upon it were fixed by public statute law, of which all persons were bound to take notice. No person could therefore, be misled or deceived as to the extent of their authority.

The county treasurer's books, at the time said order was issued, would have shown whether any funds were on hand for the payment of the claim, and the party to whom the order was issued, and the directors, had equal opportunity of knowledge as to the state of the funds. The order purports to be the obligation of the district, on its face it contains no personal undertaking of the directors, and could only have been accepted as the order of the district. The goods were undoubtedly delivered under a contract with the district and upon the faith of the district only; the directors, in this case, the president and secretary, were merely the medium of transferring, by this order, certain funds of the district to the payee mentioned in the order for certain goods or materials delivered to the district under a contract entered into by and on behalf of the district, upon the credit of the district only.

If there was no fraud perpetrated or no abuse of trust, in the issuing of the said order, the directors are not personally liable.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SALARY AND EXPENSES OF THE STATE SUPERINTENDENT OF IMMIGRATION.

The salary and expenses of the state superintendent of immigration must be paid by warrants drawn on the fund created by section 2159, Mills' Ann. Stats. When that is exhausted, the unpaid balances of the salary and expenses of that officer must be paid by certificates of indebtedness.

Attorney General's Office,
Denver, Colo., April 17, 1894.

Hon. A. C. Fisk, State Superintendent of Immigration, Denver, Colo.

Dear Sir—In response to your communication of January 23, ult., I submit the following:

The appropriation made for the payment of your salary by the act of 1889, p. 189, sec. 2, Mills' Ann. Stats., 2148, is a continuing appropriation. Your salary is a part of the expenses incident to the executive department of the state, and it ranks as one of the first and preferred claims against the revenue of the state, if not controlled by other enactment.

By sec. 2155, Mills' Ann. Stats., you are authorized, with the approval of the governor, to draw upon the funds appropriated by the act, from time to time, to defray the necessary expenses of the office, and the auditor is required to issue his warrant for the same.

By sections 2148 and 2149, Id., your salary, traveling expenses and clerk hire are provided for; also provision is made for quarters, fuel, lights and appurtenances. These quarters are intended to be commodious, as will be seen by an examination of section 2152, Id. By section 2153, Id., the assessor of each county is made a member of the staff of the state superintendent.

Sections 2154, 2157 and 2158, taken in connection with the balance of the act of 1889, show conclusively that the "Bureau of Immigration and Statistics of the state of Colorado" was conceived and organized on a broad basis by the general assembly.

An appropriation was made by that act of twenty thousand dollars, for the purpose of carrying out its provisions. This appropriation, however, was limited in its application to the demands of the office for the years A. D. 1889 and 1890.

The general assembly of 1893 made no appropriation for the office for the years A. D. 1893 and 1894; but the office of superintendent and the duties of the incumbent remain the same, nevertheless, as they are constituted by the act quoted. As such incumbent, your salary must be paid, and all the legitimate expenses incurred by you in the discharge of your duties.

It is manifest from an examination of the act that, other than the fees hereinafter designated, it was intended by the legislature that the salary and expenses of your office should be provided for by special appropriations at future sessions. No special appropriation for the years 1893 and 1894 having been made, recourse must be had to other provisions of the law. This is found in section 1829, Mills' Ann. Stats.

Your claim will be examined by the governor and attorney general, and when approved by them will be presented to the auditor, who is directed by law to give you a certificate for the amount approved, and report the same to the next general assembly. Had an appropriation been made by the last general assembly, which had been exhausted, the status of the case would be different; but none having been made, it falls clearly within the provisions of the act last cited.

As the offices of the executive department of the state government will shortly be removed to the capitol, it would be well to call the attention of the

secretary of state, to the necessity of preparing suitable quarters for your bureau in the state building.

The traveling expenses, referred to in the fourth paragraph of your letter, are provided for in section 2148, Mills' Ann. Stats. They cannot exceed five hundred dollars per annum. The payment of these expenses is controlled by the same law as your salary.

In response to the fifth paragraph of your letter, it must be said that the legislature created and provided for the salary and other expenses of your office; and the legislature can enact any law, within constitutional limits, that will affect the fund liable for the payment of the same.

The act of 1893, mentioned by you, refers to the balances that may be left of the funds appropriated for the years A. D. 1893 and 1894. None having been appropriated to the immigration bureau by that act, of course the section referred to by you does not apply.

In answer to the last paragraph, I find that sections 2159 and 2160 of Mills' Ann. Stats. provide a standing fund from which the expenses of your office are to be, in part, paid. The fees mentioned in section 2159, ordinarily amount to no more than three or four hundred dollars in any year. When we couple this fact with the recitals of the next section (2160), we find that the legislature could not have intended the fees mentioned to constitute the whole of the immigration fund. So I conclude that you can draw on the fund consisting of the fees turned over by the state board of land commissioners, for expenses incurred by your office. This may be drawn upon by a voucher for a part of your salary, or for expenses otherwise incurred under the provisions of the act of 1889. The balance remaining unpaid of your salary or expenses must be covered by certificates of indebtedness, as above referred to.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE COMPULSORY EDUCATION ACT OF 1889.

1. Under the act of 1889, it is made the duty of any school director of any school district in this state, to inquire into all cases of neglect of a parent, guardian or other person having control of any child or children between the ages of eight and fourteen years, to send such child or children to school for a period of at least twelve weeks in each year, and to prosecute any person guilty of such neglect.

2. Any director of any school district wherein an offense is committed under the act, failing to prosecute the same after it shall be brought to his attention, may be deemed guilty of a misdemeanor, and upon conviction thereof may be subject to a fine of not less than ten nor more than fifty dollars.

Attorney General's Office,
Denver, Colo., April 17, 1894.

Hon. Chas. W. Bowman, County Superintendent of Schools, Pueblo County, Colorado.

Dear Sir—By the act of 1889, Sess. laws 1889, p. 59, it is made unlawful for any person, persons or corporations, to employ any child under the age of fourteen years, to labor in any business whatever during the school hours of any school day of the school term of the public school, in the school district where such child is, unless such child shall have attended some public or private day school where instruction was given by a teacher qualified to instruct in those branches required to be taught in the public school of the state of Colorado, or shall have been regularly instructed at home in such branches, by some person qualified to instruct the same, at least twelve weeks in each year, eight weeks at least of which shall be consecutive, and shall, at the time of such employment, deliver to the employer a certificate in writing, signed by the teacher, certifying to such attendance or instruction.

A penalty is imposed by fine of not less than twenty-five dollars nor more than fifty dollars for any person or corporation found violating the above provision, and all such fines when collected are to be paid into the county treasury and placed to the credit of the school district in which the offense occurs.

Section 2 of said act requires every parent or guardian or other person in the state of Colorado, having control of any child or children between the ages of eight and fourteen years, to send such child or children to a public or private school taught by a competent instructor, for a period of at least twelve weeks in each year, at least eight weeks of which time shall be consecutive, unless such child or children shall have been excused by the board of the school district in which such parent, guardian or other person having control resides; provided, that if such parent or guardian is not able, by reason of poverty, to properly clothe any such child, it shall be the duty of the school board of the proper district, upon the fact being shown to their satisfaction, to furnish the necessary clothing and pay for the same out of the school fund of such district, by warrant as in other cases.

Section 3 of said act provided a penalty for the violation of the provisions of section 2.

Section 4 makes it the duty of any school director of the district to inquire into all cases of neglect of the duty prescribed in the act, and ascertain from the persons neglecting the reason, if any, therefor. He is also directed to prosecute forthwith, any offense occurring under the act. He is not required to have had ten days' notice from any person before commencing such prosecution, but the law makes it imperative upon any director of the school district to inquire into all cases of neglect of duty under the act of a parent, guardian or other

person, and to institute proceedings against them forthwith, upon his own responsibility.

If any director of the school district in which an offense against the act had been committed, shall personally know of such offense, and shall fail to prosecute the same of his own motion, any taxpayer of the district may serve him with a written notice of such offense, and if such director does not within ten days after the service of such notice, secure the prosecution of the offender, such failure on the part of the director is deemed to be a misdemeanor under the act, and upon conviction of such neglect of duty, he may be made to pay a fine of not less than ten nor more than fifty dollars.

I think the above sets forth the duty of the school director under the act in question, and the directors in all school districts in this state should see that the provisions of the act are complied with. While in some instances parents are dependent upon their children for support, such cases are rare, and the failure of many children to obtain the advantages of an elementary education is the result of the failure and neglect of the parent. It is the latter class that the law is intended to reach, and its enforcement will work no hardship, but on the contrary, will result in absolute benefit to the child, the parent and the community.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE METHOD OF VOTING.

1. The election laws should be liberally construed in order that the will of the elector may not be defeated by mere technicalities.

2. The main point for the judges of election to bear in mind in counting the ballots and the votes marked thereon, for the different candidates, is the intention of the voter in marking his ballot. If this can be reasonably ascertained, the votes should be counted as marked.

3. A defective or incomplete cross mark in ink upon the ballot, in a proper place, should be counted, if there be no other mark upon the ballot showing the intentiton of the voter to vote for other candidates than those indicated by such defective or incomplete mark.

Attorney General's Office,
Denver, Colo., April 18, 1894.

N. F. Clark, Esq., Florence, Colorado.

Dear Sir—Section 29, of the election law, sess. laws 1891, p. 160, provides "If a voter marks in ink more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the choice of any voter for any office to be filled, his ballot shall not be counted for such office. Provided, however, a defective or an incomplete cross marked on any ballot in ink in a proper place shall be counted if there be no other mark or cross in ink on such ballot, indicating an intention to vote for some person or persons or set of nominations, other than those indicated by the first mentioned defective cross or mark, and where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked."

In the counting of the ballots, section 31, Id., provides: "* * * each ballot shall be read and counted separately, and every name included in a marked set or list of nominations, or separately marked as voted for one such ballot, where there is no conflict to obscure the intention of the voter, as aforesaid, shall be read and marked upon the tally list, * * *."

The main point for the judges of election to bear in mind in counting the ballots and the votes marked thereon for the different candidates is the intention of the voter in marking his ballot. If this can be reasonably ascertained the votes should be counted as marked. The election laws should be liberally construed in order that the will of the elector may not be defeated by mere technicalities.

The sample ballots submitted by you are, in my opinion, sufficiently definite to determine the intention of the voters casting the same and should be counted.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE INSPECTOR OF WEIGHTS AND MEASURES.

The law requires of county commissioners in each county in the state to appoint annually an inspector of weights and measures; to make out a list of fees to be charged by said inspector, and to furnish him all the necessary tools, marks and brands required by him in the proper discharge of his duties, at the county's expense.

Attorney General's Office,
Denver, Colo., April 18, 1894.

Wm. H. Smith, Esq., Inspector Weights and Measures, Louisville, Colo.

Dear Sir—In reply to your communication of recent date, relative to your duties and compensation as inspector of weights and measures, would say, the board of county commissioners in each county in the state are required to appoint some fit and proper person, annually, at the first regular monthly meeting of every year, as inspector of weights and measures. The inspector when appointed is required to give a bond for the faithful performance of the duties of his office, as the commissioners may direct.

Mills' Ann. Stats., sec. 4646.

The commissioners are also required to make out a list of fees to be charged by said inspector, and such fees when charged are recoverable in any court the same as any other debt or account. Id., sec. 4647.

It is further the duty of the board of county commissioners to furnish to each inspector all the necessary tools, marks and brands which he may require, to be paid for out of the county funds. Id., sec. 4648.

