1899-1900

# BIENNIAL REPORT
OF
# ATTORNEY GENERAL
COLORADO

*Compliments of*

*David M. Campbell,*

*Attorney-General.*

# REPORT

OF THE

# ATTORNEY GENERAL

OF THE

# STATE OF COLORADO

FOR THE

## YEARS 1899-1900

DAVID M. CAMPBELL, Attorney General.
CALVIN E. REED,
DAN B. CAREY,
Assistants.

DENVER, COLORADO
THE SMITH-BROOKS PRINTING CO., STATE PRINTERS
1900

# BIENNIAL REPORT

OF THE

# ATTORNEY GENERAL

OF

## COLORADO.

TO HIS EXCELLENCY,

CHARLES S. THOMAS,

GOVERNOR OF COLORADO.

Sir—The Constitution of the state of Colorado requires that "the officers of the executive department * * * shall, at last twenty days preceding each regular session of the General Assembly, make a full and complete report of their actions to the Governor, who shall transmit the same to the General Assembly."

Article IV, Section 17, Constitution.
I Mills' Ann. Stats., Section 1766.

The statutes of this state provide that all biennial reports shall be deposited with the Governor on or before the fifteenth day of November next preceding the session of the General Assembly, and that said reports shall be placed in the hands of the public printer without delay.

3 Mills' Ann. Stats., Section 3329.

The statutes of this state further require the Attorney General to "report to the General Assembly or Governor, when requested, upon any business pertaining to his office."

1 Mills' Ann. Stats., Section 1786.

In obedience to the above constitutional and statutory requirements, I have the honor to submit the following biennial report of my official actions from the tenth day of January, A. D. 1899, to the fifteenth day of November, A. D. 1900, embracing a period of twenty-two months and five days.

## MONEYS RECEIVED AND DISBURSED.

The Constitution and statutes of this state provide that an account shall be kept by the officers of the executive department, of all moneys received and disbursed by them, and that all moneys received by the Attorney General in his official capacity shall be paid forthwith into the state treasury.

Article IV, Section 16, Constitution.
1 Mills' Ann. Stats., Section 1787.

You are respectfully advised that, during my official term of office, I have not, either individually or in my official capacity, received or disbursed any public or state moneys.

In my official capacity I have been called upon to prosecute and defend suits relating to matters connected with the various executive departments of the state. In some of said suits I have received and receipted for the return of the docket fees which had previously been advanced by the heads of the said executive departments; all such docket fees were returned to the officers previously advancing the same, and their receipts therefor are now on file in my office.

OFFICE DOCKET.

The statutes of this state provide that the Attorney General shall keep a "register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which book shall be delivered to his successor."

1 Mills' Ann. Stats., Section 1788.

I received from my immediate predecessor in office no less than four small office dockets, each containing the state cases pending in court during the official term of some one of my predecessors. At the commencement of my official term of office I procured for the office a large, substantially-bound and properly indexed office docket, an exact duplicate of the dockets of the Supreme Court and Court of Appeals of this state, and I have caused to be entered in said docket a record of all state cases pending in any of the courts of the state during my official term of office. This docket is of sufficient size to contain the record of all actions which this department will be called upon to prosecute or defend for several successive administrations.

CASES IN COURT.

The statutes of this state provide that the Attorney General shall appear for the state and "prosecute and defend all actions and proceedings, civil and criminal, in which the state shall be a party or interested, when requested to do so by the Governor or General Assembly, and shall prosecute and defend for the state all causes in the Supreme Court in which the state is a party or interested."

1 Mills' Ann. Stats., Section 1783.

The statutes further provide that "It shall be the duty of the Attorney General, at the request of the

Governor, the Secretary of State, the Treasurer or Auditor, to prosecute and defend all suits relating to matters connected with their departments."

1 Mills' Ann. Stats., Section 1784.

The following tabular statement will show the number of cases pending in the several courts of this state at the commencement of my official term of office on January 10, 1899; the number of cases filed since said date; the number of cases disposed of since said date, and the number of cases pending on November 15, 1900:

| Court. | Number of Cases Pending January 10, 1899. | Number of Cases Filed Since January 10, 1899. | Number of Cases Disposed of Since January 10, 1899. | Number of Cases Pending November 15, 1900. |
|---|---|---|---|---|
| District Court | 2 | 11 | 7 | 6 |
| Court of Appeals | 2 | 4 | 4 | 2 |
| Supreme Court | 32 | 46 | 60 | 18 |
| U. S Circuit Court | ..... | 1 | ..... | 1 |
| Total | 36 | 62 | 71 | 27 |

All but three of the cases pending in the two appellate courts have been briefed by this office, and these three cases will also be briefed before the close of my official term of office, provided that the plaintiffs in error shall, in the meantime, file their abstracts and briefs.*

DISBARMENT PROCEEDINGS.

At the commencement of my official term of office there were pending in the Supreme Court seven petitions for the disbarment of members of the bar of this

*[Note—Of the eighteen cases pending in the Supreme Court, judgments were rendered in four on November 19, 1900, and three more have been argued and submitted.]

state. Since that date eleven additional petitions of the same character have been filed. Of this total number of eighteen, judgments of disbarment have been entered by the court in seven cases, and one of the respondents died pending the hearing of his cause. Ten cases are now pending and undisposed of.*

While the information in these disbarment proceedings have been filed by the Attorney General, upon the order and at the direction of the Supreme Court, the knowledge of the irregularities necessitating the filing of the same, and the petitions for disbarment have, in almost all of the instances, come from the Colorado Bar Association, through its officers and members of its grievance committees.

The thanks of the bench and bar and the people of the state are certainly due to this association and its officers and committees for efforts to rid the bar of this state of unworthy members. The association has furnished special counsel to assist in prosecuting these cases, and, following the precedent established by my immediate predecessor in office, the association, through its special counsel, has been accorded the privilege of actively managing these several proceedings, subject to the general supervision of this department.

## IMPORTANT CASES.

The importance of the cases, or of some of the legal propositions therein announced by the Supreme Court, in the following cases, is sufficient to justify special mention:

In *Ames, County Assessor, vs. The People ex rel. Temple, Auditor of State*, 26 Colo., 83; 56 Pac., 656, the power of the State Board of Equalization to assess the property of railway, telegraph and telephone companies, was upheld.

---

*[Note—On November 19, 1900, judgments of disbarment were entered by the Supreme Court in two of said remaining ten cases.]

The case of *Packer vs. The People*, 26 Colo., 306; 57 Pac., 1087, was a writ of error to the District Court of Gunnison county, to review a judgment of conviction and sentence to serve a term of forty years in the state penitentiary for voluntary manslaughter. This was the fifth time that this case had been before the Supreme Court in some form, and the judgment of conviction was affirmed.

In *People ex rel. Campbell, Attorney General, vs. The District Court of Arapahoe County* (two cases), 26 Colo., 380; 58 Pac., 608, it was held that the county courts have power to pass upon the question of their own jurisdiction and their decisions upon the constitutionality of a law which purports to clothe them with jurisdiction in misdemeanor cases, cannot be reviewed by the District Court upon *habeas corpus*.

In the two cases of *In re Morgan*, 26 Colo., 415; 58 Pac., 1071, and *In re Sweeney*, 26 Colo., 451; 58 Pac., 1116, it was held that the act of the General Assembly (Session Laws of 1889, page 232), fixing the hours of employment at eight hours per day of working men in underground mines, smelters and other institutions for the reduction and refining of ores and metals, is unconstitutional and void.

In the three cases of *The People vs. Ames, County Assessor*, 27 Colo., ....; 60 Pac., 346; *The People vs. Bell, County Assessor*, 27 Colo., ....; 60 Pac., 1130, and *The People vs. Laub, County Assessor*, 27 Colo., ....; 60 Pac., 1130, it was held that the State Board of Equalization has no power to equalize valuations between classes or kinds of property in the several counties of the state, and that in equalizing and adjusting valuations, the state board must deal with the respective valuations as returned by the county assessors as entireties.

In *Carincss vs. The People*, 27 Colo., ....; 60 Pac., 565, it was held that one convicted of a crime less than capital may have, as of course, but one writ of error.

## SUIT UPON BOND OF STATE TREASURER.

On April 2, 1900, at the direction of your Excellency, and of the Honorable Auditor of State of the state of Colorado, I instituted suit in the District Court of Arapahoe county, Colorado, against Honorable George W. Kephart, ex-State Treasurer of the state of Colorado, and his bondsmen, on his official bond, to recover a balance due the state of Colorado, amounting to eleven thousand nine hundred and ninety-five dollars ($11,995.00), and interest from the tenth day of January, 1899, less the sum of four hundred and sixty-three dollars and thirty-four cents ($463.34) paid on the fifth day of July, A. D. 1899. On May 31, 1900, I received an official communication from the Honorable State Treasurer of the state of Colorado, informing me that the money due the state from the said Kephart had on that day been paid in full, and requesting me to dismiss the said suit. This request was complied with on June 12, 1900.

I may add that I am credibly informed that the failure of the said Kephart to turn over to his successor the said balance due the state at the expiration of his official term of office was due solely to the failure of a certain bank in which he, in his official capacity as State Treasurer, had deposited the above mentioned amount of the state moneys.

## OFFICIAL OPINIONS.

The statutes of this state provide that the Attorney General, when requested, "shall give his opinion in writing upon all questions of law submitted to him by the General Assembly, or either house thereof, Governor, Lieutenant Governor, Auditor, Secretary of State, Treasurer or Superintendent of Public Instruction."

1 Mills' Ann. Stats., Section 1785.

The statutes further provide that "he shall keep in proper books a record of all official opinions."

1 Mills' Ann. Stats., Section 1788.

During my official term of office this department has had occasion to counsel with and to give legal advice to the executive and other public officers of this state, their deputies, clerks and employes, the various state boards, their members, clerks and employes, as well as to the General Assembly, its committees and members of the two houses, upon hundreds of questions touching the proper discharge of their respective official duties. While the department has at all times freely counseled with the said officers touching the various matters upon which they have sought legal advice, yet opinions in writing have not been given unless the questions submitted were of sufficient importance to warrant their preservation in writing, or unless written opinions were specially requested. Impression copies of all official opinions rendered by this department are preserved in the official opinion book of the department, and copies are submitted herewith for publication in the appendix of this report.

This department is in constant and almost daily receipt of requests from county, municipal and other local public officers, as well as from the general public, for opinions upon various questions of both public and private concern. Being wholly without authority to render official opinions in such cases, and being, as a rule, without a knowledge of the facts and conditions upon which an opinion could be rendered, unless it be by an *ex parte* statement of the same, I have studiously refrained from rendering opinions in such cases.

Inasmuch as most of the cities and towns employ a city attorney to advise the municipal officers, and the several counties employ county attorneys to advise the county officers, and the statutes of this state make

it the duty of the several district attorneys in this state to officially advise county officers within their respective districts (1 Mills' Ann. Stats., Section 1555), I have respectfully requested all such public officers to submit their requests for official opinions to their proper legal advisers.

## FINANCIAL.

My predecessor, Attorney General Carr, in his report gave special attention to the financial condition of the state, and especially did he call attention to the collection of more than eighty-nine thousand dollars of the revenues of the fiscal year 1889, and the impossibility of the State Treasurer paying that money out on the actual indebtedness of the state, because of the invalidity of a large number of warrants issued during said fiscal year and no adjudication having been made to determine upon what warrants the State Treasurer should apply the money It is a very unfortunate condition, from the fact that all of the warrants outstanding for that fiscal year are drawing six per cent. interest per annum, and the said eighty-nine thousand dollars is drawing only from two to four per cent. per annum, necessitating a loss to the state of from two to four per cent. on the dollar during the time said money remains in the hands of the State Treasurer. An early disposition of this money should be provided for.

In this letter I will not discuss the financial condition of the state, further than to say that it has not improved in the last two years, nor will it improve to any considerable degree until some provision is made for the raising of a larger amount of revenue than can now be done under the Constitution of this state, with the present practice of fixing valuations upon taxable property. This department has fully dealt with almost every phase of the financial questions of this state in the opinions rendered in response to the requests of the various executive officers therefor,

which opinions are set forth in full in the appendix to this report. Other questions of great importance to the various departments of state which have arisen from time to time have been fully and carefully considered in the opinions rendered by this office, which opinions will also be found in the appendix hereto.