It will be seen by the foregoing provisions of the law that the board of county commissioners in each county of the state are required:

First—To appoint an inspector of weights and measures at their first regular monthly meeting of every year.

Second—To make out a list of fees to be charged by said inspector.

Third—To furnish him all the necessary tools, marks and brands which he may require.

Fourth—The tools, marks and brands required by him in the proper discharge of his official duties, must be paid for out of the county funds.

These are the clear and express provisions of the law. There can be no misconstruction. If the legislature intended the inspector to furnish his own tools, marks, brands, etc., at his own expense, and to pay for them out of the fees of his office, it would have so provided, but it expressly provides that these things shall be paid for out of the county funds, a source entirely separate and apart from the fees which he is authorized to charge and collect.

It is my opinion that the fees were provided him as compensation for his services as such inspector, and it is not contemplated by the law that he shall be compelled to pay for the tools, etc., necessary for the proper discharge of his duties, out of such fees. These must be paid for by the county out of the county fund.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SCHOOL BOARD.

Attorney General's Office,
Denver, Colo., April 24, 1894.

N. W. Terry, Esq., Rocky Ford, Colo.

Dear Sir—In reply to your communication of recent date, relative to the building of a school house by the board of directors of a school district, would say, the law does not specify the manner in which a school board shall proceed in the matter of building a school house, or whether such board shall advertise for bids or not. The board is permitted to exercise discretion in the matter, having in view at all times, the best interests of the district.

The right to reject any and all bids is usually reserved to prevent frauds or collusion in the executing of contracts.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE LICENSE TO SELL SPIRITOUS, VINOUS AND MALT LIQUORS.

Under the statutes of this state, no county, city or town can issue a license for the sale of spiritous or malt and vinous liquors for a greater period than twelve months nor for a less period than six months.

Attorney General's Office,
Denver, Colo., April 24, 1894.

Hon. John M. Dieke, Mayor, Tin Cup, Colorado.

Dear Sir—In reply to your communication of the 14th inst., would say, that under the statutes of this state, no county, town or city can issue license to sell spiritous, vinous and malt liquors for a period greater than twelve months, nor for a less period than six months, nor until the whole of the license fee due therefor has been paid into the proper treasury of the county, town or city.

Mills' Ann. Stats., sec. 2849.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE WOMAN'S SUFFRAGE.

1. The act of 1893 (sess. laws, page 256) submitted to a vote of the people the question of woman suffrage only. Having been adopted by the people, women in consequence are permitted to vote at all elections to the same extent as men.

2. Under the rights now conferred by the law, women may hold any civil office in this state; they are not subject or eligible to jury duty; they are not eligible to a military office, except as the same may be incidental to the exercise of a civil office; they cannot be required to pay a military or general poll tax.

3. The right of granting suffrage to women is founded in the constitution; the legislature was constituted the medium by which the people might give expression of their will as to the exercise of that right. The legislature could not of itself confer the right, neither can it now restrict or abrogate it. It can only be done by consent of the people through an amendment of the fundamental law—the constitution.

Attorney General's Office,
Denver, Colo., May 1, 1894.

H. B. Stephens, Esq., Editor "Woman Voter," Denver, Colo.

Dear Sir—Pressure of public business has prevented me from more promptly replying to your communication of March 23rd, ult., in relation to woman suffrage in the state of Colorado.

In reply to your first inquiry, "Can women vote for presidential electors, and are there any restrictions or conditions of any kind attaching to the new vote?" would say:

The act of 1893, sess. laws, p. 256, submitted to a vote of the people, the question of woman suffrage only. Having been adopted by the people, women in consequence are permitted to vote at all elections to the same extent as men. But no privilege is conferred on them by the law, except the right to vote and such further rights as are necessarily dependent thereon.

Article 7, section 6, of the constitution, reads as follows:

"No person except a qualified elector shall be elected or appointed to any civil or military office in the state."

Were it not for this limitation in the constitution, all persons other than qualified electors would be entitled to hold office. It is a right belonging generally to every member of the body politic, under our system of government, unless qualified by law. Hence, the people having removed the restriction in the case of women, in the matter of suffrage, their right to hold office is now unimpaired.

The legislature has the power to limit the exercise of public functions to any class of the people. The right to vote does not necessarily carry with it the right to sit on juries.

The extension of the right of suffrage to women does not abrogate the provision of the act of 1885, sess. laws, p. 263. By that act only "male" inhabitants are declared competent to serve as grand and petit jurors.

Article XVII., sec. 1, of the constitution, says that "the militia of the state shall consist of all able-bodied male residents of the state * * *."

By the act of 1889, sess. laws, p. 383, "every able-bodied male citizen" is subject to military duty.

The same act (p. 399), requires the military poll tax to be levied upon each "male" inhabitant. The general poll tax can be levied only on able-bodied male inhabitants. G. S., sec. 2813.

Our supreme court has recognized the constitutional provision first above quoted as being the only thing in the way of the holding of office by a woman.

9 Colo., 628.

11 Colo., 191.

Hence it appears:

1. That women may hold any civil office in this state.

2. They are not subject or eligible to jury duty.

3. They are not eligible to a military office, except as the same may be incidental to the exercise of a civil office.

4. They cannot be required to pay a military or general poll tax.

Your second inquiry, namely: "Is the equal suffrage right permanent or can it be revoked by act of the state legislature at any time?" involves a constitutional interpretation.

Judge Cooley has said that, "Participation in the elective franchise is a privilege rather than a right, and is granted or denied upon the grounds of general policy." (Cooley Const. Lim., 589.)

The right of suffrage is a political and not a natural right, and limitations have always been placed upon its exercise even in the most liberal democracies. In nearly all countries the right has been denied to females, minors, aliens and persons non compos mentis.

In 53, Pa. St., 112, Strong, J., says. "It is not to be doubted that the power to regulate suffrage in a state; and to determine who shall, and who shall not be a voter, belongs exclusively to the state itself. The constitution of the United States confers no authority upon Congress to prescribe the qualifications of electors within the several states which composed this Federal Union. The right of suffrage at a state election is a state right, a franchise conferable only by the state, which Congress can neither give nor take away." and in the case of Anderson vs. Baker, 25 Mo., 531, Chief Justice Bowie says: "The regulation of the right of suffrage has been reserved by the states to themselves, and was not delegated to the general government by the federal constitution." In this case it was held that the right to suffrage

was the creation of the organic law and might be modified or withdrawn by the same authority which conferred it without being considered as the infliction of any punishment upon those who are qualified, and the same doctrine is laid down in Blair vs. Ridgley, 41 Mo., 63.

In the case of Burch vs. Van Horn, 3 Cong. El. Cases, 205, Judge Poland, in a report of the committee, in speaking of the right of suffrage says: "When once granted, it is not a vested, irrevocable right, but it is held at the pleasure of the power that gave it; and the state may, by a change of its fundamental law, restrict as well as enlarge it."

The right to vote under the constitution is a vested constitutional right. We mean by the term vested, that a person has the power to do certain acts or to possess certain things according to the law of the land. Chase J. Calder vs. Bull, 3 Dall., 394.

If the right be vested by the constitution, it denotes a right that cannot, under the constitution, be taken away.

Rich vs. Flanders, 39 N. H., 385.

Eakin vs. Raub, 12 Serg. & R., 360.

Page vs. Allen, 58 Penn. St., 338, 347.

Capin vs. Foster, 12 Pick., 448.

Judge Cooley, in his work on constitutional limitations, further says: "Where a certain rule for the exercise of the right of suffrage has become a part of the fundamental law of the land, the right can only be extended or restricted in a democratic form of government, by the consent of the majority of those who already possess it, or by revolution."

The right of women to exercise the elective franchise in the state of Colorado was granted under and by virtue of art. VII., sec. 2, of the constitution, which is as follows:

Sec. 2. "The general assembly shall, at the first session thereof, and may at any subsequent session, enact laws to extend the right of suffrage to women of lawful age, and otherwise qualified according to the provisions of this article. No such enactment shall be of effect until submitted to the vote of the qualified electors at a general election, nor unless the same be approved by a majority of those voting thereon."

Under and by virtue of the authority granted in the foregoing section of the constitution, the ninth general assembly enacted a law conferring the right of suffrage upon women, and the same was ratified and approved by a majority vote of the qualified electors of this state, at the general election in November, 1893. The right is therefore founded in the fundamental law of the state. It is a constitutional right. The constitutional provision is not effective proprio vigore, only in so far as the action of the legislature is concerned. It was made mandatory upon this body to enact a law granting this privilege to women at its first session, but such law was of no force and effect until the same was submitted to the vote of the qualified electors, at a general election, nor unless the same be approved by a majority of those voting thereon. These provisions having been fully complied with, said section of the constitution becomes operative and in full force and effect. The rights and privileges therein granted to women, obtains equal dignity with those conferred upon male citizens of this state; they are built upon the same foundation, guarded and protected by the same authority.

The legislature was not given plenary powers, regarding the question of giving the right of suffrage to women. It was but the means to the end; an instrument by which this right might be conferred. The right itself is founded in the constitution; the legislature was constituted the medium by which the people might give expression of their will as to the

exercise of that right. The legislature could not of itself confer the right, neither can it now restrict or abrogate it. It can only be done by consent of the people through an amendment of the fundamental law—the constitution.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SALE OF PATENT AND PROPRIETARY MEDICINES.

The state board of health has no authority to compel the printing of the formula upon the label of patented or proprietary medicines sold in this state; neither can said board prevent the introduction into the state of such medicines, because the formula thereof is not published or printed upon the label.

Attorney General's Office,
Denver, Colo., May 5, 1894.

Henry Sewall, M. D., Secretary State Board of Health, Denver, Colo.

Dear Sir—In reply to your communication of recent date, in which you ask, "1. Has the state board of health at present the right, or can it be empowered to compel the printing upon its label the formula of every patented or proprietary medicine sold in this state? 2. Is it possible, and can the state board of health be the instrument to forbid the introduction into this state of any medicines whose formulae are not so stamped on the bottle or package?" would say:

Under the present laws the state board of health could not compel the printing of the formula upon the

label of patented or proprietary medicines sold in this state; neither could said board prevent the introduction into the state of such medicines, because the formulae thereof was not published or printed upon the label.

In reply to your third question, relating to the publication of a certain resolution of the pharmaceutical association, and whether or not the publication thereof would constitute a libel, permit me to state, that in my opinion, the pharmaceutical association is given no authority to regulate the sale of such proprietary or patent medicines as in the resolution mentioned; the statute concerning pharmacy and also that in relation to poisons expressly exempt such medicines from its restrictions or regulations (Mills' Ann. Stats., sec. 3497, Laws 1893, p. 369, sec. 12), except that the board may require a "caution" label such as it may devise and direct, to be affixed to the wrapper or container of all patent or proprietary medicines known to contain any of the ingredients mentioned in schedule "A" of the act (sess. laws 1893, p. 370, sec. 13, and schedule "A," p. 371, sec. 17, Id.), when the same are sold by the proprietors of establishments other than pharmacies, and where physicians' prescriptions are not dispensed, as well as itinerant vendors of merchandise. This is the only limitation placed upon the marketing or vending of these medicines by the present law. The board cannot, by resolution, prohibit the sale of patent or proprietary medicines, neither can it by this means amend or repeal existing statutes, nor restrict the operation of their provisions.