## OFFICE OF ATTORNEY GENERAL.

The Attorney General's office influences the administration of every department in the state to a greater or less degree, and must necessarily be a very busy office in a great and growing state like Colorado. The last two years have been unusually busy. Questions of great financial importance have been considered; many are yet to be considered which will fall to the lot of my successor. The burdens for the succeeding two years must necessarily be very heavy, and I am fully satisfied that it will be impossible to properly discharge the duties of this office with an appropriation any less in amount than that which the legislature has given me.

With the appropriation given me, I was able to employ constantly in my office two assistants, Mr. Calvin E. Reed, of Denver, who was in this office almost two terms as deputy under Attorney General Carr, and Mr. Dan B. Carey, of La Junta, Colorado. These two gentlemen are able lawyers, industrious and conscientious, and have rendered most valuable service to the state. They have always endeavored in every way to make the administration of this office a success. There has also been employed in this office Mr. Alfred C. Montgomery, of Pueblo, Colorado, as stenographer. He is a very efficient and competent clerk and stenographer, and has discharged the unusually heavy duties that have fallen upon him promptly and in every way satisfactorily.

There has always existed the most kindly relations between myself and the employes of the office, and each has at all times had my entire confidence.

Through this harmony of action and the efficiency of my office force, I have been enabled to do the work of the office with one less employe than heretofore.

In closing this report, I wish to express to your Excellency, as well as to the other executive officers, my acknowledgment of the many courtesies extended to me and the employes of the office during my official term.

Respectfully submitted,

DAVID M. CAMPBELL,
Attorney General.

Dated Denver, Colorado, November 15, 1900.

# APPENDIX

## OPINIONS RENDERED
## 1899-1900

# OPINIONS.

IN RE

## EXPENSES OF THE STATE BOARD OF MEDICAL EXAMINERS.

All fees received by the treasurer of the State Board of Medical Examiners as such treasurer, must be by him paid into the state treasury.

The expenses of said board can only be paid by an appropriation regularly made from funds in the state treasury and warrant properly drawn thereon.

State of Colorado,
Attorney General's Office.
Denver, Colorado, January 19, 1899.

HON. CHAS. S. THOMAS,
Governor of the State of Colorado.

Dear Sir—Replying to your request for an opinion in the matter of the payment of expenses of the State Board of Medical Examiners, I have the honor to submit the following:

This board was created by an act of the Third General Assembly. The act provides among other

things for certain fees to be paid to the treasurer of said board.

Session Laws of 1881, page 187, section 6.

The question is now raised whether or not the expenses of the board can be paid out of the funds in the hands of its treasurer. The act above referred to provides further that all fees received by the treasurer of said board, shall be paid into the state treasury, and that the expenses of the board shall be paid out of the funds in the state treasury not otherwise appropriated.

Session Laws of 1881, page 188, section 13.

These provisions of law are still in force and answer the question raised, in the negative. The fees received by the treasurer of the board must be paid into the state treasury. The expenses of the board must be paid out of the funds of the state treasury when the provisions of article V, section 33, of the State Constitution have been complied with. Said section of the Constitution reads as follows:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof."

To the same effect are the opinions of Attorney General Engley found at pages 31, 69 and 115 respectively of his report for the years 1893-94, and the opinion of Attorney General Carr found at page 42 of his report for the years 1895-96.

Very truly yours,

D. M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## OFFICERS AND EMPLOYES OF THE GENERAL ASSEMBLY.

---

Act of 1895, fixing number and compensation of officers and employes of General Assembly, is void.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, January 26, 1899.

Dear Sir—I am in receipt of your official communication, under date of January 17, 1899, transmitting a written protest, signed by certain members of the House of Representatives of the Twelfth General Assembly, and requiring my written opinion concerning your official duties in the matter of the said protest.

The written protest which accompanies your communication is directed to you in your official capacity, and is signed by four members of the House of Representatives of the Twelfth General Assembly. It is a protest against the issuance of warrants for the pay of certain employes of the House of Representatives of the Twelfth General Assembly, employed under the act of 1895, upon the ground that said act of 1895 is unconstitutional and void.

Your request for official advice is in the following words: "Kindly advise me whether this office shall be governed by the act of 1895, creating such offices, or not?"

This opinion is rendered in writing in accordance with the statutes of this state, which provide that the Attorney General shall give his opinion in writing

upon any question of law submitted to him by the Auditor of State.

The Act of 1895, to which reference is made, is entitled, "An Act to amend sections 1 and 2 of an Act entitled, 'An Act to amend general sections 1579 and 1580; and to repeal general section 1581 of the General Statutes of the State of Colorado,' approved January 31, 1891," approved February 6, 1895. (Session Laws 1895, page 183.)

This act fixes the number and compensation of officers and employes of the General Assembly, and was passed in obedience to the commands of Section 27, Article V, of the Constitution of the State of Colorado, which provides that "The General Assembly shall prescribe by law the number, duties and compensation of the officers and employes of each house; and no payment shall be made from the state treasury, or be in any way authorized to any person, except to an officer or employe elected or appointed in pursuance of law."

The above act, as appears from the title thereof, was an amendment to a prior act passed for the same purpose, which will be found in Session Laws 1891, page 234. The purpose of the amendment of 1895 was to increase the number of officers and employes and to increase the compensation of certain employes.

In the discharge of your official duties as Auditor you must be governed in the matter of the issuance of warrants for the salaries of the officers and employes of the General Assembly by the statutes of the state of Colorado. The act of 1895 being the last legislative declaration upon this subject, must, if valid and constitutional, control your official action. The question directly presented by the said protest and by your official communication, is the constitutionality and validity of said act of 1895.

The act of 1895 was known as "House Bill No. 138." I have carefully examined the printed house and senate journals for the year 1895, the same being a reprint of the official proceedings of the Tenth Gen-

eral Assembly, and have carefully compared the same with the original records on file in the office of the Secretary of State of the state of Colorado, and my investigation discloses the following: H. B. No. 138 was introduced in and passed the House of Representatives of the Tenth General Assembly. It was thereafter transmitted to the Senate, and while in the Senate was amended in the committee of the whole on second reading. It was afterwards amended upon the recommendation of the Revision Committee. After passing the Senate with amendments, the bill was returned to the House of Representatives, which house by a yea and nay vote refused to concur in the Senate amendments. The Senate insisted upon its amendments, and a conference committee was appointed on behalf of the Senate, as well as on behalf of the House of Representatives. Thereafter the conference committee's report was regularly adopted by a yea and nay vote in the House of Representatives. It appears from the Senate journal, pages 318 and 319, that the report of the conference committee was duly made to the Senate, and the only record of the adoption of that report is in the following words: "Senator Newman moved that the report be adopted. Agreed to."

Section 23, Article V, of the Constitution of the state of Colorado, provides that, "No amendment to any bill by one house shall be concurred in by the other, nor shall the report of any committee of conference be adopted in either house except by a vote of a majority of the members elected thereto, taken by ayes and noes, and the names of those voting recorded upon the journal thereof."

Our Supreme Court has said that the taking of the ayes and noes mentioned in the above section is mandatory.

*In re* Roberts, 5 Colo., 533.

Under the above section of our Constitution, as construed by the Supreme Court of Colorado, there

can be no doubt that there was a fatal defect in the passage of the said act of 1895. I have no doubt whatever that if this matter was presented to a court of competent jurisdiction that court must necessarily hold said act of 1895 to be unconstitutional and void for non-compliance in its passage with a mandatory constitutional provision.

If the act is unconstitutional and void for the reasons stated, then it must have been ineffectual as an amendment to the said act of 1891, which latter act remains in full force and effect.

This is not a new question. The defect in the passage of the act of 1895 was pointed out in January, 1897, by the then State Auditor, your immediate predecessor. I am credibly informed that the judiciary committee in the Senate in the Eleventh General Assembly reported to that body that the said act was void for the reasons herein stated. To my personal knowledge the invalidity of the act in question was generally conceded by the state officers and the members of the Eleventh General Assembly. The question of the validity of the act was directly raised by the Attorney General of Colorado in a mandamus proceeding against the Auditor of State in the District Court of Arapahoe county in the early summer of 1897, and the invalidity of the act was at that time conceded by opposing counsel and apparently not doubted by the court, but upon final hearing the court held that it was not absolutely necessary to pass upon the validity of said act in order to finally determine the issues involved. An exception was preserved to the ruling of the court, and that case is now pending on appeal in the Court of Appeals of the state of Colorado.

I am credibly informed that warrants were drawn by the last State Auditor, under the act of 1895, for the payment of the salaries of the officers and employes of the Eleventh General Assembly, upon the theory that an act passed by the General Assembly is presumed to be constitutional and valid until the con-

trary is declared by a court of competent jurisdiction, and that an executive or ministerial officer should not raise the question as to the constitutionality of a statute under which he acts in his official capacity. Such, in effect, was the rule laid down by the Supreme Court of Colorado in the case of

The People vs. Ames, 24 Colo., 422, 430.

That case, however, was one in which a ministerial officer charged with the levy and extension of taxes, had declined to perform his statutory duties. The court, recognizing the fact that the collection of taxes is necessary for the support and maintenance of any form of government, held that the officer should perform his duties as defined by statute and leave to the person affected, that is the taxpayer, the privilege of raising any question as to the constitutionality of the law. The question that we are now considering is one relating to the disbursement of public revenues, and where the interested person is one who is seeking payment out of the public revenues, and the general public only and no particular individual is affected by the payment.

In another case our Supreme Court, in discussing the right of executive officers to raise the question of the constitutionality of a statute, made use of the following language:

"Expressed differently, it is, we think, a fair deduction from the authorities that, in advance of a determination by a court of competent jurisdiction, a ministerial or executive officer can not, for himself, pass upon the constitutionality of a statute, except in so far as it directly prescribes his official duties, or confers some power, or imposes some liability upon him, or prescribes the range of his official conduct."

Newman vs. The People, 23 Colo., 300, 311.

That case distinctly recognizes the right of a ministerial or executive officer to question the consti-

tutionality of a statute which prescribes the range of his official conduct.

In my opinion it is the solemn duty of public officers, charged with the disbursement of public funds, to protect the public treasury by any and all lawful means within their power; to exercise the same diligence and the same fidelity that corporate officers would exercise in protecting the interests of a corporation which they serve, or that private individuals would exercise over their own financial affairs. The rule announced in the *Hall* case is, I believe, a sound one when applied to the facts of that case, but in my opinion it has no application to a case of this kind, where there is no individual interested in the protection of the public treasury, more than that of the common interest which is possessed by every taxpayer. I do not believe that public officers, charged with the disbursement of public funds, are at liberty to disburse those funds under legislative acts known by them to be null and void. If they are, there could be no protection to public interests until an aroused and outraged public sentiment would induce some individual taxpayer to institute proper proceedings in court on his own account and at his own expense, for the protection of the public treasury.

If you should issue the warrants under the act of 1895, and some court of competent jurisdiction should thereafter declare the act to be void before the same were called and paid, then the warrants could never be called or paid, but must be left outstanding in the hands of the original holders or innocent purchasers.

It is probable that the warrants, if issued, would, under authority of law, be purchased by the State Treasurer as an investment for the public school fund, or some other trust fund in his hands, and if the warrants should be declared void the public school fund, or some other trust fund of the state, would again find itself in possession of invalid state warrants. If the warrants should be called and paid by the State Treas-

urer before their invalidity was determined in court, then the State Treasurer and his bondsmen might find themselves in the position of being proceeded against in court for misappropriating public moneys.

The following extracts from some of the authorities will indicate to you the position in which you, as Auditor of State, and the State Treasurer would stand after having acted under an unconstitutional and void law:

"An unconstitutional law is, in legal effect, no law at all, and the ministerial officer can not, therefore, justify his action under it, even though he acted in good faith upon the presumed validity of the law which had not yet been declared to be unconstitutional."

Mechem on Public Officers, section 662.

"An unconstitutional law can offer no one authority, justification or protection."

19 Am. and Eng. Ency. of Law, 519.

"No question in law is better settled, and this is admitted by counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences."

Sumner vs. Beeler, 50 Ind., 341.

The syllabus of that case is as follows:

"Ministerial officers and other persons are liable for acts done by them under an unconstitutional and void enactment of the legislature, and, in an action against them for damages, can not justify under such enactment."

"Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of

the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and, upon familiar and well settled principles, is liable in this action."

Kelly vs. Bemis, 4 Gray (Mass.), 83.

"When a statute is adjudged to be unconstitutional, it is as if it had not been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

Cooley's Constitutional Limitations (6th Edition), 222.

To declare an act of the legislature unconstitutional and void is always a delicate duty for the courts, and much more so for an Attorney General. A conviction of the soundness of my conclusions in this case is my justification for the position which I have taken in this matter. If any person who is affected by your official action under this opinion doubts the soundness of my conclusions he is at liberty to take immediate steps for the purpose of bringing this act before some court of competent jurisdiction for the purpose of having a judicial determination of the question here involved. If the honorable members of the Twelfth General Assembly should accept my conclusions in this matter as sound, they will not be seriously embarrassed in the discharge of their duties, for the reason that the act of 1891 makes provision for the employment of a large number of officers and employes of the General Assembly, and that body has it within its power to promptly pass a legal and valid statute providing for the number and compensation

of such employes as it may deem necessary for the proper discharge of its business.

Respectfully yours,

D. M. CAMPBELL,
Attorney General.

By CALVIN E. REED,
Assistant.

To Hon. George W. Temple,
Auditor of State,
Capitol Building, City.

---

IN RE

## JURIES IN CIVIL CASES.

---

A statute providing for other than a unanimous verdict is unconstitutional.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, January 30, 1899.

Sir—I am in receipt of your official communication of the 23d instant, enclosing a printed copy of Senate Bill No. 142, and requesting my official opinion as to the constitutionality of the same.

The said bill provides that "In all civil cases in courts of record which shall be tried by a jury, three-fourths of the number of jurors sitting in such case may concur in and return a verdict therein."

I am advised by your letter that it is the intention of the judiciary committee of the Senate to so amend the said bill that five out of six or nine out of twelve jurors may render a verdict in civil cases.

The constitutionality of this bill, or, in other words, the question as to the right of the legislature to enact such a law is one which depends for its determination upon a proper construction of that part of the Constitution of Colorado known as the "Bill of Rights." The determination of this question depends upon the extent to which the Bill of Rights has guaranteed to the citizens of this state a trial by jury. In the absence of any guarantee in the Constitution of a jury trial, the legislature would have undoubted power to adopt a law of this character. A proper construction of the Bill of Rights can only be reached by a consideration of the essential requisites of the common law jury, and the question as to how far those requisites have been preserved by the Bill of Rights to the citizens of this state free from legislative control.

"Ever since Magna Charta, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race."

Proffatt on Jury Trial, Section 81.

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State Constitution in the Union."

Parsons vs. Bedford, 3 Pet. (U. S.), 441, 446.

"An institution that has so long stood the trying tests of time and experience, that has so long been guarded with such scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it."

Work vs. The State, 2 O. St., 296, 303.

"Just how it had its origin is involved in some mystery; but, whatever its origin, the right of trial by a jury of twelve men became fixed centuries ago in the common law, and una-

nimity of verdict became requisite, until, wherever the Anglo-Saxon tongue was spoken, and in many other countries, this right came to be regarded as the great bulwark of the liberty of the citizen. Whether charged with an offense against the commonwealth, or in a controversy with another, the right could always be invoked. When separated from the mother country, we regarded it as a birthright, and have ever been jealous of any attempted innovations upon the system."

McRae vs. Railroad Company, 93 Mich., 399, 401.

The Constitution of the state of Missouri provides that the trial by jury shall remain inviolate:

"The meaning of which is, that with respect to facts, the trial shall be by twelve men, and they shall all and each of them be good and lawful men; they must have a good fame, possess integrity and intelligence; they must not be aliens, vagrants, outlaws, nor under the conviction of crimes. They must all be under oath when they try a fact or cause; they must *all agree in their verdict;* and the right to have disputed facts tried by such a jury, and in such a manner is to remain inviolate."

Bank of Missouri vs. Anderson, 1 Mo., 174, 175.

"We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the Constitution and the laws were adopted.

"The terms 'jury,' and 'trial by jury,' are and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.

"A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly empaneled under the direc-

tion of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instruction of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their *unanimous verdict* upon the issue submitted to them."

Opinion of the Justices, 41 N. H., 550, 551.

"The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted in our bill of rights."

Vaughn vs. Scade, 30 Mo., 600, 604.

"The *unanimity* of the twelve members constituting the jury is another essential attribute of a trial jury. To accept a verdict of any number less than the whole is quite foreign to the idea suggested by a jury trial as it has been established for centuries, and as now generally presented to us. * * * The practice is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict."

Proffatt on Jury Trial, Section 77.

The Federal Constitution, when adopted, preserved the trial by jury in criminal cases, but by silence in regard to the trial in civil cases, left that matter to the discretion of Congress. This omission from the Federal Constitution of a guarantee of a trial by jury in civil cases caused much public discontent and disapprobation.

Proffatt on Jury Trial, Section 83.

"One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted this right was secured by the Seventh Amendment to the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

Parsons vs. Bedford, 3 Pet. (U. S.), 441, 446.

The seventh amendment to the Federal Constitution, which secures the right of trial by jury at the common law relates to such courts only as sit under the authority of the United States, and was not intended as a restriction upon the state courts.

Houston vs. Wadsworth, 5 Colo., 213, 217.

The Constitution of Colorado in the Second Article, which is called the "Bill of Rights," provides as follows:

"The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment; *Provided*, the General Assembly may change, regulate or abolish the grand jury system."

Section 23, Article II, Constitution. (Bill of Rights.)

A proper construction of this section, made in the light of the foregoing principles, will determine the question as to the constitutionality of the proposed bill. The words, "trial by jury," and "a jury," as used in the said section, are, in my opinion, used in their ordinary sense and mean "a common law jury" as that term was understood at the time of the adoption of the Constitution of Colorado. The term "common law jury" had a definite and fixed meaning at that time and was used in the Constitution of Colorado in that sense.

"The right of trial by jury shall remain inviolate in criminal cases." There can be no doubt that this means a common law jury consisting of twelve persons whose verdict must be unanimous. All the incidents of a common law jury are retained and guaranteed to the citizen in criminal cases. In criminal cases the right to a trial by jury, according to the common law

meaning of that term, is preserved to the citizen free from legislative interference.

Parker vs. People, 13 Colo., 155, 165.

Your request calls for an opinion as to a jury in civil cases only, and I shall, therefore, in this opinion, confine myself to a discussion of the right to a jury in civil cases. "But a jury in civil cases in all courts * * * may consist of less than twelve men." This clause of the above section of the Constitution of Colorado undoubtedly authorizes the legislature to fix any number of jurors less than twelve for the trial of civil cases. The question here presented is, has the legislature power and authority to fix the number at twelve and provide for a verdict by a concurrence of less than twelve, or to fix a less number than twelve and provide for a verdict by the concurrence of a less number than the number so fixed as constituting a jury?

In construing the above language of the Constitution, it must be determined whether or not by the use of the words "a jury in civil cases" the framers of the organic law intended to preserve and guarantee to the citizens of this state a common law jury with all of its incidents as understood at the time of the adoption of the Constitution, with a single exception of the number. In my opinion such was the intention of the framers of that instrument, and such is a true construction of the language used. The legislature may decrease the number of jurors, but in my opinion a jury trial, with all of its other incidents and essential requisites, is guaranteed to the citizen, and the sole power given the legislature in this section is to decrease the number, not to take away any of the other incidents of a jury as that term was understood at the common law.

"If the legislature had fixed the number at 11, or 9, or 6, the right would yet remain to have that number impaneled and sworn well and truly to try the case, and render a verdict by the vote and voice of every juror." * * * "They have not

surrendered a right to trial by jury such as it was understood to be before the Constitution was adopted, but have granted the right to the legislature to fix a less number than 12, if, in its judgment and discretion, it so determines, but preserving all the other incidents of the trial by jury as it was known and understood before, which means a unanimous verdict of the number fixed by the legislature. The legislature, by the act, has not reduced, but seeks to destroy the common law incidents of the trial." * * * "This can not be the true interpretation of these clauses of the Constitution. It destroys the unanimity of the verdict of 12 men. As well might the legislature have attempted to provide for the rendition of a verdict by a less number than 12."

McRae vs. Railroad Co., 93 Mich., 399, 405-406.

It is a familiar maxim of the law that the mention of one thing is an exclusion of the other. The mention of the one thing, that is, the right to decrease the number of jurors excludes the idea that the legislature was given any other or further control over a jury in the trial of civil cases.

If the Constitution was silent as to a jury in civil cases, as was the Federal Constitution at the time of its adoption, then the legislature would have undoubted control over the subject and might either abolish juries in civil cases, retain the common law jury or enact any modification of the system which might seem wise to that body. The very fact that a jury is provided for in civil cases indicates that it was the intention of the framers of the Constitution to preserve a jury trial with *all of its incidents* except that of the number. It is a rule of construction that the language used in the Constitution must, if possible, be given that construction which will give effect to every word used and leave no part meaningless. Unless the above construction be given to the Constitution, the language used with reference to a jury in civil cases is absolutely meaningless, unnecessary and might have been omitted. Why provide for a jury in civil cases and authorize the legislature to reduce the

number unless it was the intention to preserve the institution of a jury trial with all of its other incidents except that of the number? If it was the intention of the framers of the Constitution to allow the legislature to regulate or abolish jury trials in civil cases, that aim and end would have been accomplished by simply omitting from the Constitution all mention of a jury in civil cases. The framers of the Federal Constitution did this, but public sentiment at once demanded an amendment to that instrument so as to secure this cherished right.

The test of this construction will be found in the answer to the following question: Can the legislature in this state abolish juries in civil cases? If so, then the legislature has the power to ablish unanimous verdicts and provide for a verdict by less than the whole number of jurors. If the above language is construed so as to prevent the legislature from abolishing juries in civil cases, then it must be construed as guaranteeing "a jury," that is a common law jury with all of its incidents with the single exception of the number.

"The right of trial by jury shall remain inviolate in criminal cases; but a jury * * * in criminal cases in courts not of record may consist of less than twelve men, as may be prescribed by law."

In my opinion it is beyond controversy that in criminal cases *in courts not of record*, the legislature has power *only* to decrease the number and not to take away any of the other incidents of a common law criminal jury. It follows, therefore, that the language, "but a jury in civil cases in all courts * * * may consist of less than twelve men," empowers the legislature to decrease the number only and not take away any of the other incidents of a common law civil jury.

The language used in our Constitution is, "But a jury in civil cases in all courts * * * may consist of less than twelve men." The use of the words

"in all courts" is significant. At common law juries did not belong to inferior courts.

Work vs. The State, 2 O. St., 296, 308.

Our Constitution must, therefore, be construed as guaranteeing a jury in civil cases in courts not of record. The jury so guaranteed may consist of less than twelve men, but the legislature has no power to take away any of the other incidents belonging to a common law jury so guaranteed. The framers of the Constitution would not have made use of the language "in all courts" had it not been their intention to guarantee a jury in civil cases.

"Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment."

Had it been the intention of the framers of the Constitution to abolish the unanimous incident of the civil jury, it is not too much to presume that language similar to the above would have been made use of to accomplish that purpose.

"The General Assembly may change, regulate or abolish the grand jury system." Had it been the intention of the framers of the Constitution to allow the legislature to change, regulate or abolish the jury system in civil cases, similar language to the above would undoubtedly have been made use of in reference to a jury in civil cases.

In a case in the Supreme Court of Colorado which involved the right of a trial court to appoint a referee and direct a reference under the provision of the civil code, that court made use of the following language:

"In our case there is no constitutional impediment in the way of a liberal construction of the code remedy. Section 23 of the bill of rights, referred to in appellant's brief, secures the right of trial by jury in criminal cases, *but imposes no restriction upon the legislature in respect to the trial of civil causes.*"

Houston vs. Wadsworth, 5 Colo., 213, 216.

That case did not involve the precise question here discussed, and we do not believe that in a case of this kind that court would give to the language used in that case a literal construction. We do not believe that that court would feel itself bound in a case involving the question here discussed by the language used in the above case.