In relation to your fourth inquiry, viz: "What would be the most efficient procedure to put a stop to the advertisement in Colorado of remedies whose publication is forbidden by law?" would say:

I think such cases are fully covered by the provisions of section 1327, Mills' Ann. Stats., and any violation of this section or any other, governing

crime, in this state, should be brought to the attention of the district attorney, in order that the same may be prosecuted.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE ASSESSMENT OF MINES AND MINING CLAIMS.

1. The fiscal year of each county in the state commences on the first day of January in each year.

2. The assessment of mines and mining claims for the year 1894, must be based upon the gross proceeds in dollars and cents derived therefrom, during the fiscal year commencing on January 1st, 1893.

Attorney General's Office,
Denver, Colo., May 7, 1894.

Hon. R. M. Sherwood, Assessor, Eagle County, Red Cliff, Colo.

Dear Sir—In reply to your communication of recent date, relative to assessment of mines and mining claims, would say:

The fiscal year of each county in this state commences on the first day of January in each year. Sess. laws 1891, p. 111, sec. 1.

The assessment of mines and mining claims for each year is based upon the gross proceeds in dollars and cents derived from the mine and mining claim during the preceding fiscal year, i. e., the assessment of mines and mining claims for the year 1894 will be based upon the gross proceeds in dollars and cents derived therefrom, during the fiscal year commencing on January 1, 1893.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE EXPENSES OF THE INSTITUTION FOR THE MUTE AND BLIND.

1. Neither the legislature nor the officers and agents of the state, nor all combined, can create a debt or incur an obligation, for, or in behalf of the state, except as to the amount and in the manner provided for in the constitution.

2. The institute for the mute and blind cannot incur a greater expense during any fiscal year than the revenue for such year will cover, and such revenue includes the 1-6 mill tax, and any special appropriation made by the general assembly for the use and benefit of the institution for such fiscal year.

3. Said institution may anticipate and incur indebtedness in any year to the extent of eighty per centum of the gross amount of the levy made for that year.

Attorney General's Office,
Denver, Colo., May 12, 1894.

Hon. Daniel Hawks, President Board of Trustees,
Mute and Blind Institute, Greeley, Colo.

Dear Sir—In reply to your communication of recent date, relative to the expenses of the institution for the mute and blind, and the statutes now in force relating to fiscal affairs of state institutions, would say, the laws referred to by you are in force and effect at the present time and may be found in Mills' Ann. Stats., as sections 4112-4117, inclusive. Section 4112 is the act of 1887 and section 4114, a portion of the act of 1889.

The eighty per centum referred to in section 1, of the act of 1887, limits the amount to which the officers of a state institution may contract an indebtedness in any one year, based upon the levy of the special tax for that year, and not to the time when such indebtedness may be contracted. The indebtedness may be contracted at any time during the year, provided, that such indebtedness does not exceed eighty per centum of the gross amount of the levy made for that year.

In answer to your second inquiry, as to the right of the governor to authorize the contraction of an indebtedness under section 1, of the act of 1887, would say, that it has been well established both in this state and in other states having similar constitutional restrictions, that neither the legislature nor the officers and agents of the state, nor all combined, can create a debt or incur an obligation for or in behalf of the state, except as to the amount and in the manner provided for in the constitution.

In re appropriations, 13 Colo., 323.

Cooley Const. Lim., 69, 70.

People vs. May, 9 Colo., 92.

10 Pac. Rep., 641.

Lake Co. vs. Rollins, 9 Sup. Ct. Rep., 652.

S. O., 130, N. S., 672.

People vs. Johnson, 6 Cal., 499.

People vs. Supervisors, 52 N. Y., 563.

The institute for the mute and blind is supported by means of a state tax; a part of which is imposed by means of a special levy for that purpose, which is in the nature of a continuing appropriation, and sometimes aided by a special appropriation by the legislature, of a certain amount, derived however, from the same source—the state tax. By section 11, article X., of the constitution, taxation is limited to a certain rate. By section 16, of the same article, expenditure is limited to the taxes raised. Taking the provisions of the two sections together, the intention would seem to be, that the annual state tax should meet the annual state expenditure.

The People ex. rel vs. May, 9 Colo., 80.

These two sections last mentioned, construed with section 3, article 11, show that no state indebtedness was contemplated except such as might be incurred under said section 3, Id.

Section 3, above referred to, provides: "The state shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue, erect public buildings for the use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States; * * *." The words "casual deficiencies of revenue" in this section, mean deficiencies that happen by chance or accident, and without design or intention to evade the constitutional inhibition.

Hovey vs. Foster (Ind.), 21 N. E. Rep., 41.

In re Legislative App., 13 Colo., 325.

The provisions of the section cannot be made available except to provide for a valid indebtedness occasioned by a "casual deficiency" as above defined; where the deficiency comes by making expenditures or appropriations in excess of the limit fixed by art. X., sec. 16, the same is not a "casual deficiency;" Id.

The proviso in section 4112, Mills' Ann. Stats., is as follows: "Provided, That in cases of emergency, the governor may authorize the contraction of such indebtedness as in his judgment shall be absolutely necessary for the maintenance and support of the institution, until such time as the general assembly shall meet." By the enactment of this proviso, the legislature has undertaken to delegate a power to the governor, which, under the constitution, the state itself is prohibited from exercising. There is no limit placed upon his discretion. By the language of the statute he alone is to decide, when the "emergency" exists, and the amount of indebtedness that shall be incurred in order to meet such emergency. Such power was never contemplated by the framers of the constitution; on the contrary, in order to preserve the integrity, standing and credit of the state, and its institutions, to prevent extravagance and a wanton expenditure of the public revenues by indiscreet persons, who, under our system of government, succeed in obtaining positions of trust in the several

departments, the makers of that instrument in their sound judgment and wisdom, expressly limited and restricted the annual state expenditure to the annual state tax; this being clearly the intent and purpose of the constitutional provisions, as regards the state, it follows that all officers and agents of the state in any department whatsoever, must necessarily come within the same inhibition.

The officers of the state institutions themselves are expressly prohibited from incurring or contracting any indebtedness, for, in behalf of or in the name of such state institutions, or in the name of the state, in excess of the sum appropriated by the general assembly for the use and support of such institution for the fiscal year. Section 4114, Id.

The institution cannot incur a greater expense during any fiscal year than the revenue for such year will cover, which revenue includes the 1-6 mill tax and any special appropriation made by the general assembly, for the use and benefit of the institution for such fiscal year.

The institution may anticipate and incur indebtedness in any year to the extent of eighty per centum of the gross amount of the levy for that year.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF MINES.

For the purpose of assessment, mines are divided into two classes; first, mines producing annually upward of $1,000; second, non-producing claims, including those that produce something, but less than $1,000.

Attorney General's Office,
Denver, Colo., May 18, 1894.

S. B. Wright, Esq., Bonner's Ferry, Idaho.

Dear Sir—In reply to your communication of recent date, relative to the assessment of mining claims, would say, all mining property is by statute subjected to taxation. For the purpose of assessment, it is divided into two classes:

First—Mines producing annually upwards of $1,000.

Second—Non-producing claims, including those that produce something, but less than $1,000.

Mines belonging to the first class are to be valued according to the peculiar method specified by statute in relation thereto. Mills' Ann. Stats., sec. 3224. Mines of the second class are to be assessed in the manner provided for the assessment of other taxable realty.

People ex. rel vs. Henderson, 12 Colo., 369.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE APPOINTMENT OF DEPUTIES BY SHERIFFS, COUNTY CLERKS, COUNTY TREASURERS AND COUNTY ASSESSORS.

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1. Under section 17, p. 313, sess. laws 1891, the employment and the compensation of deputies and assistants for sheriffs, county clerks, county treasurers and county assessors, is placed within the discretion of the board of county commissioners; and in the absence of any statutory tenure of office or specific stipulation as to period of employment of such deputies or assistants, the question of the removal, discharge or retention of such deputies or assistants, rests with said board.

2. None of the above named county officers can employ deputies or assistants without the consent of the board of county commissioners and hold the county responsible for their salary.

Attorney General's Office,
Denver, Colo., May 21, 1894.

Hon. M. D. Copp, Chairman Board County Commissioners, Phillips County, Holyoke, Colo.

Dear Sir—In reply to your communication of recent date, relative to the appointment of deputies to the county clerk and treasurer, would say, section 17, p. 313, sess. laws 1891, provides as follows:

Sec. 17. "Deputies and assistants may be employed by the sheriffs, county clerks, county treasurers and county assessors under the direction of the board of county commissioners for said counties respectively, and shall be paid salaries out of the fees, commissions and emoluments of the office wherein employed (except employes of county assessor who shall be paid out of the county treasury), to be fixed by the board, the selection of said deputies and employes to be made by the officer authorized to employ them."

It seems by the provision of the section above quoted, that the question of the necessity for such

deputies and assistants as therein mentioned, is left to the discretion of the board of county commissioners. The deputies and assistants are to be employed "under the direction of the board of county commissioners," but whenever the board of county commissioners directs the employment of such deputies and assistants, the officers for whom they are to be employed are given the right by virtue of the same section, to select such persons as they see fit to name. The employment and the compensation of such deputies and assistants, is placed within the discretion of the board of county commissioners. In the absence of any statutory tenure of office or specific stipulation as to period of employment of such deputies and assistants, and the circumstances or emergency which demanded such employment no longer existing, their removal, discharge or retention is discretionary with the board of county commissioners.

To answer the questions submitted by your board specifically, I should say:

First. In the absence of any statutory tenure of office or specific stipulation as to period of employment of such deputies and assistants, the question of the removal, discharge or retention, of such deputies and assistants, is discretionary with the board of county commissioners.

Second. The only "showing" necessary to be made in order to cause a removal or discharge of such deputies or assistants is, that it would be for the best interests of the county that they be no longer employed.

Third. Neither the county treasurer nor the county clerk can employ deputies or assistants without the consent of the board of county commissioners and hold the county responsible for their salary.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE PUBLISHING DELINQUENT TAX LIST.

A contract between a county and the publisher of a newspaper, for the publishing of the delinquent tax list of a county, having been entered into before the enactment of a law changing the fees for such publication, cannot be abrogated, nor can the parties thereto be released from its obligations by virtue of the new act.

Attorney General's Office,
Denver, Colo., April 24, 1894.

J. W. Van Deventer, Esq., Sterling, Colo.

Dear Sir—In reply to your communication of recent date, as to whether or not your contract with the county treasurer of Logan county, regarding the publication of delinquent tax list can be enforced, would say, that all contracts are construed in accordance with the law in force at the time they are made.

The legislature is prohibited from passing acts ex post facto in their operation or those impairing the obligations of a contract. Your contract with the county treasurer was made on March 1, 1894. The fees therein mentioned were, I presume, the legal fees allowed publishers at the time said contract was made. The contract was for publishing the delinquent tax list of 1894. The new act changing the fees for this work was approved March 3, 1894, and after the contract was entered into, but it can in no way interfere with or affect the operation of the contract.

If the contract itself is legal, a law enacted after its execution can in no way change its obligations.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE WORKING OF POLL TAX BY MEMBERS OF STATE MILITIA.

Under the present law, there are several classes of poll tax, some of which may be paid by labor in lieu of cash. Active members of all companies, troops and batteries, being exempt under the law from labor on the public highways, cannot be compelled to work a poll tax, but are not exempt from paying another class which may not thus be paid, and from which they are not expressly exempt.

Attorney General's Office,
Denver, Colo., May 31, 1894.

Capt. Wm. Calhoun, Monte Vista, Colo.