After a careful examination of the question embraced in your communication, I am of the opinion that, for the reasons given, the bill, if passed, would not be constitutional. I am not unmindful of the fact that there exists a difference of opinion upon this question among many of the able lawyers of this state, and I am frank to say it is a question of construction purely, and one upon which little direct authority will be found, and is, therefore, a question not entirely free from doubt.

For many centuries a jury has been regarded as the great bulwark of the people's liberties. Not only the people themselves, but the courts have jealously guarded any encroachment upon this right. I am not, however, insensible to the growing sentiment manifested within the past few years in favor of allowing a verdict by a divided jury. This sentiment has found expression in constitutional provisions in some of the Western states, but I am not prepared to believe that this sentiment will so affect the minds of the courts or so influence their judgment as to induce a departure by judicial interpretation from a time-honored institution.

In view of the importance of this question, you will pardon my suggestion at this time, that it might be advisable to submit this matter to the Supreme Court for a determination, in the event that the bill shall progress far enough to indicate a probability of its final passage.

The term "civil case" does not embrace every case which is not classed as a criminal case; not every case which is not a criminal case is a civil one. A "civil case" had a certain meaning at the common law,

and the term is ordinarily used in state Constitutions in the common law sense.

Railroad Company vs. Heath, 9 Ind., 558.

The inquiry contained in your communication deals with a jury in civil cases only; I therefore express no opinion as to whether or not the right of trial by jury is preserved in those cases which are neither civil nor criminal.

Section 15 of Article II, of the Constitution of Colorado, provides for "a jury" in condemnation proceedings. For the reasons above stated I express no opinion at this time as to whether or not the words, "a jury," as used in the above section, were used with reference to their common law meaning requiring a jury of twelve and a unanimous verdict.

McManus vs. McDonough, 107 Ill., 95, 103.
(Dissenting opinion.)
Bibel vs. People, 67 Ill., 172.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.

By CALVIN E. REED,
Assistant.

To Hon. Ed. T. Taylor,
Chairman of the Senate Judiciary Committee,
Twelfth General Assembly,
Capitol Building.

[Note. The matter of the constitutionality of Senate Bill No. 142, was submitted by legislative question, to the Supreme Court of Colorado for decision, but that court declined to answer the question, upon the ground that its answer would require a review of the case of *Houston v. Wadsworth*, 5 Colo., 213, a former decision of that court.

In Re. Senate Bill No. 142, To Regulate Jury Trials in Civil Cases, 26 Colo., 167.

The above bill was subsequently passed by the legislature. Session Laws of Colorado, 1899, page 244.

On June 25, 1900, the Supreme Court of Wyoming, in the case of *First National Bank of Rock Springs v. Foster*, 61 Pac., 466, held that the statute of Wyoming, providing for a verdict by a divided jury, from which said Senate Bill No. 142 was copied, was unconstitutional and void.]

---

IN RE

## COUNTY COMMISSIONERS.

---

The death of a person elected to the office of county commissioner before qualifying in his office, does not create a vacancy which can be filled by appointment.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 3, 1899.

Sir—I am in receipt of your official communication, under date of January 26, 1899, in which you advise me that you have been officially notified that one L. Hutchins was elected to the office of county commissioner for the third commissioners' district in Kit Carson County, Colorado, at the last general election, and that the said Hutchins died before qualifying in said office.

Your official communication, after citing certain constitutional and statutory provisions relating to the subject, requests my official opinion upon four questions therein stated, and concludes with the following request:

"Please state in conclusion whether in your opinion a vacancy exists which should be filled by executive

appointment, or whether the old incumbent holds over until his successor is elected and qualified?"

The Constitution of this state provides that, "In each county there shall be elected for the term of three years three county commissioners, * * * One of said commissioners shall be elected on the first Tuesday in October, eighteen hundred and seventy-six, and every year thereafter one such officer shall be elected in each county, at the general election, for the term of three years."

Section 6, Article XIV.

The statutes of this state provide for the election in each county of one county commissioner annually, who "shall continue in office three years," and "whose term of office shall be three years."

1 M. A. S., Sections 782 and 1579.

The statutes of this state also provide that 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 his office until the next general election.

1 M. A. S., Sections 790 and 1580.

The Constitution of this state provides that, "In case of a vacancy occurring in the office of county commissioner, the governor shall fill the same by appointment; and in case of a vacancy in any other county office," etc.

Section 9, Article XIV.

The above sections of the Constitution and statutes recognize the office of county commissioner as a county office.

The Constitution of this state contains the following provision:

"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; * * *"

Section 1, Article XII.

Answering your first interrogatory, I may say that it has been determined by the Supreme Court of this state that the last above quoted section of the Constitution applies to the office of county commissioner.

People ex rel. Williams vs. Reid, 11 Colo., 138, 140.

It is further provided by statute that,

"When the term of office of any sheriff, * * * 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 perform all the duties of such office until his successor shall be duly qualified as required by law."

1 M. A. S., Section 920.

The statutes of this state provide that every county office shall become vacant upon the happening of certain events enumerated therein.

1 M. A. S., Section 924.

Answering your second, third and fourth interrogatories, I will say that in my opinion the above section of the statutes has no application to the facts of the case now under consideration; the sixth subdivision of said section does not apply to this case, and for this reason it is unnecessary to determine whether or not said section is in harmony with Section 1 of Article XII of the Constitution, above quoted.

The law, in common with the average officeholder, abhors a vacancy in a public office. For this reason, to prevent the interruption of public business and to decrease the executive patronage of appointments, the

Constitution and statutes provide that an incumbent of any civil office shall continue to hold his office and discharge the duties thereof until his successor is duly qualified.

It was decided by the Supreme Court of Pennsylvania, more than half a century ago, that the death of the person elected to fill the office of clerk of the Orphans' Court, before he has qualified himself according to law, does not create a vacancy, but the incumbent, who is authorized to hold the office until his successor shall be qualified, holds over.

The Constitution of that state provided that,

"They [certain officers] shall hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified. Vacancies in any of the said offices shall be filled by appointments to be made by the governor, to continue until the next general election, and until successors shall be elected and qualified as aforesaid."

Commonwealth vs. Hanley, 9 Pa. St., 513-515.

In an early case in California, one Mandeville was elected Comptroller to succeed Whitman, the incumbent. Mandeville never qualified or claimed his office, but accepted an appointment from the President of the United States as Surveyor General of California, and continued to hold office under that appointment until after the expiration of the period within which he was required to qualify as Comptroller. It was held by the Supreme Court of that state that the incumbent was entitled to hold the office until his successor qualified, and that there was no vacancy which could be filled by an executive appointment.

The People vs. Whitman, 10 Cal., 38.

Field, J., filed a dissenting opinion and cited the earlier case of,

People vs. Reid, 6 Cal., 288.

The decision in the case of *People vs. Whitman, supra*, was approved and followed by the same court in a later case, where the following language was used:

"It was manifestly the intent of the Constitution that the Governor should appoint only where there is no party authorized by law to discharge the duties of the office. The object was to prevent a public inconvenience arising from the want of a party authorized for the time being to discharge the duties of a public office. When there is a party expressly authorized by law to discharge those duties temporarily, till the power upon whom the duty of election, or appointment, is devolved can regularly act, there is no occasion for calling into exercise this extraordinary power vested in the Governor to make a merely *temporary* appointment. There is no good reason for appointing a party to temporarily discharge the duties of an office when there is already a party expressly authorized by the Constitution or laws to temporarily discharge those duties."

People vs. Tilton, 37 Cal., 614, 621.

"It is the settled law of this state that the mere expiration of the term of the incumbent of the office does not create a vacancy therein such as the Governor alone is authorized to fill by the appointment of a successor."

People vs. Tyrrell, 87 Cal., 475, 479.

People vs. Edwards, 93 Cal., 153.

In a very instructive case in Indiana, which reviews the authorities upon this question, the Supreme Court of that state said:

"This right to hold over continues until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which by law is entitled to elect a successor."

State vs. Harrison, 113 Ind., 234; s. c. 3 Am. St. Rep., 663.

The following authorities are also in point:

State vs. Lusk, 18 Mo., 333.
Hubbard vs. Crawford, 19 Kan., 570.
State vs. Howe, 25 O. St., 588; s. c., 18 Am. Rep., 321.
19 Am. and Eng. Ency. of Law, 431-434.
City of Central vs. Sears, 2 Colo., 588, 590.
People vs. Reid, 11 Colo., 138. 140.

The legislature of this state having enacted a law which changed the commencement of the term of office of county treasurers from January to July, our Supreme Court held that the purpose was not to *extend* the term, but to fix the commencement of the term of office of county treasurers. The court further held that the effect of the legislative act was to leave a vacancy extending from the date of the expiration of the term of office of county treasurers in January to the date of the commencement of the term as fixed by the act, which was in July.

In re County Treasurers, 9 Colo., 631.

The above decision does not militate against the conclusion to which I have arrived, which is, that there is not a vacancy existing in the office of county commissioner in Kit Carson county, which can be filled by executive appointment, and that the present incumbent holds over until his successor is duly elected and qualified.

People ex rel. Boughton, 5 Colo., 487.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.

By CALVIN E. REED,
Assistant.

To His Excellency,
CHARLES S. THOMAS,
Governor,
Capitol Building.

IN RE

## APPOINTMENT OF MEMBERS OF GENERAL ASSEMBLY AS TRUSTEES OF STATE NORMAL SCHOOL.

---

Members of a corporation created by the state for the sole purpose of exercising some branch of its sovereign power, or for the purpose of performing one of its duties, are civil officers, under the state.

"The Trustees of The State Normal School" is a corporation organized for the purpose of enabling the state to better discharge the duty devolving upon it to provide for the education of its citizens. The position of a member of such corporation is a civil office under the state, and under the provisions of Article V, Sec. 8 of the State Constitution, a member of the General Assembly is not eligible to appointment as such trustee at any time during the term for which he shall have been elected a member of the General Assembly.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 9, 1899.

HON. CHARLES S. THOMAS,
Governor of the State of Colorado,
Denver, Colorado:

Dear Sir—In answer to your request for an official opinion as to whether or not, under the provisions of our State Constitution, members of the General Assembly of Colorado are eligible to appointment as members of the board known as "The Trustees of the State Normal School," I have the honor to submit the following:

The constitutional provision involved reads as follows:

Article V, Section 8.

"No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under the 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."

"The Trustees of the State Normal School" is a board created by act of the legislature, approved April 1, 1889.

Session Laws of 1889, page 409.

I shall attempt first to determine whether or not members of the board are civil officers.

Membership on the board is a position created by law; the method of selecting members, their terms of service, and their compensation are prescribed by law. They are required to take an oath of office, the position is by law designated an office, and the board has control of the funds and property of the school, including the appropriations made by the General Assembly for its support.

Session Laws 1889, page 409.

A public office and public officers have been defined and described by various courts of last resort as follows:

"A public office is an agency for the state and the person whose duty it is to perform the agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts for the state."

State vs. Stanley, 66 N. C., 63.

"Every man is a public officer who hath any duty concerning the public, and he is not the less a public officer when his authority is confined to narrow limits."

Bunn vs. People, 45 Ill., 400.

"Certainly where an individual has been appointed or selected in the manner prescribed by law, has a designation and title given him by law and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer."

Bradford vs. Justices, 33 Ga., 336.

"An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties."

U. S. vs. Hartwell, 6 Wallace, 393.

This statement is quoted and approved by our own Supreme Court.

In Matter of House Bill 166, 9 Colo., 628, 629.

"The employment of the defendant was in the public service. He was appointed pursuant to law and his compensation was fixed by law. Vacating the office of a superior would not have affected the tenure of his office."

Held that the defendant was a public officer.

U. S. vs. Hartwell, 6 Wallace, 393.

"All persons who by authority of law are entrusted with the receipt of public money, through whose hands public money or money belonging to it passes on its way to the public treasury must be so considered."

That is, must be considered as public officers.

Commonwealth vs. Evans, 74 Pa. State, 139.

To the same effect are:

Ogden vs. Raymond, 58 Am. Dec., 429, 430.
State vs. Wilson, 29 O. St., 347.

in which the question is considered at length and the authorities discussed.