Dear Sir—In reply to your communication of recent date, asking whether or not members of the state national guard can be compelled "to work a poll tax," would say, the several provisions of the statute relating to poll tax, are as follows:

"A poll tax shall be assessed on every able-bodied male inhabitant of the state, over the age of twenty-one and under fifty years, whether a citizen of the United States or an alien."

Mills' Ann. Stats., sec. 3764.

For the purpose of raising revenue for state, county and school purposes, the law provides that there shall be levied and assessed upon taxable real and personal property within this state in each year, certain taxes, "and a poll tax not to exceed one dollar for such purposes as shall be determined by the board of county commissioners of each county." Section 3768, Id.

A poll tax is a per capita tax and is levied as such in addition to, and regardless of, the rate levied upon the taxable real and personal property within the state.

Again it is provided, "Every able-bodied man, between the age of twenty-one and fifty years, shall annually pay to the overseer of roads of the district wherein he resides, a road tax of three dollars, or in lieu of such sum shall labor two days upon the public roads wherever notified by the overseer, as hereinafter provided, but the provisions of this act shall not apply to persons residing within the corporate limits of cities and towns." Section 3954, Id.

The authority is granted to councils in cities and boards of trustees of towns, "To levy and collect annually from each able-bodied male citizen of such city or town between the ages of twenty-one and sixty years, a poll tax, or require a certain amount of labor in lieu thereof; provided, such tax shall not exceed the sum of three dollars per capita." Section 4404, Id.

As will be seen from the above sections, the tax to be paid to the overseer of roads, and the poll tax levied by the councils of cities and boards of trustees in towns, may either be paid in cash or labor may be performed in lieu thereof, but such alternative is not provided in the case of the poll tax mentioned in section 3768, supra.

You do not state in your communication the nature of the poll tax you are requested to "work," but I presume, the poll tax to which you refer falls within the purview of section 4404, supra, that is, that the town of Monte Vista, under and by virtue of the authority therein conferred, has levied a poll tax upon every able-bodied male citizen residing therein, including members of the militia, and as in your case, having failed to pay the tax, have been notified that a certain amount of labor will be required of them in lieu thereof.

Section 20, p. 392, sess. laws 1889, provides that "active members of all companies, troops and batteries shall, during their membership, be exempt from labor on the public highways and from service as jurors." This section exempts members of the

state national guard from being forced to work in default of payment of the poll tax mentioned in sections 3954 and 4404, supra, but does not exempt them from the payment of the poll tax mentioned in section 3768, supra.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SOLDIERS' AND SAILORS' HOME.

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1. The board of commissioners of the soldiers' and sailors' home, cannot issue interest-bearing warrants when there are no funds in the hands of the treasurer of said commission to meet bills when presented.

2. There is no authority for the officers of the institution, or any of them, to issue interest-bearing warrants in any form.

Attorney General's Office,
Denver, Colo., June 11, 1894.

Hon. John W. Browning, Secretary Board of Commissioners, Soldiers' and Sailors' Home, Denver, Colo.

Dear Sir—In reply to your communication of recent date, relative to warrants issued by the board of commissioners of the soldiers' and sailors' home, would say, that in my opinion, under the statute governing the fiscal affairs of state institutions, and in the absence of any authority granted by the act creating and establishing the said home, said board cannot issue interest-bearing warrants when there are no funds in the hands of the treasurer of said commission to meet the bills as presented.

With the exception of voluntary subscriptions which the commissioners are authorized to receive on behalf of the state, for the benefit of the home, it is dependent for its support and maintenance upon special appropriations made by the general assembly. It receives no part of its revenue from the levy of a special tax, such as the educational and other institutions of the state have provided for them. Its warrants when issued are cash warrants, drawn upon the fund appropriated for the purpose of meeting its running expenses. It cannot issue warrants in anticipation of the collection of revenue and its sum of indebtedness in any year cannot exceed the amount of the appropriation made for its support during such year.

The act of 1889, establishing the home, provides for the election of a treasurer for the institution, but in no manner specifies the nature of his duties. Mills' Ann. Stats., sec. 4105. The commissioners draw money directly from the state treasury, whenever it is needed, provided an appropriation has been properly made for the use of said institution, and there are funds in the state treasury to meet such appropriation, and I see no other duty for the treasurer of the institution to perform, than to parcel out the money so received from the state treasury to the individual creditors of the institution. There is no authority anywhere granted for the officers of the institution, or any one of them, to issue interest-bearing warrants in any form.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE SALARY OF COUNTY ASSESSORS.

1. In all counties except those of the first and second classes, county assessors are to be paid only for each day actually employed for the county, and the per diem must not exceed seven dollars; it may be less if the county commissioners see fit to make it so.

2. The law does not specify any particular office hours for county assessors.

Attorney General's Office,
Denver, Colo., June 19, 1894.

Hon. George E. Metcalf, County Assessor, Boulder, Colorado.

Dear Sir—In reply to your communication of recent date, would say, county assessors in all counties, except those of the first and second classes, receive as their compensation a sum not to exceed seven dollars per day, for each day actually employed for the county, as may be allowed by the board of county commissioners of the respective counties, but in no instance to exceed the sum of twenty-five hundred dollars per annum. Sess. laws 1891, sec. 13, p. 312.

The language of this statute needs no explanation, assessors in the counties of the classes above indicated, are to be paid only for each day actually employed for the county, and the per diem must not exceed seven dollars; it can be less if the county commissioners see fit to make it so.

All county officers except the county superintendent of schools, county assessor and county surveyor, are required to be kept open at least eight hours every working day. Of course this does not include legal holidays. Sess. laws 1891, sec. 18, p. 313.

The three offices included in the above exception are not prescribed as to the time they shall remain open.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE MILITARY POLL TAX.

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1. Session laws 1889, Art. VI., sec. 1, provides for the levying of a military poll tax. Such tax may be levied upon residents of this state and applies equally to all males, whether citizens or aliens, except active members of the national guard and such other persons as may be exempt by law.

2. Honorably discharged soldiers and sailors of the United States are exempt from the payment of a military poll tax, also active firemen and those having served as such for a period of five years are exempt from the payment of a poll tax.

Attorney General's Office,
Denver, Colo., June 19, 1894.

Hon. Davis H. Waite, Governor of Colorado.

Dear Sir—Replying to the communication of the Hon. W. Q. Gresham, secretary of state, United States, transmitted by you to this office, would say, the statute in relation to the militia of the state, provides that "the county commissioners of each county shall, at the time of levying the tax for county purposes, cause to be levied an annual poll tax of one dollar upon each male inhabitant over the age of twenty-one years, excepting active members of the national guard and such other persons as may be exempt by law. A failure or neglect on the part of the county commissioners to levy such tax shall subject such county commissioners, and each one

of said such commissioners, to a fine of not less than one thousand nor more than five thousand dollars, for the benefit of the military fund, and it is hereby made the duty of the adjutant general to institute proceedings against such commissioners to recover such fine. The said 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."

L. '89, pp. 399, 400, art. VI., sec. 1.

The above tax when collected must be kept by the county treasurers separate from all other funds, and must be transmitted quarterly by the county treasurers to the state treasurer, who is directed to place it to the credit of the military fund.

This is the only military tax levied upon residents of this state and applies equally to all males whether citizens or aliens.

Honorably discharged soldiers and sailors of the United States are exempt from payment of any military poll tax levied in this state. Active firemen and those having served as such for a period of five years are also exempt from the payment of a poll tax.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE ASSESSMENT AND REVENUE.

1. The revenue of 1894 is the tax collected in 1895, based upon the assessment and levy of 1894, together with the unexpended balances of preceding years which may be credited to the revenue of 1894.

2. Warrants are paid in the order of their registry. Warrants drawn in 1894, for the payment of a part of the expenses of that year, are payable only out of the revenues of 1894.

3. Warrants of any year issued in excess of the revenue for such year, are illegal and void.

Attorney General's Office,
Denver, Colo., June 19, 1894.

Hon. Walter A. Garrett, Clerk and Recorder, Georgetown, Colo.

Dear Sir—In reply to your communication of recent date, would say, the revenue of 1894 is the tax collected in 1895, together with the unexpended balances of preceding years which may be credited to the revenue of 1894, that is to say, the assessment of property is made between the 1st day of May and the 20th day of June, 1894 (sess. laws 1893, secs. 1 and 2, p. 412), the assessed valuation then determined is the basis of the revenue for 1894. The levy is made in October, and the amount of the revenue for 1894 can then be estimated, based upon the amount of such levy and the assessed valuation theretofore established. The tax list must be delivered by the assessor to the county treasurer, on or before January 1, 1895. Sess. laws 1893, sec. 11, p. 418. This tax list is full and sufficient authority for the treasurer to collect all taxes contained therein. The taxes based upon the assessment and levy made as above stated, are due and payable on or before the last day of February and July, 1895. Sess. laws 1893,

sec. 2, p. 433. When collected, these taxes comprise a part of the revenue for the year 1894. If there is a balance remaining to the credit of the revenue of 1893, after all warrants of said year have been paid, then such balance may become a part of the revenue of 1894 and made subject to the payment of its warrants.

The law provides that expenditures must be limited to and paid out of the revenues in each year.

13 Colo., 316-328.

Warrants are paid in the order of their registry. Warrants drawn in 1894, for the payment of a part of the expenses of that year, are payable only out of the revenues of 1894. If issued in 1894, but for the payment of a part of the expenses incurred during any preceding year, the said warrants must be paid out of the revenue of the year in which such expense was incurred. Warrants of any year issued in excess of the revenue for such year, are illegal and void.

13 Colo., 316.

Whenever there are no moneys in the county treasury of a county, to the credit of the proper fund, to meet and defray the necessary expenses of the county, warrants may be issued in anticipation of the taxes already levied for the payment of such expenses to the extent of eighty per cent. of the total amount of the taxes levied. Mills' Ann. Stats., sec. 801.

Respectfully,

EUGENE ENGLEY,
Attorney General.

IN RE INSPECTOR GENERAL OF THE STATE MILITIA

For all other purposes than those mentioned in section 3081, Mills' Ann. Stats., the inspector general of the militia is also paymaster general.

Attorney General's Office,
Denver, Colo., July 3, 1894.

General W. W. Ferguson, Inspector General, State Militia, Denver, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the construction of certain military statutes of the state, would say: Section 3034, Mills' Ann. Stats., provides for the appointment of general officers of the militia, among whom is "an inspector general, with the rank of colonel, who shall act as paymaster general."

Section 3059, Id., prescribes the duties of the inspector general, among which it is stated: * * * "He shall act as paymaster general, and shall give bond in the sum of five thousand dollars for the proper and faithful discharge of his duties as such."

The inspector general is also required to make payments of vouchers for the per diem of members of the militia during state encampments. Section 3030, Id.

The next section, 3031, makes an exception, and provides that vouchers for transportation, subsistence, medical attendance (when not rendered by a medical officer of the service), medical supplies and quarters, and use of horses for the troops serving in the field under orders from the commander-in-chief,

shall be forwarded to the adjutant general, who will pay the same when audited by the state military board and approved by the governor.

The exception above noted is the only one found in the statutes; but for all other purposes the inspector general is the paymaster general of the state militia.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE CONDITIONAL PARDONS.

The governor may grant a conditional pardon and may annex any condition he thinks fit, whether precedent or subsequent, on the performance of which the validity of the pardon will depend.

Attorney General's Office,
Denver, Colo., July 19, 1894.