Also,

Parks vs. Soldiers' and Sailors Home, 22 Colo., 86, 96.

In view, therefore, of the character of the position of members of the board in question, their duties, the manner of their appointment and their relation to the public, I am convinced that they are unquestionably civil officers, and that the position is a civil office within the meaning of that term as used in the constitutional provision above quoted.

The question remains whether or not they are officers "under this state."

Section 2 of the act creating the board declares it to be a body corporate, and authorizes it to hold property for the use of the State Normal School, "be a party to all suits and contracts, and do all things thereto lawfully appertaining, in like manner as municipal corporations of this state."

It may be conceded that municipal officers are not officers "under the state," though appointed by the chief executive, yet I think it will scarcely be contended that this corporation is a municipal corporation simply.

If it was created to govern the school as a community of individuals, as cities, towns and villages are governed, and for no other purpose, it might be said to be a municipal corporation. But being established as it is for the purpose of better enabling the state to discharge one of the most sacred duties which rests upon it, a duty provided for by the national government and enjoined by the Constitution of this state—the duty of providing for the education of its citizens—the municipal powers conferred upon the board must be regarded as having been conferred for the purpose of enabling it to control and govern the school as a community, not as an end but as a means to the more effectual exercise of its larger powers and functions for the purpose of the upbuilding, maintenance and direction of an institution which is designed

to give character, direction, force and effect to the state's educational effort, and to facilitate the business transactions of the board in reference thereto. Membership upon the board must, therefore, I think, be considered a state office, or at the very least an office under the state.

Authority for this position is not wanting.

In *People vs. Sanderson,* 30 California, page 168, the question is considered in reference to a trustee of the State Library, a position analogous to the one here under consideration, and it was there decided that such trustee is a state officer.

In *State vs. Wilson, supra,* the position of Medical Superintendent of the Hospital for the Insane was decided to be an office and said to be a state office.

In *People vs. McKee,* 68 N. C., 429, it was decided that members of the "Board of Trustees of the North Carolina Institution for the Deaf and Dumb and Blind" are state officers, for the reason, among others, that the Constitution calls them so, as our statute calls members of the board under consideration.

To the same effect are the opinions in the following cases:

Porter vs. Pillsbury, 11 Howard Pr., 240.
People vs. Bledsoe, 68 N. C., 457.

It is argued that as the statute makes the State Normal School an integral part of the public school system of the state, therefore the relations of the officers of that school to the public are similar to those of officers of district and high schools throughout the state. I think, however, that this is clearly erroneous.

The business of governing is found to be facilitated by the organization of municipalities with certain powers of government, restricted to comparatively small areas. It does not, however, follow that because the executive officers of a municipal corporation are not state officers, therefore the Governor is not a state officer.

It has likewise been found that the duty devolving upon the state to provide for general education can be more effectually performed by the formation of school districts with powers to elect their own officers. That these officers are not state officers does not, however, lead toward the conclusion that the officers of a school whose field is the whole state and whose effects are designed to reach all citizens, are not state officers.

It has been suggested that the members of this board, being officers of a corporation, are therefore not officers "under the state." This conclusion is obviously incorrect. There are corporations which are organized by the state for the sole purpose of exercising some branch of its sovereign power or performing some one of its most obvious duties.

A good example of such a corporation is found in the board known as the Regents of the University of Colorado, and in reference thereto I cannot do better than quote from the brief of my predecessor in office, filed in the Supreme Court of this state in the case of *People vs. Regents,* 24 Colo., 175:

> "It is true the regents of the University of Colorado are declared by the Constitution to be a 'body corporate,' but they are not a private corporation, having 'special privileges conferred by government upon individuals.' They are a part of the government. The State University is a state institution—a part of the state—as much so as the Governor or the courts. The right to educate the youth of the state, as exercised by said institution, is not a franchise—a special privilege—but it is the exercise of one of the essential functions of the state government, through the agency, in this case, of an institution established by the state in the same Constitution that created the state. The Regents of the State University are state officers, elected by all the people of the state, to manage and control certain affairs of the state, with jurisdiction co-extensive with the state."

The statutory provisions for the Normal School are substantially the same as the constitutional provision for the State University. The Normal School is a part of the state, its officers are state officers.

"A State Normal School," says the court in *State vs. Haben,* 22 Wisconsin, 660, 669, "as its name indicates, is a state institution established for the benefit of the people of the entire state and maintained by public funds provided by the state."

In support of this view I call attention to the opinions in the following cases:

Regents vs. McConnell, 5 Neb., 423, 426-427.

Regents vs. Board, 4 Mich., 212, 227.

Head vs. Curators, 47 Mo., 220, 224-225.

University vs. Maultsby, 8 Ired. Eq. (N. C.), 257, 263.

University vs. Winston, 5 Stew. & Port. (Ala.), 17, 23-25.

The term "civil officers" is used in the Constitution to describe all public officers not military.

Article VII, Section 6.

It is my opinion, therefore, that a membership on the Board of Trustees of the State Normal School is a "civil office under this state," and that no Senator or Representative is eligible to be appointed to such office during the time for which he shall have been elected as such Senator or Representative.

I am not unmindful of the fact, however, that members of the General Assembly have heretofore been appointed and retained as members of said board upon the theory that they are officers of a corporation and not officers under the state. I am aware also that General Engley, formerly the Attorney General of this state, upon a full consideration of this matter reached a different conclusion from that herein expressed. I find his opinion at page 151 of his report for the years 1893-4, and have read it with much care and interest. Notwithstanding the learning and ability displayed in the argument therein presented, I am unable to agree with the conclusion reached.

I fully appreciate the deference due to a construction placed upon the Constitution and statutes by successive Governors of this state, whose wisdom, zeal and patriotism in the discharge of their duties cannot be questioned. Nevertheless my examination of this subject fully convinces me that while the authorities are not entirely reconcilable, the letter of the law, both constitutional and statutory, sustains the above conclusion. If such be the letter of the law, how much more strongly does the spirit of the constitutional inhibition demand the same construction. The reason for the inhibition is a wise one. The evils it is intended to avert are too obvious to require enumeration or description. That no evil has arisen so far from an opposite construction of the provision is no assurance that the state and its institutions can pursue the same course with impunity in the future. While it is to be hoped that the same patriotism and integrity which prevented evil in the past may continue, the Constitution forbids us to rely solely on that hope.

Very truly yours,

D. M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## SENATE BILL NO. 20.

---

A bill to provide for the taxation of Gifts, Legacies and Inheritances is a bill for raising revenue and must originate in the House of Representatives.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 10, 1899.

TO THE HONORABLE SENATE
Of the Twelfth General Assembly of Colorado:

I am in receipt of a resolution passed by your honorable body and transmitted to me by your secretary, which resolution reads as follows:

"Whereas: Section 31 of article 5 in our State Constitution provides that all bills for raising revenue shall originate in the House of Representatives; and

"Whereas: Senate Bill No. 20 by Senator Roe, A tax upon Legacies, is a bill for raising revenue;

"Therefore, be it Resolved, That a copy of Senate Bill No. 20 be submitted to the Attorney General for an opinion as to the constitutionality of this bill if introduced in the Senate and requesting an opinion at the earliest possible date."

The resolution is accompanied by a copy of the bill mentioned therein.

In response thereto I have the honor to submit the following:

Section 31, Article V, of our State Constitution, reads as follows:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments, as in case of other bills."

Your resolution requires an opinion as to whether or not the bill referred to is such a bill as must, under the provisions of the above section of the Constitution, originate in the House of Representatives.

The tax contemplated by the bill is not, properly speaking, a property tax, but it is rather as its name indicates, a tax on the right to inherit, and to the extent to which it operates it may be considered a regulation of that right.

Judging from the effect of laws similar to the one here proposed, which are in operation in other countries and in other states of this country, the expectation may be reasonably indulged that the provisions of the bill, if put into operation, would produce no inconsiderable amount of revenue, which amount would increase as the years go by. The bill itself contemplates the production of revenue and provides for its collection and payment into the state treasury.

Of course not every law which produces revenue is a revenue law. Bills for other purposes which may incidentally produce revenue are not within the meaning of this constitutional provision. While laws of this nature are frequently advocated and commended because they regulate the right of inheritance, and because they act as a restriction upon the acquiring of property by those who have not earned it, yet I am satisfied that the court would hold that the main object of this bill is to raise revenue, and that it must originate in the House of Representatives.

I arrive at this conclusion independently of the language of your resolution above referred to. Referring to that, however, it seems to set at rest the question as to how the Senate viewed this bill in that regard, "Whereas, Senate Bill No. 20, by Senator Roe, a Tax Upon Legacies, *is a bill for raising revenue.*" This is the language of your resolution, and if it is to

be taken as a correct statement of the purpose of the bill, of course settles the question as to where it should originate.

Very truly yours,

D. M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

---

IN RE

## RELIEF BILLS.

---

The General Assembly is inhibited by Constitutional provisions from passing Relief Bills.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 13, 1899.

Sir—I am in receipt of your official communication, under date of January 30, 1899, transmitting a copy of Senate Bill No. 126, entitled "A bill for an act for the relief of the widow and children of M. Ernest Conrad, and of the widow and child of Sumner Whitney," in which you request my official opinion upon the question of the constitutionality of the same. It appears that M. Ernest Conrad and Sumner Whitney were both killed while attempting, in the discharge of their duty, to effect the arrest of a gang of outlaws.

The question presented by your official communication is:

"Whether or not this appropriation can, under our Constitution, be made by this legislature, or whether any relief can be rendered by the General Assembly to these unfortunate people?"

I quote from your communication as follows: "The Senate judiciary committee is of the opinion that such appropriation as this bill provides for would be in violation of sections 28 and 34 of Article V, of our Constitution."

I also note your statement that the sad condition in which these people have been placed by their sudden bereavement "so appeals to our sense of patriotism and justice that we are unanimously desirous of recommending this appropriation if it is possible to do so."

However strongly the unfortunate condition of these people may appeal to our sympathies, I have no doubt that the members of your honorable committee will agree with me that the question to be determined is one of the constitutional power of the legislature, and one which cannot in any way be affected by individual desires or sympathies.

The Constitution of Colorado contains the following provisions:

"No bill shall be passed giving any extra compensation to any public officer, servant or employe, agent or contractor, after services have been rendered or contract made, nor providing for the payment of any claim made against the state without previous authority of law."

Section 28, Article V.

"No appropriation shall be made for charitable, industrial, educational, or benevolent purposes, to any person, corporation, or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."

Section 34, Article V.

The following references and quotations will show the construction which has heretofore been placed upon the above sections of our Constitution by my predecessors and by the courts of this state.

The General Assembly in 1889 made an appropriation of $2,500.00 for the purpose of meeting cer-

tain expenses of the committee from Colorado to the Deep Water Convention in August, 1888, and Attorney General Jones, in an official opinion to the Chief Executive of the state, held that the said appropriation

"Belongs to that class of cases which are near the line dividing the powers in the legislature from the powers which are not in the legislature. Expenditure of public money can only be made for a public purpose, affecting the interest of the state."

Opinions of Attorney General, 1889-1890, page 10.

In 1891 the General Assembly passed an act,

"To provide for the assistance of agriculture and the relief of the settlers in certain counties of the state and to appoint a commission to carry out the provisions hereof."

Session Laws, 1891, page 37.

Attorney General Maupin, in an official communication directed to the State Treasurer, after stating that the evident purpose of the act was

"To relieve settlers in their distress, and, as far as possible, aid them in continuing the business of farming in the locality where they now are, without which aid many of them, would be compelled to abandon their homes and farms and seek a livelihood elsewhere."

And after saying,

"If, therefore, it is possible, in any view of the law, to sustain the constitutionality of this enactment, it ought to be sustained."

Held that the act of the legislature in appropriating money from the public treasury in the manner and for the purpose specified in said act was in direct violation of section 34, of article V, of the State Constitution, and that the act, therefore, was unconstitutional and void. He further held that the State Treasurer

would not be protected in paying warrants issued under said act, and if he did so it must be at his peril.

Opinions of Attorney General, 1891-1892, page 20.