Hon. J. H. Gabriel, Secretary State Board of Pardons, Denver, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the power of the governor to grant conditional pardons, with a condition precedent or subsequent, would say I find the weight of authorities in favor of the exercise of such power by the executive, both in England and the United States.

In England, the king may extend his mercy on what terms he pleases, and may annex any condition he thinks fit, whether precedent or subsequent,

on the performance of which the validity of the pardon will depend.

4 Block Comm., 401;
Co. Lit., 274, b.

The same doctrine obtains in the United States, and without referring to the circumstances arising under each particular case, would respectfully refer you to the following authorities in support of the power.

Ex parte Wells, 18 How. (U. S.), 307, 331 and note.
U. S. v. Wilson, 7 Pet. (U. S.), 150.
Flavell's case, 8 W. and S. (Pa.), 197
State v. Chancellor, 1 Strobh (S. Car.), 347.
47 Am. Dec., 557.

In connection with the cases above cited, I also submit the following, in which may be found various expressions of the courts in relation to the legal effect of particular cases.

Waring v. U. S., 7 Ct. of Cl., 501.
State v. Barnes, (S. Car., 1890).
Ex parte Kennedy, 135 Mass., 48.
Arthur v. Craig, 48 Iowa, 264.
30 Am. Rep., 395.
West's case, 111 Mass., 443.
State v. Addington, 2 Bailey (S. Car.), 516.
23 Am. Dec., 150.
Re Lockhart, 1 Disney (Ohio), 105.
Comm. v. Phila., Co. Prison, 4 Brewst. (Pa.), 320.
Ex parte Marks, 64 Cal., 29.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE CATTLE INSPECTORS.

1. There is no authority in law whereby the inspectors appointed by the state board of stock inspection commissioners are given the right to sell estrays and appropriate the money thus derived for their own use and benefit, or for that of said board.

2. The funds now in the hands of said board of inspection commissioners, derived from such source, cannot be used by them without further legislative action.

Attorney General's Office,
Denver, Colo., July 31, 1894.

Hon. Casimero Barela, Treasurer State Board Inspection Commissioners, Denver, Colo.:

Dear Sir—In reply to your letter of the 23d inst., in relation to certain moneys in your hands as treasurer of the state board of inspection commissioners, in which you state that such money has come into your hands as treasurer for estrays taken and sold by the different inspectors of said board, and in which you ask if said board has the right to use or authorize you to use any portion of this fund for any purpose whatever, except in the payment to owners for such estrays, would say I do not understand by what authority or by what means the funds held by you accumulated in the manner stated in your letter. Under the law, it is the duty of the state board of inspection commissioners to employ competent cattle inspectors not to exceed ten in number at any one time, and distribute them at such points within or without the state as will most effectually prevent the legal slaughter or shipping of cattle. Nowhere do I find in the law any provision whereby the inspectors so appointed are given the right to sell estrays and appropriate the money so derived for their own use and benefit, or for that of the state board of inspection commissioners. The statute prescribes a

method of procedure in the matter of estrays, prior to their sale, but when the same are sold, it is directed that the money so received, after deducting all legal costs, fees and charges, shall be paid to the county treasurer for the school fund. You state, however, in your letter, that you have a large sum of money in your hands as treasurer of the state board of inspection commissioners, and that said money was derived from the sale of estrays. If it is impossible to comply with the law, so that the money thus received may be credited to the counties lawfully entitled thereto, for the benefit of the school fund, I would suggest that no disposition can be made of such fund by the state board of inspection commissioners, or any other person or persons under them, without further legislative direction, and would further suggest that at the next session of the general assembly a bill be introduced, under the direction of your board, for the proper disposition of said fund.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION OF A WATER COMMISSIONER.

The words "pro rata" in section 2387, Mill's Ann. Stats., mean that each county into which a water district extends is liable for an equal amount of the compensation of a water commissioner.

Attorney General's Office,
Denver, Colo., August 1, 1894.

Hon. Robert Turner, Senator Twelfth District, Idaho Springs, Colorado:

Dear Sir—In reply to your communication of recent date, in which you ask a construction of sec-

tion 2387, Mills' Ann. Stats., and other sections pertaining to water commissioners, would say that the Colorado court of appeals has decided that the words "pro rata" in said section mean that each county into which a water district extends is liable for an equal amount of the compensation of a water commissioner.

2 Colorado Court of Appeals, p. 508.

Without discussing the wisdom of this decision, we must accept it as the law until the same is reversed, or the legislature shall see fit to change the statute upon which it is based.

Very respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE COUNTY INDEBTEDNESS.

Counties with an assessed valuation of less than a million dollars may create a debt by loan for the erection of necessary public buildings, and making and repairing public roads and bridges, but this debt, together with the county indebtedness already existing, cannot lawfully exceed a sum produced by a levy of taxation of twelve dollars on the thousand.

Attorney General's Office,
Denver, Colo., August 1, 1894.

Hon. P. J. Dempster, County Attorney, Holyoke, Colorado:

Dear Sir—In reply to your communication of recent date, in which you ask if Phillips county, with an assessed valuation of less than one million dollars, can create a bonded indebtedness for the

purpose of building a court house, would say the limit of such indebtedness, as well as for all other county purposes, is prescribed by section 6, article XI, constitution of Colorado.

In ascertaining the meaning of this section we must first see if it is capable of interpretation. If we are unable to ascertain the meaning by interpretation, we must resort to rules of construction.

The whole section is composed of two sentences. The first is prolix and composed of many clauses, and one proviso.

The first clause forbids any county to contract a debt by loan for any purpose, except for the purpose of erecting public buildings, making and repairing public roads and bridges.

The second, third and fourth clauses forbid the creation of a debt in any one year, by loan, by counties with an assessed valuation of more than five million dollars, to exceed a sum produced by the levying of a tax of one dollar and fifty cents on each thousand dollars thereof; and forbids the creation of a like debt by counties with an assessed valuation of less than five million dollars, to exceed a sum produced by the levying of a tax of three dollars on each thousand dollars thereof.

The fourth clause aforesaid provides that the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not at any time exceed twice the amount above herein limited, unless by a vote as prescribed.

"Twice the amount herein limited" means twice the rate of one dollar and fifty cents, for counties with an assessed valuation of more than five millions; that is, it means that no such county can create a debt by loan, of more than a sum raised by a rate of taxation of three dollars on the thousand, without the vote, as afterward provided; and the

same phrase, as applied to counties with a taxable valuation of less than five million dollars, means that such counties shall not create a debt by loan of more than a sum raised by taxing itself at a rate greater than six dollars on the thousand without such vote.

There are two classes of rates of taxation contemplated for each class of valuations. One is the rate of one dollar and a half for the class first mentioned, which is as far as the county can go in any one year, and double that rate—that is, three dollars—in case the aggregate debt by loan of such counties, created in more than one year, should demand a levy of that amount. The other is the rate of three dollars for the class last-mentioned, which is as far as the county can go in any one year; and double that rate—that is, six dollars—in case the aggregated debt by loan of such counties created in more than one year should demand a levy of that amount.

Now, it is plain that the counties in the class of the first valuation can create a debt by loan for the payment of which a levy of taxation at the rate of three dollars on the thousand would be required, provided that no part of that debt, amounting to a greater sum than would be produced by a levy of one dollar and a half, has been created in any one year; and it is equally plain that counties in the class of the second valuation can create a debt by loan for the payment of which a levy of taxation at the rate of six dollars on the thousand would be required, provided that no part of that debt, amounting to a greater sum than would be produced by a levy of three dollars, has been created in any one year.

And this debt, created by levies of three dollars and six dollars respectively, may be created without any vote of the people; for section 5 provides how it may be increased by such vote. At first glance it would appear that the words "last herein

mentioned," found at the last of the fifth clause, are intended as a qualification of the word "valuation," which they immediately follow; but analysis of the whole sentence forbids any such conclusion, for this reason—there is but one "valuation" mentioned for each class of counties. There is but one "valuation" that can be taxed—that is, the valuation fixed in every county by the assessor. The convention did not intend it to be understood that this part of the clause should mean the "valuation last mentioned," but the "rate upon the valuation last mentioned."

The rate of valuation last mentioned is twice the rate prescribed for counties mentioned in the third and fourth clauses. Hence, the vote may direct a taxation of six dollars on the thousand in counties in the first class of valuations, in the creation of a debt by a loan, and a taxation of twelve dollars on the thousand for counties in the second class of valuations.

To come to any other conclusion would be to hold that the constitutional convention stultified itself; for we have seen that, under the provision of the section quoted, a county may create a debt by loan to the extent of three dollars on the thousand in counties of the first class mentioned, and six dollars in counties of the second class mentioned, without a vote of the people; and unless we hold that the people can increase this rate by a vote, the provision concerning the vote can have no effect. The vote of the people could, otherwise, accomplish no more than the county board could without such vote.

Turning now to the statute enacted to direct the method by which a loan may be effected (G. S., Sec. 671, Mills' Ann. Stats., Sec. 934), we find that the legislature has restricted the power of the board in the matter of creating a debt by loan. The first clause of the section applies to all counties, and re-

quires that the question of creating the debt shall be submitted to a vote of the people. This clause is entirely compatible with the section of the constitution quoted. The legislature has full power to control the method to be pursued by the board in the premises, notwithstanding the power to make a loan may be given by the constitution. The last two clauses of the section of the act quoted limits the amount of the debt to be created by counties whose assessed valuation exceeds one million dollars, but does not affect the case of counties with a valuation of less than one million dollars. The power of the latter is, therefore, only limited by the provisions of the constitution, which, as above stated, may be extended to the creation of a debt of twelve dollars on the thousand.

I therefore find that Phillips county, having an assessed valuation of less than a million dollars, may, by a vote had in accordance with the provisions of the statute quoted, create a debt amounting to a sum which would result from levy of a tax of twelve dollars on the thousand. But the whole amount of the debt of the county, created by contract, must be provided for in this levy. If the county is in debt by warrant, or by any other form of outstanding contract, this debt must be computed along with the new debt proposed to be created, and the sum of the two—the debt already existing, and the debt about to be created—must not exceed such a sum as would be created by the levy of a tax of twelve dollars on the thousand. To illustrate: If Phillips county should at this time be indebted in a sum representing the product of levy of six dollars on the thousand of its assessed property, it could only create a new debt by loan, of six dollars on the thousand. This principle was declared by our supreme court in People v. May, 9 Colo., 80, and in People v. Seely, Id., 4045.

The court say that "* * * the aggregate amount of indebtedness of any county for all purposes * * * shall not at any time exceed twice the amount herein limited * * *."

You can ascertain the amount of new indebtedness you may create by loan by computing the rate of taxation it would be necessary to impose upon the assessed valuation of the county in order to raise the amount of your present indebtedness, then subtract that rate from the rate of twelve dollars on the thousand, and the remainder would represent the vote which may be imposed in order to raise the new loan.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE SECRETARY OF SCHOOL DISTRICT.

A secretary of a school district, having been duly elected and having taken the oath required by law, cannot be removed by the county superintendent for failure to file a bond before entering upon the duties of his office.

Attorney General's Office,
Denver, Colo., August 1, 1894.

N. F. Clark, Esq., Precinct Chairman P. P., Florence, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the secretaryship of a school district in your county, and whether or not the county superintendent could declare a vacancy in said office, where the secretary fails to file a bond

within the time prescribed by law, would say: School districts are divided into three classes—first, second and third. School boards in districts of the first class, at their first meeting after election, are required to elect a secretary, who may or may not be a member of the board. In districts of the second and third classes, the secretary is a director, and elected by the electors of the district instead of by the board.

Mills' Ann. Stats., Sec. 4005.

If a director fails to take and file an oath of office within twenty days after his election, the county superintendent may deem his office to be vacant and appoint some suitable person to fill such vacancy.

Id., Sec. 4011.

In school districts of the second and third classes, this would apply to the secretary of the board, who is also a director, but would not necessarily apply to secretaries in districts of the first class.

The secretary is also required to execute a bond before entering upon the duties of his office.

Id., Sec. 4019.

The failure of the secretary of a school district to file a bond before entering upon the duties of his office, as required by the statute, would not constitute a forfeiture, nor would it cause a vacancy in said office.

Having taken the oath of office, as prescribed, and failing or refusing to file the required bond, the secretary may be compelled to do so by proper court proceedings, in which the court, in all probability, would require him to comply with the law and the order of the court, or suffer the penalty of forfeiture in case of default.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE TAXES COLLECTED BY COUNTY TREASURERS.

Whenever money is paid to the county treasurer on account of taxes, whether the same be paid voluntarily, by tax sale or by assignment of certificates of purchase from the county, he should at once credit the several funds for which the tax is paid with the amount due to each.

Attorney General's Office,
Denver, Colo., Aug. 1, 1894.

Hon. Lewis F. Mathews, County Clerk, Springfield, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the disposition of money received by the county treasurer upon the assignment of certificates of purchase held by the county for land sold for delinquent taxes, would say the money so received by the county treasurer must be paid and credited to the several funds for the benefit of which the tax was levied and collected.

The county treasurer acts as trustee for the several funds. Whenever money is paid to the county treasurer on account of taxes, whether the same be paid voluntarily, by tax sale, or by assignment of certificates of purchase from the county, he should at once credit the several funds for which the tax is paid, with the amount due to each.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE COUNTY SURVEYOR.

The statutes contain no provision requiring county commissioners of a county to employ the county surveyor to do the necessary work in laying off and establishing public roads, neither is he entitled to the emoluments arising from the doing of any work let out by the county commissioners to other persons.

Attorney General's Office,
Denver, Colo., August 3, 1894.

Hon. Theo. Rosenberg, County Surveyor, Glenwood Springs, Colo.:

Dear Sir—In response to your letter of June 23d ult., will say that there is nothing in our statutes requiring the county commissioners of a county to employ the county surveyor to do the necessary work in laying off and establishing public roads. His duties require him to make surveys when required by order of court, or by request of any person. His certificate is prima facie evidence of the facts it sets out. He must keep a record of his surveys in a book to be provided by the county, and a copy of his field notes and calculations, and must give copies when required. In these respects his obligations differ from those of a private surveyor. His powers enable him to appoint deputies.

But I can nowhere find any law that entitles him to the emoluments arising from the doing of any work let out by the county commissioners to other persons. I have examined the law of Illinois, from which the bulk of our statutes are taken, and find a similar condition.

I, therefore, am compelled to say that you have no suit, notwithstanding the moral justification of your claim.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE TAXATION OF CHURCH PROPERTY.

If part of a church building is rented out for any purpose besides religious worship, it must be taxed.

Attorney General's Office,

Denver, Colo., August 3, 1894.

Hon. J. J. Minor, County Judge, Canon City, Colo.:

Dear Sir—In reply to your favor of 9th ult., I find that our statute exempts from taxation only such property belonging to religious bodies as is used "solely and exclusively for religious worship."

The hall rented to the Sons of Temperance must be taxed. The balance of the building is exempt. (First M. E. Church, etc., vs. City of Chicago, 26 Ills., 482.)

Exemptions from taxation are not favorably regarded by the law. They are in derogation of the common right.

12 Colo., 497.
117 Ills., 50.
119 Ills., 85.
124 Ills., 637.

Very truly,

EUGENE ENGLEY,
Attorney General.

IN RE SOLDIERS' AND SAILORS' HOME.

Section 2 of the act of 1889, "To establish the Soldiers' and Sailors' Home" does not apply to the department commander of the G. A. R. He is not required to give the bond required of the commissioners appointed by the governor under the act of 1889.

Attorney General's Office,
Denver, Colo., August 4, 1894.

Hon. N. Rollins, Department Commander, G. A. R.,
Leadville, Colorado:

Dear Sir—In response to your letter of 19th ult., I submit the following:

The amendment of the act of 1889, found on page 441 of the session laws of 1893 becomes intelligible when reading it with a comma after the word "state," in the second line from the top of page 441. If this comma is not placed there, then the noun "commander," in the same line, is one of the objects governed by the verb "appoint," in the last line of page 440, and then the verb "shall be," in the fifth line of page 441, has no subject. This produces grammatical absurdity. The comma belongs at the place named. It is so found in the bill as reported by the committee on revision and constitution, of the house, which report recommended that the bill, as then reported, be placed on file for third reading, and passed.

House Journal 1893, p. 1040.

The bill, as then reported, was afterwards passed.

Id., p. 1185.

By misprison, this comma was omitted in the enrolled bill. The fact is apparent, nevertheless,

that the amendment of 1893 does not place the department commander of the G. A. R. in the same category as the other members of the commission. The amendment makes him a commissioner virtute officii, and it is made obligatory upon the governor by the secretary of state to issue his commission, as such, upon the receipt of a certificate of his election, as such commander.

Section 2, of the act of 1889, does not apply to his case. That section contemplates only six commissioners, two of whom are to hold for two, two for four, and two for six years. Two go out of office every two years, their places to be filled by two new appointees, thus keeping the board at the number of six. The commander cannot be affected by this provision, for that would do away with the intendment that there should be a complete renewal of the board every six years. Nor can he be considered as one of the four who must be honorably discharged soldiers, sailors or marines, for he might die and be succeeded by a non-resident; in which case there would be only three to act, and the board could transact no business, legally, until there should occur a vacancy in the place held by one who is not such discharged soldier, sailor or marine, and such vacancy is filled by the appointment of one so qualified.

As the legislature chose not to amend section 2, at the time they amended section 1, and as the two sections cannot be made compatible except upon the theory that the commander is not bound by the provisions of section 2, I find that your certificate of election is your voucher, and upon its presentation you are entitled to your certificate of membership of the board. This certificate of election is a guarantee of good conduct, which the statute substitutes for a bond.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE PRIORITY OF TITLE OF LOCATORS OF MINERAL LAND.

Where lands are known to be mineral in character and located as such, prior to the surveys, the title of the locators will prevail against the state, claiming the same as school lands.

Attorney General's Office.

Denver, Colo., August 8, 1894.

Hon. J. D. Livingston, Hahn's Peak, Colo.:

In response to your letter of 24th ult., will say that if the lands mentioned were known as mineral lands, and located as such, prior to the survey, the title of the locator will prevail against that of the state. The state can commute section 16, by locating a section elsewhere on the public domain.

I advise you to correspond with the secretary of the state land board, Denver, Colorado.

Yours truly,

EUGENE ENGLEY,

Attorney General.

IN RE ROAD TAX.

1. The disability claimed by a person to exempt him from road duty must be real. In each case it is a question of fact.

2. The list of men subject to road duty in a county is furnished by the road overseer to the board of county commissioners at the January meeting.

3. Section 2979, p. 873, G. S., does not apply to persons residing in cities and towns.

Attorney General's Office.

Denver, Colo., August 8, 1894.

Hon. T. C. Davis, Police Magistrate, Coal Creek, Colorado:

Dear Sir—In reply to your letter of 20th ult., will say that where a person claims to be disabled from working on the public roads, his disability must, in order to make the claim available, be real. In each case the disability is a question of fact; and the fact that a person can and does constantly engage in manual labor as arduous as is that required of persons working on the public roads, is prima facie evidence of his ability to do the last mentioned work. To overcome this presumption would require the strongest kind of evidence to come from others besides the man himself.

An "able bodied man" is such a man as can do any work that may be assigned him by the road overseer. A man may be able-bodied to do one class of work and not so for another kind.

The list of men subject to road tax is furnished by the road overseer to the board of county commissioners at the January meeting.

Section 2979, Gen. Statutes, pages 873-874, does not apply to persons residing in the corporate limits of cities and towns.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE LIQUOR DEALER.

On abandonment of business before expiration of license, a liquor dealer cannot recover any part of the money paid for such license.

Attorney General's Office,
Denver, Colo., August 8, 1894.

Hon. John A. Norwood, Justice of the Peace, Tin Cup, Colorado:

Dear Sir—In response to your letter of 1st ult., will say that when a liquor dealer applies for and obtains a license from a town to sell liquor for a given period of time, and abandons the business before the expiration of that time, there is no breach of contract on the part of the town occasioned by such abandonment, and he cannot recover any part of the money he has paid for the license.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE TAX SALES.

Where "A" mortgages land by deed of trust, and afterwards incurs a tax on his personal property, which becomes delinquent, and the treasurer sells the land so mortgaged to collect the personal tax so delinquent, and the land is afterwards sold under foreclosure of the deed of trust, the title of the purchaser under the tax sale, if the sale has been in all respects regular, must prevail over that of the purchaser under the foreclosure.

Attorney General's Office,
Denver, Colo., August 10, 1894.

Hon. John Gray, County Attorney, Montrose, Colorado:

Dear Sir—In response to your letter of 19th ult., I submit the following: Section 3770, Mills' Ann. Stats., provides that "All taxes shall be levied for the fiscal year ending November 30 in each year, and shall be a perpetual lien upon all real estate subject to taxation * * *."

This means that the lien shall be upon the real estate of the person against whom the tax may be levied. No distinction is made in this section between taxes levied upon personal and taxes levied upon real estate, and there could be no question raised as to the effect of this section, were it not that the legislature, in the next section of the act, provided for a lien of taxes levied or assessed upon personal property. By the latter section it is provided that "all taxes levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon * * *."

There are two rules of construction which, applied to these two sections, lead to opposite conclu-

sions—one is "expressio unius exclusio alterius;" the other is, that all acts and parts of acts must be construed "in pari materia," and such a construction shall prevail as will give effect to all the acts and all parts of the acts.

The latter rule is the more imperative. Under the former it may be contended that the legislature having provided, in the latter section, for a specific lien, in the case of taxes levied upon personal property, they intend this lien to exclude the notion of the general lien provided in the former section, which makes all taxes a lien on real estate.

But the two sections can be construed together, and the effect of both preserved.

The first provides for a lien on real estate, and the second for a lien on personal estate.

By the first, real estate is affected by a lien of all taxation; by the second, personal property is affected by a lien of taxation of personal property, and this lien is restricted to the specific property levied upon. Both sections are in force.

Suth. Stats. Const., Secs. 283-288.

Repeals by implication are not favored in the law, and these two sections being part of the same act, must be allowed to have full operation, if it can be done under approved canons. As I said above, the rule which authorizes such a construction must prevail over the rule which would destroy the effect of the first section in reference to the kind of taxation which is made a lien on real estate.

Hence, I am led to the conclusion that when the tax was levied against the property of the citizen mentioned, whether it was a tax on real or personal property, the tax became a lien upon his real property, and a sale of the real estate, if made subsequent to the levy, is made cum onere the tax lien. The county may follow the property and enforce the lien, wherever the title may rest.