Attorney General Carr, in an opinion upon the constitutionality of House Bill No. 67, addressed to the Honorable, The House of Representatives of the Tenth General Assembly, under date of February 4, 1895, in answer to the following interrogatory:

"Can the General Assembly legally, under the laws and Constitution, make an appropriation for the relief of the citizens of the state in distress on account of drouth or other unavoidable causes?"

Reviews and approves the above-cited opinion of Attorney General Maupin.

It appears from this opinion of Attorney General Carr that the Auditor of State, having refused to draw his warrant for the amount of the appropriation made by said act of 1891, a petition was accordingly filed in the District Court of Arapahoe county, praying the issuance of a writ of mandamus to compel him to issue said warrant; that the said court sustained a general demurrer to the petition and that no record can be found showing the issuance of a writ of mandamus against the said Auditor of State, or that an appeal was taken from the judgment of said court upon the said demurrer. The opinion contains the following statement: "But I have been informed that the warrants were drawn by the Auditor and paid by the Treasurer."

This opinion, going farther than that of his predecessor, holds that the legislature is absolutely barred by, the constitutional provision,

"From making appropriations for industrial, educational, charitable or benevolent purposes, to any person whomsoever, under any circumstances whatever."

The above opinion was not published in the volume of official opinions issued during that biennial period, but will be found in Record Book No. 6, in this office, at page 53.

House Bill No. 67, entitled "A Bill for an Act to Provide for the Assistance of Agricultural Development and for Relief of certain settlers in certain counties in the State, and to appoint a Commission to carry out the provisions hereof," above referred to, having passed the General Assembly, and its constitutionality having been submitted to the Supreme Court by means of an executive question, that court, in its opinion, made use of the following language:

"We find the principle underlying this bill condemned by our Constitution as unsafe and dangerous. It would permit relief to the silver miner whose occupation has been destroyed by hostile legislation of congress; to the mechanic who has lost his tools, and to a railroad company whose road has been destroyed by an act of God. And, however strongly the unfortunate condition of these farmers may appeal to the members of this court as individuals, as judges sworn to support the Constitution the question presented is one purely of constitutional law. We think it is clear that the state can not, in its sovereign capacity, extend aid for charitable, industrial, educational or benevolent purposes to any person, corporation or community, unless such person, corporation or community is under the absolute control of the state, and that the appropriation attempted to be authorized by the bill under consideration is forbidden by section 34 of article V of our State Constitution.

"We have not reached this conclusion without much reluctance. The condition of the people sought to be benefited by this act appeals to all to overlook the rules and principles established by our State Constitution, but the question presented must be determined by the court without reference to the hardships the conclusion may work in individual cases."

In re Relief Bills, 21 Colo., 62, 68.

Attorney General Maupin held that section 34, article V, of the State Constitution, does not prohibit the granting of donations to those who have rendered past military service to the state, his opinion being

based upon the proposition that it was a payment in consideration of *past services* rendered the state, and not a charitable donation nor a gratuity.

Opinions of Attorney General, 1891-1892, page 54.

The legislature of this state having passed an act making an appropriation for the purpose of paying a bounty upon sugar beets grown in this state, Attorney General Carr, in an official opinion to the Chief Executive of the state, in which he refers to the case *In re Relief Bills, supra,* held that the said appropriation was in violation of section 34, of article V, of the State Constitution.

Opinions of Attorney General, 1895-1896, page 37.

The same Attorney General, in an official opinion addressed to the chairman of the Senate judiciary committee, held that Senate Bill No. 53, "A Bill for an Act for the relief of J. B. Hurlbut, C. B. Brown and Jos. Trimmer," was in violation of sections 28 and 34, of article V, of the State Constitution. I quote from that opinion as follows:

"When a citizen is deprived of his property by the unlawful and wanton acts of a mob, it goes without saying that there should be a way provided whereby he can receive compensation, but it does not follow that the state can be held liable for the unlawful acts of a mob, or that there is or can be any liability attaching to the state, or that a bill for damages in such case can be held under any circumstances to be a lawful claim against the state."

Opinions of Attorney General, 1897-1898, page 185.

After a careful examination and consideration of the question propounded in your communication, I am compelled to hold that appropriations of the char-

acter specified in said bill would be in violation of the above constitutional provisions.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Ed. T. Taylor,
Chairman of the Senate Judiciary Committee,
Twelfth General Assembly,
Capitol Building.

---

IN RE

## INTERNAL IMPROVEMENT FUND.

---

The Internal Improvement Fund and the Internal Improvement Income Fund can only be used for the purpose of making internal improvements within the state of Colorado, and can not be lawfully appropriated by the General Assembly for the purpose of erecting public buildings for the use of state institutions.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 15, 1899.

Sir—I am in receipt of your official communication, under date of February 11, 1899, which is as follows:

"Enclosed herewith I send you a copy of Senate Bill No. 31 and 152, the first of which provides for an appropriation of $30,000.00 out of the internal improvement *income* fund, for the completion of an addition to the State Normal School; and the latter bill provides for an appropriation of $30,000.00 out of said

internal improvement *income* fund, for the erection of a building for the State Agricultural College.

"Will you kindly advise our committee whether or not, in view of the decision of our Supreme Court, *In Re Internal Improvement Fund*, 24 Colo., 247, these appropriations can be lawfully made?

"Will you also advise us as to the difference, if any, between the internal improvement *permanent* fund and the internal improvement *income* fund, and also the sources from which each of those funds are derived?"

Your official communication, as I understand it, calls for my official opinion upon the question as to whether or not the proposed appropriations in said bills would be lawful, and also contains a request for general information in reference to the internal improvement permanent fund and the internal improvement income fund. This opinion, therefore, will furnish you with all the information of which I am possessed upon this subject.

An act of congress, approved September 4, 1841, contains the following among other provisions:

"And there shall be and hereby is, granted to each new state that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such state before its admission, and while under a territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

"* * * And the net proceeds of the sales of said lands shall be faithfully applied to objects of internal improvements within the states aforesaid, respectively, namely: Roads, railways, bridges, canals and improvement of water-courses, and draining of swamps;"

5 U. S. Stats. at Large, page 455, Sections 8 and 9.

The Revised Statutes of the United States, embracing the Statutes of the United States, general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners

appointed under an act of congress, contains the following section:

"There is granted, for purposes of internal improvement, to each new state hereafter admitted into the Union, upon such admission, so much public land as, including the quantity that was granted to such state before its admission and while under a territorial government, will make five hundred thousand acres."

R. S., U. S., Section 2378.

In the year 1888 the Supreme Court of Colorado held that the effect of the Revised Statutes of the United States was to repeal said act of 1841, and leave in force only the said section 2378.

"The action of congress in repealing the provision first above named shows unequivocally an intent to leave the designation of the specific kinds of "purposes" of "internal improvement" for which the fund shall be expended wholly to the discretion of the proper state authorities."

Internal Improvement Fund, 12 Colo., 285.

The above case holds, with certain qualifications, that the internal improvement fund may be used for building reservoirs for the storage of water for the purpose of irrigation and domestic uses, or for the purpose of changing the channel of streams so as to better control the water flow therein for irrigation and domestic uses.

An act of congress, approved March 3, 1875, commonly called "The Enabling Act," contains the following provision:

"That five per centum of the proceeds of the sales of agricultural public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making such internal improvements within said state as the legislature thereof may direct."

Enabling Act, Section 12.
18 U. S. Stats. At Large, 474.

In considering the above section, together with the last above cited Federal Statute, the Supreme Court of Colorado, in the year 1888, made use of the following language:

"The act of congress places no limit upon the power of the General Assembly over the fund, except that it shall be used for the purpose of internal improvement within the state."

In re Senate Resolution Relating to Internal Improvement Fund, 12 Colo., 287.

That opinion holds that public reservoirs for the storage of water for irrigation or domestic uses are internal improvements, and the General Assembly may lawfully make appropriations from said fund for such purposes. That opinion further holds that there is no objection to appropriating the said fund for the purpose of diverting water from natural streams and storing the same in reservoirs for purposes of irrigation and domestic uses.

The above section of the Enabling Act came before the Supreme Court of Colorado in the year 1893 for consideration and construction, at which time it was said by the court:

"It must not be understood from this language that there are no limitations upon the power of the legislature respecting the use of this fund." * * * "Internal improvements, within the meaning of the Enabling Act, must be located within the state; they must be improvements of a fixed and permanent nature, as improvements of real property."

In re Internal Improvements, 18 Colo., 317.

That case holds that the term "internal improvement," not being defined in the Enabling Act, must be taken in the sense in which those words are used in American legislation, and further, that no part of the internal improvement fund can be lawfully appropriated to defray the current expenses of carrying on state institutions.

The above case was cited with approval by the same court in 1893, in a case in which it was held that the internal improvement fund is properly applicable to the construction of a system of canals and reservoirs within the state, at the discretion of the legislature.

In re Canal Certificates, 19 Colo., 63, 68.

In 1897 the Supreme Court of Colorado again had occasion to consider the said section 12 of the Enabling Act, as well as the said section 2378 of the Revised Statutes of the United States. It was then said by that court that the courts have uniformly held that the phrase "internal improvements" does not embrace buildings erected for the use of the state in its sovereign capacity,

"Such as a state capitol, state university, penitentiaries, asylums, quarantine buildings and the like, for education, the prevention of crime, charity, and the preservation of the public health are all recognized functions of state government."

In re Internal Improvement Fund, 24 Colo., 247.

That case directly determines that the internal improvement fund cannot be used for the erection of public buildings, nor for the erection of buildings for state institutions, and also that the several donations of land by congress were made for specific purposes, and that the proceeds derived therefrom constitute trust funds to be applied to the purposes of the respective grants, and that it is apparent that neither congress in making the grants, nor the framers of the Constitution of this state in providing for their preservation, intended that either of these funds should be diverted to any other purpose than that of the object of the grant.

The above decision of the Supreme Court was rendered in response to an executive question referring to section 3 of Senate Bill No. 30. (Session Laws 1897, page 81.)

The above section contained an appropriation out of the internal improvement fund for the purpose of "constructing a cottage for female patients" at the State Insane Asylum.

At the oral argument before the court in said case, the court was advised that there were other bills then in the hands of the Chief Executive, whose approval or disapproval would depend upon the decision to be rendered by the court in response to the executive question relating to said Senate Bill No. 30. The typewritten brief filed by the Attorney General in that case contains the following:

"The purpose of the executive question will be plain when it is remembered that in addition to the above appropriation, there are now in the hands of the executive three other bills which make separate appropriations out of the same fund.

"The first makes an appropriation of $1,500 for the purpose of reimbursing the town of Grand Junction for and on account of a subscription to certificates of indebtedness which were to have been issued by the board of control of the contemplated state ditch in Mesa county. The second appropriates $3,500 out of the internal improvement fund for the purchase of material, constructing new wells, and increasing the water supply for the State Industrial School at Golden. The third appropriates $3,000 out of the internal improvement income fund for additions to the buildings and improvements upon the grounds of the Colorado School for the Deaf and the Blind."

House Bill No. 266 (Session Laws, 1897, page 57) was subsequently approved by the Chief Executive, after obtaining from the Attorney General an opinion that the act to reimburse the town of Grand Junction might lawfully contain an appropriation of money for that purpose out of the internal improvement fund.

Opinions of Attorney General, 1897-1898, page 49.

The remaining two bills referred to in said brief of the Attorney General were Senate Bill No. 95 (Session Laws 1897, page 88, Section 2), by which an ap-

propriation of $3,000.00 was made out of "the internal improvement fund, or the internal improvement income fund," for the purpose of making an addition to the buildings and improvements upon the grounds of the Colorado School for the Deaf and Blind. The chief executive, in his veto message attached to said bill, made use of the following language:

"For the same reasons given for my veto of section 3 of Senate Bill No. 30 I disapprove of section 2 of Senate Bill No. 95, this appropriation being in conflict with the decision of the Supreme Court as to the disposition of internal improvement funds."

And Senate Bill No. 26 (Session Laws 1897, page 67, section 2), which made an appropriation out of the internal improvement income fund, for the purpose of purchasing materials, constructing new wells and increasing the water supply for the Industrial School for boys, was also vetoed by the Chief Executive, who made use of the following language:

"From this section I must dissent, as it is in conflict with the decision of the Supreme Court in regard to appropriating internal improvement fund."

The Constitution of this state contains the following provision:

"The General Assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made; and the general assembly shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants."