You say that "subsequent to the execution of the deed (of trust) the taxes for 1892 and 1893, on the personal property of A., (the citizen mentioned), became delinquent, and the said land was sold by the county treasurer, at tax sale, to pay said personal property tax. Subsequent to said tax sale, the land was sold by trustee * * * under the terms of trust;" and then you ask the question: "Is the lien for the personal property tax prior and superior to the trust deed?"

The personal property tax of "A." became due while he still owned the equitable title to the land. The claim of the county and state, for the said tax, became a lien upon the real property owned by him at the time the tax was levied, as I have said above. While the trustee, under the deed of trust, held the legal title to the land, it was only a security for a debt. The tax seized upon the res itself of the real estate. It became an incumbrance upon it in the hands of the mortgagor. All property, real and personal, must be taxed except such as is exempt by the express provision of the constitution and statute, or by the policy of the law. The equitable title remaining in the mortgagor is subject to the lien of the tax, and this has the same practical effect as if the entire title, both legal and equitable, is affected with the lien; for the lien may be enforced by the treasurer.

Section 3773, Mills' Ann. Stats., provides that "in case where lands are mortgaged, if the mortgagor fails or neglects to pay the taxes, or in case said mortgagor permits any land so mortgaged to be sold for any taxes, the mortgagee may pay said taxes or redeem any land so sold for taxes," and then goes on and subrogates the mortgagee to the rights of the state and county in respect to the lien.

It seems, then, that the purchaser of the land under the deed of trust cannot escape the payment of the taxes accruing against the mortgagor up to

the time of the sale, whether they are levied against real or personal property. Were it otherwise, then the land itself might escape taxation, for the equity of the mortgagor might prove to be worthless, from the fact that the debt, with accrued interest, for which the mortgage was executed, might equal the value of the land, and then, if the land could not be followed into the hands of the purchaser, there would be nothing of value upon which the tax lien could attach.

The title of the purchaser at the tax sale, if that sale has been regular in other respects, must be bought in by the purchaser or under the foreclosure before he can claim a perfect title, and if he should fail to redeem the property sold at the tax sale within three years, the title of the purchaser at the tax sale is perfect and his own title worthless.

In support of these views, I cite:

40 Ind., 353.
41 Id., 410.
105 Ill., 224.
30 N. Y. Eq., 667.
32 Id., 386.
33 Id., 415.
Black Tax Tit., Vol. 1, Chap. 15 and cases.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE SAGUACHE RESERVOIR.

Where, in a contract for the construction of a state reservoir, it is stipulated that "the contractor shall employ such a number of workmen and teams, etc., as will be directed by the engineer in charge," and the contractor refuses to put the men and teams to work at the direction of the engineer, or if the contractor absents himself so that he cannot be notified by the engineer, and has left no one in his stead to receive such notice and carry out its precepts, and the work has stopped by reason of a failure to keep men and teams employed, there is a breach on the part of the contractor, and the contract may be discharged at the option of the state, and men and teams employed by the state to finish the work, according to other stipulations in the contract.

Attorney General's Office,
Denver, Colo., August 14, 1894.

Hon. C. B. Cramer, State Engineer:

Dear Sir—In your letter of this date, inquiring as to whether the board of construction of the Saguache reservoir had the power to suspend the work by the contractor and go on and finish the reservoir at the charge of the state, you state:

(1). That the work has been suspended by the contractor himself for the space of ten days.

(2). This suspension was caused by a "strike" of the men, which strike was brought about by the the failure of the contractor to pay his men for the months of June and July.

(3). That the contractor is otherwise in debt, and it is believed that he is not able to resume and carry on the work.

In answer to your question, I will say that there is no essential difference between the liability of the state on its contracts, and the liability of a municipal or other corporation, or a private person.

The state, however, being able to contract only through its officers, is not bound by estoppels to the same extent as individuals; and the power of the officer to bind the state by a contract must be inquired into by the contractor. He cannot claim that the state is bound by the contract of an officer who had been held out to be fully empowered to make it, when, in fact, the officer had no such power.

In addition to this, it may be said that public policy demands that a contractor, constructing a great public work, may do or suffer things to be done or to occur, which may, in cases, authorize a board to declare a breach on the part of the contractor, when such authority could not be claimed by a private party.

An examination of the contract discloses that this work must be finished by Oct. 1, 1894. You say the delay caused by the strike has prevented this part of his obligation from being fulfilled by the contractor.

The stipulation in the contract does not in express terms make the completion of the reservoir on October 1st, 1894, an indispensible element, yet it might, under a given state of circumstances, become such.

It may be shown that by no fault of the board he has delayed the work so that it could not be completed on said date. But, if the board should attempt to discharge the contract on this ground, the time not having arrived on which the work was to be completed, it would have to show, in case of suit, that it was impossible to complete the work in the time specified, and that this state of things was brought about by the acts and doings of the contractor, and without any fault of the board. But, assuming that the board could do this, it would not be sufficient, for a failure to complete the work on the 1st of October would not deprive the contractor of his pay; for the reason that this stipulation was

not specifically made essential by the contract. Damage might be recouped against the contractor for failure to finish the work on that day, but it would have to be plainly proved.

But section 17, of the contract, directs that "the contractor shall employ such a number of workmen and teams, etc., as will be directed by the engineer in charge." This stipulation plainly gives the engineer the power to make directions of the most important character about the work, and particularly to see that sufficient force is employed to keep the work well under way. If the contractor refuses to put men and teams to work at the direction of the engineer in charge, or if his agent at the work fails to do so, or if the contractor absents himself so that he cannot be notified by the engineer in charge, and has left no one in his stead to receive such notice and carry out its precepts, he has made a breach, and the board may consider the contract discharged, as far as the control of the contractor is concerned, and go on and finish the work according to the stipulations of the contract.

In this view of the case, I recommend that the engineer in charge be instructed to notify the contractor, or in his absence, his agent in charge at the reservoir, to immediately resume work with men and teams as directed by the engineer, and if this is not done instantly, then the board will be justified in putting the men to work at the charge of the state.

Very truly,

EUGENE ENGLEY,

Attorney General.

IN RE PREPARING CRIMINAL AFFIDAVIT BY JUSTICE OF THE PEACE.

Preparing a criminal affidavit by a justice of the peace does not violate the provisions of sec. 1, chap. 71, acts of 1893.

Attorney General's Office,
Denver, Colo., August 15, 1894.

Hon. B. F. Waite, Justice of the Peace, Loveland, Colorado:

Dear Sir—Replying to your letter of late date, I will say that your conclusion is correct.

The section mentioned (Sec. 1, chap. 71, p. 123, laws 1893), does not apply to complaints made before a justice of the peace. Such are not pleadings; they are mere affidavits, and must be filed before capias can issue. It is your duty to write out the affidavits in such cases, unless you are relieved of the duty by the district attorney or some one who might choose to do the work for you.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE STATE REFORMATORY.

The legislature having made the state reformatory a part of the penitentiary system, the board of penitentiary commissioners may use the money appropriated out of the penitentiary income fund, by section 4 of the act approved April 8, 1893, (S. B. 366), for the benefit of the state reformatory, in the way of purchasing machinery which is intended to be affixed to the freehold and made a part of the permanent improvements in the buildings belonging thereto.

Attorney General's Office,
Denver, Colo., September 1, 1894.

Hon. I. G. Berry, Warden State Reformatory, Buena Vista, Colorado:

Dear Sir—In your letter of the 10th inst., you inquire whether your institution can use money appropriated out of the penitentiary income fund, under section 4 of chapter 29, session laws, 1893, for the payment of bills for boiler and engine, with connections and electric dynamo and fixtures, which boiler, engine and dynamo are to be bedded in solid masonry with stone foundations in the machine shop and to be used in driving machinery in the machine shop and cell house; and you further say that without the use of this appropriation, said machine shop and cell house would be practically useless.

In reply I will say that the penitentiary permanent and penitentiary income funds arise from the disposition of lands which belong to the state by virtue of section 9 of the enabling act. The proceeds of the sale and lease of these lands constitute practically one fund and must be used for the purpose for which they were donated by congress, namely, "for the purpose of erecting a suitable building for a penitentiary or state prison * * *."

The general assembly has made the state reformatory a part of our state penitentiary or prison system; hence, money expended there is as much in accordance with the purpose of the concession, as if expended at Canon City on the penitentiary building proper.

The machinery you speak of, when it is affixed to the freehold in the manner indicated, becomes a part of the reformatory building, and as essential to the use of the machine shop as the roof or foundation.

Hence, the expenditure referred to, when incurred, is incurred in the erection of buildings belonging to the penitentiary system, and is entirely within the law; and if there is money in the penitentiary income fund, I see no reason why it may not be drawn out, upon proper vouchers, for the purposes indicated.

Yours truly,

EUGENE ENGLEY,
Attorney General.

IN RE CERTIFICATES OF NOMINATION FOR DISTRICT JUDGE.

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1. In the absence of statutory definition, as to when a day on which a thing is to be done begins, it must be considered a natural day. The natural day of the 6th of November, 1894, begins at the hour of midnight, preceding the hour at which the polls are to be opened. A certificate of nomination filed at any time after the hour of midnight of September the sixth, 1894, and not less than thirty days before the day of election, is filed within the time prescribed by law.

2. When two certificates of nomination, regular in form, and claiming to represent the will of the regular convention of the same party, are filed with the secretary of state, he should,

unless his action in the premises be arrested by legal proceedings, certify the names of the candidates mentioned in the certificate first filed in his office.

Attorney General's Office.

Denver, Colo., September 8, 1894.

Hon. Nelson O. McClees, Secretary of State:

Dear Sir—In response to your questions of this date, I have to say:

First—Certificates of nomination for district judge are required, by section 9, of the election law, to be filed "not more than sixty days * * * before the day of election." The day of election is the day on which an election is held. In the absence of statutory definition, as to when a day on which a thing is to be done begins, it must be considered a natural day. The natural day of the 6th of November for 1894 begins at the hour of midnight preceding the hour at which the polls are to be opened. In this case it begins at the moment the hour of midnight arrives—the moment which marks the close of the day of November the fifth. If a certificate of nomination is filed with you at any time after the hour of midnight of September the sixth, 1894, and not less than thirty days before the day of election, it is filed within the times prescribed by law.

In your second question you inquire as to what the duty of the secretary of state is in regard to the certification of a nomination, where there are two certificates filed with him, both in proper form, and certified by the presiding officer and secretary of a convention, and it is claimed in each of the two certificates that the nominees therein described are the true nominees of the regular convention of the party mentioned.

It appears from this statement that there has been a "split" in the party to which the two sets of

nominees belong, or claim to belong. The certificate of each wing or faction claims that that wing or faction is the lawfully constituted body to make a nomination for the party. To ascertain the relative merits of the claims of these two factions, does not fall within the province of the secretary of state, unless we can discern where that duty is imposed by the statute. The inquiry into such matters belong to the tribunals constituted by law for that purpose.

The act of 1894, section 3, provides as follows: "Any convention of delegates of a political party which presented candidates at the last preceding election held for the purpose of making nominations to public office * * * * * may nominate candidates for public offices to be filled by election within this state. A convention, within the meaning of this act, is an organized assemblage of voters or delegates representing a political party * * *."

The popular meaning of "organization" is "the act of arranging in a systematic way for use or action." (Webster.)

In a convention it means the choosing of its officers, as president or secretary, and the doing of whatever may be thought necessary to place the assemblage of voters or delegates in a proper shape for the transaction of the business in hand.