Section 10, Article IX.

The statutes of this state contain the following:

"All purchase-moneys arising from the sale of land, shall be paid by the state board to the treasurer, who shall receipt for

the same, and the same shall be by him credited to the permanent fund to which the land sold belonged. All interest on purchase-money, and all rents received from lands leased, shall be paid by the state board to the state treasurer, and by him credited to the income fund to which the land belonged. All such funds, whether permanent or income, unless otherwise disposed of by law, shall be invested by the State Treasurer, first, in the bonds of the state of Colorado; second, in the interest-bearing warrants of the state of Colorado; *Provided, however*, That such bonds or warrants shall be purchased only at a price not to exceed par, *and the interest only shall be used for the purposes for which the grant was made.*"

2 Mills' Ann. Stats., Section 3643.

Attorney General Engley held that the above statute authorizing the State Treasurer to invest moneys of the internal improvement permanent fund and the 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.

Opinions of Attorney General, 1893-1894, page 189.

An act of the legislature of this state, passed in the year 1887, provides for the location of certain internal improvement lands in Saguache county. The same act provides that the "profits or interest arising from the same shall be turned into the state internal improvement fund."

Session Laws of 1897, page 412.

2 Mills' Ann. Stats., Sections 3654-3656.

In an opinion concerning the powers and duties of the State Board of Land Commissioners, Attorney General Jones discusses the several grants contained in the Enabling Act, as well as the constitutional provision above referred to relating to the same.

Opinions of Attorney General, 1889-1890, page 73.

Attorney General Maupin held that appropriations from the internal improvement fund for the erection of buildings for state institutions are valid.

Opinions of Attorney General, 1891-1892, page 31.

The above opinion cites no authorities and gives no reason for the conclusion arrived at. It is needless to say that the decision of the Supreme Court of Colorado last above referred to announces a contrary doctrine.

Attorney General Engley held that the internal improvement fund may be used for public buildings and for machinery, provided such machinery is made a permanent accession to the building.

Opinions of Attorney General, 1893-1894, page 133.

This decision is also in conflict with the later decision of the Supreme Court of this state above referred to.

The same Attorney General, in a later opinion, made use of the following language:

"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."

Opinions of Attorney General, 1893-1894, pages 185, 186.

Attorney General Carr, in an opinion rendered to the House of Representatives of the Tenth General Assembly, held that the internal improvement fund cannot be used for the support of state institutions, nor for the erection of buildings for said institutions.

Opinions of Attorney General, 1895-1896, page 169.

The same Attorney General held that the interest upon the internal improvement fund, being in the nature of accretions to said fund, may be appropriated by the legislature in its discretion and for any purpose whatever.

Opinions of Attorney General, 1895-1896, page 177.

It will be noted that the above opinion does not deal with the internal improvement income fund, but only with the interest upon the internal improvement permanent fund.

With the conclusion reached in the above opinion I am unable to agree. The internal improvement permanent fund arises from the sale of lands granted by congress for the purpose of making internal improvements within this state. The lands are held in trust, and the funds derived from the sale thereof constitute a trust fund, and the state of Colorado, by accepting this trust, became a trustee charged with the enforcement of the terms of the trust. I am not prepared to accept as law the proposition that the state may invest trust funds under its control and apply the income thereof to purposes foreign to the trust.

A reference to the chapter on appropriations, in the third volume of Mills' Annotated Statutes, will show what appropriations have been made out of the internal improvement fund and the internal improvement income fund for the years 1891, 1893, 1894 and 1895.

3 Mills' Ann. Stats., Section 161c.

I will now answer specifically the several questions contained in your communication.

The internal improvement fund, frequently spoken of as the internal improvement permanent fund, is derived from the sale of lands granted to this state by congress for internal improvements, under section 2378 of the Revised Statutes of the United

States, and from five per centum of the proceeds of the sale of agricultural public lands within the state of Colorado, under section 12 of the Enabling Act.

The internal improvement income fund is derived from interest on deferred payments of the purchase price of internal improvement lands; from rentals received from internal improvement lands which have been leased, and from interest derived from the investment of the principal of the internal improvement permanent fund and the internal improvement income fund in state bonds or interest-bearing warrants.

2 Mills' Ann. Stats., Section 3642.

There is, in my opinion, no difference between the two funds, except in name. The separation of the receipts into two separate funds is doubtless made for the purpose of convenience of bookkeeping. In my opinion no appropriation can be made from the internal improvement income fund which could not be lawfully made from the internal improvement permanent fund. The accretions constitute, in my judgment, a part of the trust fund, and must be applied, under the terms of the trust, to the purposes of the trust as specified in the congressional grants and directed by the Constitution of this state. Equity, good conscience and fidelity to its trust will not permit the state of Colorado, after having accepted the grant from congress, to hold said lands, lease them and apply the rentals to purposes foreign to the trust, nor to sell the lands and apply the interest on deferred payments, or the interest derived from the investment of the proceeds of the sale to purposes foreign to the trust.

I must, therefore, conclude that the General Assembly is without power to make appropriations out of the internal improvement fund for the erection of buildings for the use of the state institutions in the

manner provided by Senate Bill No. 31 and Senate Bill No. 152.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To HON. ED. T. TAYLOR,
Chairman Senate Judiciary Committee and Chairman Pro Tem. Finance Committee,
Capitol Building, City.

---

IN RE

## PUBLIC LAND INCOME FUNDS.

---

The Public School Income Fund cannot be appropriated for the purpose of paying the salaries and expenses of the office of Superintendent of Public Instruction.

The salaries and expenses connected with the office of the State Board of Land Commissioners cannot be paid out of the Public Land Income Funds arising from congressional grants made for specific purposes.

The Saline Land Permanent and Income Funds may be appropriated for such purposes as the legislature may direct.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 16, 1899.

Sir: I am in receipt of your official communication, under date of February 3, 1899, in which you request my official opinion upon the following questions:

"1. Whether the salaries and expenses pertaining to the office of State Superintendent of Public Instruction may not le-

gally be paid out of the *income* of the Public School Income Fund.

"2. Whether all that part of the salaries and expenses connected with the office of the State Land Board, which are now paid out of the general revenue, may not be pro-rated and paid out of the income fund from the various public lands under the control of said board."

A determination of the questions submitted will necessitate an examination and inquiry into the origin and sources of the several grants of public lands to this state, the objects and purposes of those grants and the constitutional guarantees respecting the same.

The school lands of this state are derived from the congressional grant to this state, contained in the Enabling Act:

"The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter section, and as contiguous as may be are, hereby, granted to said state *for the support of common schools.*"

Section 7, Enabling Act; 18 U. S. Stats. at Large, 474.

"That the two sections of land in each township herein granted for the support of common schools, shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the *interest of which is to be expended in the support of common schools.*"

Section 14, Enabling Act; 18 U. S. Stats. at Large, 474.

An act of congress, approved April 2, 1884, gives

"The State of Colorado the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as may have been or shall be found to be mineral lands."

U. S. Stats. at Large, 1883-1884, Chapter 20, page 10.

"The public school fund of the state shall consist of the proceeds of such lands as have heretofore been, or may hereafter, be granted to the state by the general government for educational purposes; all estates that may escheat to the state; also all other grants, gifts or devises that may be made to this state for educational purposes."

Section 5, Article IX, Constitution.

My investigation of this subject has not led me to believe that the public school fund of the state contains at present any moneys derived from the sale of estates that have escheated to the state, nor from grants, gifts or devises made to the state for educational purposes.

The Constitution of this state contains the following provisions:

"It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor. * * * The General Assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved *and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made.* and the General Assembly shall provide for the sale of said lands from time to time; and *for the faithful application of the proceeds thereof in accordance with the terms of said grants.*"

Section 10, Article IX, Constitution.

"The public school fund of the state shall forever remain inviolate and intact; the *interest thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state,* in such manner as may be prescribed by law. *No part of this fund,* principal or interest, *shall ever be* transferred to any other fund, or *used, or appropriated, except as herein provided.* The State Treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law

directed. The state shall supply all losses thereof that may in any manner occur."

### Section 3, Article IX, Constitution.

"The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year."

### Section 2, Article IX, Constitution.

"The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, Auditor of State, State Treasurer, Attorney General, and Superintendent of Public Instruction, * * *."

### Section 1, Article IV, Constitution.

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

### Section 2, Article X, Constitution.

"No appropriations shall be made, nor any expenditure authorized by the General Assembly, whereby the expenditure of the state during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the General Assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year."

### Section 16, Article X, Constitution.

"Any legitimate expenditure of the state necessary to be provided for by a state tax is a state purpose, and the tax to be provided is a tax for a state purpose."

People Ex Rel. Thomas v. Scott, 9 Colo., 422, 430.

In Re Appropriations, 13 Colo., 316.

The public school income fund is made up of interest on purchase money, or deferred payments on school lands sold, and rentals received from school lands leased.

2 Mills' Ann. Stats., Section 3643.

All interest received by the State Treasurer on account of the investment by him of the public school permanent fund and the public school income fund in the bonds of the state of Colorado, or interest-bearing warrants of this state, are also credited to the public school income fund.

The Superintendent of Public Instruction is an executive officer.

Willis vs. Owen, 43 Texas, 41.

State vs. Womack, 4 Wash., 19.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 95.

In my opinion, the Superintendent of Public Instruction is an executive officer of this state, and the salaries and expenses incident to the maintenance of that office must be paid out of the fund created by law for the purpose of defraying the expenses of the state government for each fiscal year. The salaries and expenses of that office constitute expenditures of the state government for a state purpose, and are not expenditures for the maintenance or support of the common schools of this state.

The funds derived from the sale or lease of school lands; interest upon deferred payments and interest upon the investment of the public school permanent fund and the public school income fund constitute, under the several acts of congress and the Constitution of this state, a trust fund, held in trust by the state of Colorado for the support and maintenance of the common schools of this state, and no part thereof, principal or interest, can be lawfully used or appropriated for any other purpose.

In my opinion, no part of the public school permanent fund or the public school income fund can be used for the purpose of paying the salaries or expenses pertaining to the office of the Superintendent of Public Instruction.

City of Chicago vs. the People, 80 Ill., 384.
Crosby vs. Lyon, 37 Cal., 242.
In Re Loan of School Fund, 18 Colo., 195.
In Re State Lands, 18 Colo., 359.
In Re Kindergarten Schools, 18 Colo., 234.
In Re Canal Certificates, 19 Colo., 63, 68.
Hockaday vs. County Commissioners, 1 Colo. App., 362, 371.

Answering the second question contained in your communication, your attention is called to the following decision of the Supreme Court of this state:

"Outside of a few small tracts of land used for specific purposes, the only lands owned by the state were received as donations from the general government for specific purposes, such as schools, public buildings, etc. See, secs. 7, 8, 9 and 10, Enabling Act."

In Re Canal Certificates, 19 Colo., 63, 68.

The Enabling Act (18 U. S. Stats. at Large, 474) contains separate grants of lands to the state of Colorado, as follows:

Sections 7 and 14 grant sections numbered sixteen and thirty-six in every township for the support of common schools.

Section 8 grants fifty sections for the purpose of erecting public buildings at the capital of the state for legislative and judicial purposes.

Section 9 grants fifty sections for the purpose of erecting a suitable building for a penitentiary or state prison.

Section 10 grants seventy-two sections for the use and support of a state university.

Section 11 grants all salt springs within the state, not exceeding twelve in number, with six sections of land adjoining, "to be used and disposed of on such terms, conditions and regulations as the legislature shall direct."

Section 12 grants five per cent. of the proceeds of the sales of agricultural public lands lying within the state, and sold by the United States subsequent to the admission of the state into the Union, for the purpose of making internal improvements within the state.

Section 2378 of the Revised Statutes of the United States grants to this state five hundred thousand acres of land for the purposes of internal improvements.

An act of congress, approved July 2, 1862, grants to the several states for the endowment, support and maintenance of an agricultural college, an amount of public land equal to thirty thousand acres for each Senator and Representative in congress to which the states were respectively entitled by an apportionment under the census of 1860.

12 U. S. Stats. at Large, 503.

The above act provides that all expense of management and superintendence, and all expense incurred in the management and disbursement of the moneys which may be received from the grant, shall be paid by the states to which they belong out of the treasury of said states, so that the entire proceeds of the said lands shall be applied without any diminution whatever to the purpose specified in the act.