Both of the certificates filed by you are regular in form, and both claim that they represent the will of the regular convention of the same party. The only light thrown upon the situation in this case is found in section 7, of the act, which says that "if any such certificate does contain the names of more candidates than there are offices to fill, only those names which came first in order on such certificates, and the equally numbered with the offices to be filled, shall be taken as nominated, and all the rest of such names shall be treated as surplusage."

While this section applies to cases where there is only one certificate, it shows that the legislature

attached importance to the order in which names might appear, and gives precedence to the one first appearing.

Extending the principle to this case, it seems to me that you may consider the two certificates as being one certificate containing the names of more candidates than there are offices to fill, and that you should, unless your action in the premises be arrested by legal proceedings, certify the names of the candidates mentioned in the certificate first filed in your office. I recommend, however, that you immediately inform the candidates concerned, in order that they may bring their case before the proper tribunal, if they so desire; the final decision of which will shape your action in the premises.

Very truly,
EUGENE ENGLEY,
Attorney General.

IN RE COUNTY PRINTING CONTRACTS.

When a county board has made a printing contract, the legislature cannot afterward make a law impairing the obligation of it.

Attorney General's Office,
Denver, Colo., September 18, 1894.

Hon. J. L. Hodges, County Attorney, Glenwood Springs, Colo.:

Dear Sir—In your letter of the 3rd inst., you state that the board of county commissioners of your county let a contract for county printing as required by law, for the year 1894. Since the making of this contract, the act of March 3, 1894, was passed. (P. 45, Special Session Laws, 1894.)

You then inquire if the last act requires the board to abrogate this contract and advertise for bids as required by the act last cited.

In response I will say that I have heretofore given an opinion upon this same question. The state legislature cannot make a law impairing the obligation of contracts. The act of 1894 cannot interfere with the contract mentioned, nor is your county board required to make another.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE COMPENSATION COUNTY TREASURER AND REBATE OF TAXES.

The board of county commissioners must allow the compensation prescribed in section 84, page 843, G. S., to the county treasurer, but only in cases where the treasurer has made the report mentioned in the section.

Attorney General's Office,
Denver, Colo., September 18, 1894.

Hon. E. R. Hannah, County Treasurer, Breckenridge, Colo.:

Dear Sir—Replying to your letter of the 7th inst., I submit the following:

Section 84, p. 843, General Statutes, referred to by you, applies to cases where there has been a double or erroneous assessment, and a report of the same made by the treasurer. The object of this section seems to be to throw safeguards around the sale of land for taxes, and to prevent sales, which could afterwards be set aside on the ground of such erroneous or double taxation.

The board of commissioners, in case the abatement mentioned by you, was made in pursuance of a report made by you, must allow you such compensation as would be equal to the fees for collecting the taxes levied on such double or erroneous assessments, the amount of which compensation must be paid into the "county treasurer's commission and fee fund."

But this allowance must be in compensation of such report. It is not to be made to the treasurer in cases where the commissioners rebate the taxes of their own motion.

The board had the authority to abate the taxes mentioned.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE FAILURE OF APPROPRIATION AND CERTIFICATE OF INDEBTEDNESS.

Where an appropriation has been made by the legislature to pay certain claims, and it appears that the revenue out of which the payment is to be made is exhausted by prior appropriations, then such appropriation in excess may be considered as not having been made at all, and the claimant may apply for a certificate of indebtedness, or bring his claim before the general assembly.

Attorney General's Office.
Denver, Colo., September 24, 1894.

Hon. A. Levy, Walsenburg, Colo.:

Dear Sir—In response to your inquiry of this date, as to what should be done in order to put your claim against the state in proper shape, you make the following statement:

You and one Ferd. Myer are the owners by purchase for valuable consideration, of certain certificates for premiums on loco weed, issued by the county clerks of Huerfano and Costilla counties, amounting to about six thousand dollars in face value. You presented these certificates to the auditor of state, with the request that he issue a warrant or warrants for the amounts represented by them. This the auditor declined to do, assigning in writing the following reason, namely, that there has been a large decrease in the valuation of the state, in consequence of which there will not be sufficient revenue for the years 1893 and 1894 for all of the appropriations made by the ninth general assembly, and that as the bill appropriating a sum for the payment of these and like certificates (H. B. 427, Session Laws, p. 50), was one of the last appropriation bills of said ninth general assembly to become a law, this appropriation must fail for the reason that prior appropriations have absorbed the fund from which it is made payable.

Assuming the statement of the auditor to be true, your claim falls into the class referred to in the act of 1885. (Session Laws, sec. 5, p. 205.)

All appropriations made in excess of the revenue are unlawful, and an act of the legislature attempting such excess appropriation, is unconstitutional and void. And this principle applies to appropriations made from the general or any particular fund.

When appropriations have been made, which in the aggregate, equal the fund, it is not within the power of the general assembly to make any other appropriation from the same fund. This being true, in the light of the auditor's statement, there has been no appropriation made by the act of 1893 quoted.

It is a question of difficulty to decide, sometimes, whether an act makes an excessive appropriation.

For, according to the estimates made by the auditor of state and transmitted to the general assembly, an act, when passed by that body may, at the date of its passage, be apparently within the limit of a particular fund; whereas, when the revenue is thereafter collected, it may appear that it does not amount to enough to meet prior appropriations and leave a balance to satisfy the appropriation in question. Appropriations of equal rank take precedence according to the date of the acts establishing them, so that, if the general fund, as realized by subsequent collections, shall have been consumed by appropriations of superior dignity or prior date to the appropriation made by the act referred to (Session Laws 1893, p. 50), then that act makes no appropriation at all, and you must look for relief to the act of 1885, referred to, and apply to the governor and attorney general to approve the claim, and then present it to the auditor for a certificate of indebtedness, to correspond to its amount; or you must bring your claim to the attention of the general assembly.

Yours truly,
EUGENE ENGLEY,
Attorney General.

IN RE SPECIAL LEVY OF TAXES FOR REDEMPTION OF OUTSTANDING WARRANTS.

By the provisions of an act entitled "An act concerning county government," approved April 8, 1893, for the redemption of outstanding warrants, the board of county commissioners are required to levy a tax of five mills on the dollar of assessed property, if a lower levy would be insufficient to liquidate all such warrants outstanding and unredeemed at the time such levy is made.

Attorney General's Office,
Denver, Colo., October 18, 1894.

Hon. Walter A. Garrett, County Clerk, Georgetown, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the construction of section 1, chapter 54, laws of 1893, would say, the language of said section is such that you are compelled to levy the limit of five mills on the dollar of assessed property, as therein provided.

Section 1, page 100, Session Laws 1893.

Section 1 provides that there shall be levied "a sufficient tax, not exceeding five mills on the dollar of assessed property, * * * for the purpose of creating a 'special fund' for the liquidation, payment and redemption of all such unliquidated and unpaid warrants or orders."

If "all such unliquidated and unpaid warrants or orders" cannot be liquidated by a levy of an amount less than the limit, it is intended by the act that the full limit of five mills shall be resorted to, and so levied "annually, until all of such un-

liquidated and unpaid warrants or orders shall be fully liquidated, paid and redeemed, principal and interest," as provided in said act.

If, then, as you state in your letter, a levy of a tax less than five mills on the dollar of assessed property in Clear Creek county will be insufficient to liquidate all outstanding and unpaid warrants of said county, at the time such levy is made, you are required by the act to levy the full limit of five mills, as therein provided.

Respectfully,
EUGENE ENGLEY,
Attorney General.

IN RE FEES OF COUNTY TREASURERS ON CERTIFICATES OF PURCHASE

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1. The act of 1891, concerning fees, allows county treasurers in counties of every class, the sum of twenty-five cents for each certificate of purchase, and the sum of five cents for each tract therein described.

2. Section 6, page 48, Session Laws 1894, amends the act of 1891, by fixing a limit of ten cents in the fee to be taxed upon each tract of land described in the certificate of purchase, but the fee for the certificate remains the same—twenty-five cents.

Attorney General's Office,
Denver, Colo., October 19, 1894.

Hon. A. N. Turney, County Treasurer, Yuma, Colorado:

Dear Sir—In reply to your communication of recent date, relative to the fees to be charged by county treasurers on certificates of purchase, would say the law of 1891 provides that the sum of twenty-five cents shall be charged for each certificate of pur-

chase, in counties of every class, and the sum of five cents for each tract therein described in counties of every class.

The law of 1894, referred to by you (Session Laws 1894, page 48, section 6), amends the act of 1891 so far as concerns the fee to be charged upon each tract of land described in the certificate of purchase, but does not change the law in respect to the fee to be charged for the certificate itself.

The language of the second proviso in section 6, Id., is rather ambiguous and unintelligible, but my construction of it is, that the ten cents therein mentioned refers to tracts of land, and is intended as a limit of fees to be charged upon each tract described in the certificate of purchase.

The fee for the certificate of purchase remains the same as provided by the act of 1891.

Respectfully,

EUGENE ENGLEY,

Attorney General.

IN RE PENALTY UPON DELINQUENT TAXES.

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1. Under the provisions of section 3, page 433, Session Laws 1893, if the first installment of one-half of the annual tax is not paid prior to March 1, then the penalty of one per cent per month is added for each and every month or fractional part thereof, between the first day of March and the first day of August following. If not paid as therein provided, before August 1, then and in that event, the amendment as provided in section 4, Session Laws 1891, page 286, governs; the whole of the tax for the preceding year then becomes delinquent and draws interest at the rate of fifteen per cent. per annum.

2. After the sale, the penalties as provided by the act of 1894 must govern.

Attorney General's Office,

Denver, Colo., November 5, 1894.

Hon. V. J. Kraft, County Treasurer, Rico, Colo.:

Dear Sir—In reply to your communication of recent date, relative to the penalty to be taxed upon delinquent taxes, would say, section 2, Session Laws 1893, p. 433, provides that, "all taxes shall be due and payable, one-half on or before the last day of February and the balance on or before the last day of July of the year following the one in which they were assessed."

Section 3, Id., provides that "In case the first installment of one-half the taxes is not paid prior to March 1 in each and every year, then there shall be assessed against such installment of taxes a penalty of one per cent. for each month or fractional part thereof, until paid, provided it be paid prior to August 1, as provided by law."

The meaning of the latter section is plain and cannot be misunderstood. If the first installment of one-half is not paid prior to March 1, then the penalty of one per cent. per month is added for each and every month or fractional part thereof, between the first day of March and the first day of August following. That is to say, in order to receive the benefit of the penalty of one per cent. per month, the first installment of one-half of the tax must be paid prior to August 1, of each year. If not paid as provided, before August 1, aforesaid, then, and in that event, the amendment as provided in section 4, Session Laws 1891, p. 286, governs, which says that "on the first day of August the unpaid taxes of the preceding year become delinquent and shall thereafter draw interest at the rate of fifteen per cent. per annum, but the treasurer shall continue to receive payments of the same with interest until the day of sale for taxes." After the sale, the penalties as provided by the act of 1894 must govern. (Session Laws 1894, pp. 45-48.)

In the case presented by Mr. Knowles, the county treasurer is correct in his method of calculation.

As the first installment of one-half prior to August 1, was not paid, the penalty of one per cent. per month from February 28 to August 1, is not applicable.

The entire tax was delinquent August 1, and must therefore come under the provisions of section 4, Session Laws 1891, above quoted, if paid prior to sale for delinquent taxes. If not paid until after such sale, the penalties as provided in the act of 1894 above referred to, would apply.

Respectfully,

EUGENE ENGLEY,
Attorney General.

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