Section 5 of the above act of congress was amended by an act approved July 23, 1866, so as to entitle all new states admitted into the Union to the benefit of said act.

14 U. S. Stats. at Large, 208.

An act of congress, approved April 2, 1884, provides that the state of Colorado may select an amount of land equal to thirty thousand acres for each Senator and Representative "which said state is entitled to in congress."

U. S. Stats. at Large, 1883-1884, Chapter 20, page 10.

Under the above act the state of Colorado became entitled to select ninety thousand acres of public lands for the support and maintenance of the State Agricultural College.

The statutes of this state provide that all purchase money arising from the sale of state lands shall be credited to the permanent fund to which the land sold belonged, and all interest on purchase money and all rents received from lands leased shall be credited to the income fund to which the land belonged.

2 Mills' Ann. Stats., Section 3643.

As I have stated above, the interest derived from the investment of either the permanent land funds or the income land funds in the bonds of the state of Colorado, or interest-bearing warrants of this state, is also credited to the respective income land funds.

There are seven permanent land funds arising from the sale of lands, under the statutes above cited, which are as follows:

Permanent school fund;
Internal improvement permanent fund;
University permanent fund;
Penitentiary permanent fund;
Public building permanent fund;
Agricultural College permanent fund, and
Saline land permanent fund.

In pursuance of the statute last above cited, seven *income* funds are created, namely:

School income fund;
Internal improvement income fund;

University income fund;
Penitentiary income fund;
Public building income fund;
Agricultural College income fund, and
Saline land income fund.

For the reasons given above in the answer to your first question, it is my opinion that the public school income fund cannot be used for any purpose except for the support and maintenance of the common schools of this state, and it cannot, therefore, be used for the purpose of paying any part of the salaries and expenses of the State Land Board.

In an official opinion rendered by this office to the Chairman of the Senate judiciary committee, on yesterday, it was held, for reasons therein stated, that the internal improvement income fund could not be lawfully appropriated for any purpose except for internal improvements within this state.

The original act of congress above referred to, making a grant of public lands to the several states for the support and maintenance of an agricultural college, distinctly provides that the expenses connected with the management of said lands and the management and disbursement of the moneys derived from the sale thereof, shall be paid by the state to which the lands belong. Manifestly, therefore, no part of the Agricultural College income fund can be used for the purposes specified in your second question.

As to the separate grants contained in the Enabling Act, for the benefit of the University, Penitentiary and public buildings, I am satisfied that the funds arising from the sale of said lands and the accretions thereof, constitute trust funds, which cannot, without a violation of the terms of the trust, be appropriated by the legislature for any purpose other than that specified in the Enabling Act which makes the grant. In the absence of authority of congress in the granting act by which the State of Colorado, the trustee, may reimburse itself for expenses in-

curred in the execution of the trust, the state must bear that expense and cannot use any part of said funds for the purpose of paying the salaries and expenses connected with the office of the State Land Board.

There remains to be considered but one other grant of public lands, namely, that contained in section eleven of the Enabling Act, by which all salt springs within this state, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, were granted to this state "for its use, * * * to be used and disposed of on such terms, conditions and regulations as the legislature shall direct."

This grant of saline lands seems to be the only one which is not limited by the terms of the granting act to a specific purpose, and I see no reason, therefore, why the proceeds arising from this grant may not be used for such purposes as the legislature may in its wisdom direct.

I learn from the ninth biennial report of the State Board of Land Commissioners, that five salt springs only have been discovered, and that 18,836.62 acres of land have been patented to this state under this grant, all of which is located in Park county. The acreage sold prior to November 30, 1894, amounts to 4,949.95 acres. The acreage remaining November 30, 1896, was 13,886.67 acres.

I learn from the tenth biennial report of the State Board of Land Commissioners, that for the biennial period of 1897-1898, $20.00 only was received and credited to the saline land permanent fund, and for the same period $54.00 was received and credited to the saline land income fund.

Inquiry at the office of the State Treasurer discloses the fact, as shown by the records of that office, that on July 31, 1893, in pursuance of a statute passed at the ninth session of the General Assembly, (Laws of 1893, page 267,) $13,546.21, standing to the credit of the saline land permanent fund, and $3,812.87 standing to the credit of the saline land income fund,

was transferred to the general revenue fund of the state for the year 1893.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General,
By CALVIN E. REED,
Assistant.

To HON. H. H. SELDOMRIDGE,
Chairman of the Senate Finance Committee,
Capitol Building.

---

IN RE

## APPOINTMENT OF MEMBERS OF GENERAL ASSEMBLY AS TRUSTEES OF STATE NORMAL SCHOOL.

---

The attempt to appoint to office a person who is by the Constitution disqualified from being appointed, is absolutely void.

The office thus attempted to be filled, if vacant at the time of the attempted appointment remains vacant, notwithsanding such person enters upon and performs the duties of such office.

---

State of Colorado,
Attorney General's Office.
Denver, Colo., February 21, 1899.

HON. CHARLES S. THOMAS,
Governor of the
State of Colorado:

Dear Sir—In reply to your inquiry as to whether or not a vacancy exists upon the board of trustees of the State Normal School, by reason of the fact that one of the incumbents was a member of the State Senate of Colorado at the time of his appointment as said trustee, I have the honor to submit the following:

The language of the Constitution of this state, so far as it is material to this question, is the first paragraph of Section 8, Article V, which reads as follaws:

"No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state."

The effect of this provision of the Constitution is to make void any act done in contravention of its terms.

Cooley's Const. Lim., pages 98-101, and note 1, p. 100.

Shelby vs. Alcorn, 72 Am. Dec. (Miss.), 169.

In Re Breen, 14 Colo., 401.

R. Co. vs. R. Co., 15 Fed., 658.

The language of this constitutional inhibition not only makes the two offices under consideration incompatible, the one with the other, but it absolutely incapacitates a State Senator, during the term for which he has been elected, from being appointed such trustee. Not only this, but it incapacitates the appointing power from appointing him, so that the attempted appointment is not merely illegal, not merely voidable, but absolutely and entirely void, and invests the senator attempted to be appointed, with no vestige of authority as such trustee, and the office thus attempted to be filled is left vacant.

People vs. Curtis, 1 Idaho, 753.

Shelby vs. Alcorn, 72 American Dec. (Miss.), 169, 176.

People vs. McKee, 68 N. C., 429, 438-439.

People vs. Bledsoe, Id., 457.

Mechem on Public Officers, Sec. 131.

People vs. Clute, 50 N. Y., 451, 467-468.

Comm. vs. Comrs., 5 Binn. (Pa.), 534.

State vs. Peele, 124 Ind., 515, 517-518.

Gosman vs. State, 106 Ind., 203.

In *People vs. Curtis*, a member of the territorial legislature had been elected Judge of the Probate Court in one of the counties of that territory, in violation of a United States statute, which provides that no member of any legislative assembly of any territory shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased while he was such member of the legislature. The court in that case held that the appellant not being eligible to the office of Probate Judge at the time fixed by law for the term to begin, the office became vacant.

In Shelby vs. Alcorn, 72 American Dec. (Miss.), 169, Alcorn was appointed by the board of police to the position of Levee Commissioner. The court finds that said position is an office of profit and trust under the state, and that Alcorn, having been a member of the legislature which created said office, was ineligible to be appointed thereto. On page 176, Id., the court speaks as follows:

"Upon the admitted facts, the prohibition applied as well to the board of police, who held the appointing power, as to the defendant in error. It did not simply render him ineligible to the office of levee commissioner. It operated also upon the board, and incapacitated it from making the appointment. It is of the very nature and essence of the fundamental law of a state that it avoids every act performed in violation of its provisions. The act of appointment was therefore void. It was void for want of capacity in the appointee to accept, and for want of power in the board of police."

I understand that Senator McCreery was appointed trustee as aforesaid in 1891, during a term for which he had been elected as State Senator, and that he was again appointed in 1897, during his second term as State Senator. Whatever effect, under different circumstances, the second clause of the section of our Constitution from which the above quotation is made, might have upon his right to be elected to the office of Senator, while holding the office of Trustee of the State Normal School, is immaterial, for the reason that his appointment in 1891, being

void, it could not in any view of the matter interfere with his election as State Senator in 1896; so that the appointment under which he now claims to hold as trustee was unquestionably made during the time for which he had been elected State Senator, and is, for that reason, void.

In my opinion, therefore, a vacancy exists upon the board of trustees of the State Normal School, for the reasons stated in your inquiry.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

---

IN RE

## TOLL ROADS.

---

Companies operating toll roads in this state can not collect toll for the use of such road, after the charter of such company has expired.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 3, 1899.

THE HONORABLE,
The Committee of Finance of the Senate,
Denver, Colorado:

Dear Sirs—I am in receipt of your communication asking whether or not a toll road company operating in this state and under the laws thereof, can legally collect toll for the use of any road belonging to any such company, after the charter of such company has expired. In reply thereto I have the honor

to say that the Supreme Court of this state, in the case of *The Virginia Canon Toll Road Company vs. The People,* reported in 22 Colo., at page 429, has said that under the facts there stated the right to collect toll expired with the charter of the company.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

---

IN RE

## SUPERINTENDENT OF COLORADO INSANE ASYLUM.

---

Superintendent cannot lawfully maintain himself and family at the public expense and out of the asylum appropriation.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 4, 1899.

Sir—I am in receipt of your official communication, under date of February 25, 1899, which is in part as follows:

"I beg leave to call your attention to Section 2970, Mills' Annotated Statutes, which provides that the Superintendent of the Insane Asylum shall receive a salary of $2,000 per annum, payable quarterly. It is also provided that he shall reside at the asylum.

"I find nothing in the statutes which warrants the inference that he is to receive any additional compensation.

"The question which I would like to have answered is: Can the superintendent lawfully maintain himself and family at the public expense and out of the asylum appropriation in addition to his salary?"

The statutes of this state relating to the Colorado Insane Asylum provide that:

"The superintendent shall be a regularly graduated physician, and he shall *reside* at the asylum. He shall receive a salary of two thousand dollars per annum, payable quarterly."

2 Mills' Ann. Stats., Section 2970.

I do not find any other provision in the statutes relating to this subject.

The definition of the word "reside," given in the Century Dictionary, is "to dwell permanently or for a considerable time; have a settled abode for a time, or a dwelling or home; specifically, to be an official residence." And the same authority defines "residence" in law as "the place where a man's habitation is fixed without any present intention of removing it therefrom."

The Constitution of this state provides that:

"The officers of the executive department except the Lieutenant-Governor, shall, during their term of office, *reside* at the seat of government, * * *."

Section 1, Article IV.

The statutes of this state relating to the organization and management of the State Penitentiary, provide that:

"The Warden shall reside upon the penitentiary grounds, and for that purpose shall have the use of the dwelling-house thereon but in no case shall he be allowed to appropriate any goods, clothing, supplies or any article whatsoever, purchased and intended for the use of the penitentiary, for his own use, but the same shall be kept by him and applied to the sole use for which they were purchased."

2 Mills' Ann. Stats., Section 3420.

The statutes relating to the organization and management of the State Reformatory provide that:

"The Warden of the State Reformatory shall receive the sum of twenty-five hundred (2,500) dollars and his subsistence for all the services required of him. The Chaplain shall receive the sum of one thousand (1,000) per annum."

2 Mills' Ann. Stats., Section 4171.

Subsistence is defined as "that which supports animal life; means of support; provisions or that which procures provisions; livelihood."

I have not, within the time at my disposal, been able to find any judicial decisions in point, nor any direct legal authority upon the construction of this or similar statutes. Questions may arise under this statute which would be not only difficult of solution, but upon which differences of opinion might exist. The statute certainly contemplates that the superintendent shall be provided with an official residence or with suitable official apartments at the asylum. The keep, subsistence or maintenance of himself and family is not, in my opinion, embraced in our statute under the word "reside."

Answering your specific question, I am of the opinion that the superintendent cannot "lawfully maintain himself and family at the public expense and out of the asylum appropriation in addition to his salary."

Respectfully,
D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To His Excellency,
CHARLES S. THOMAS, Governor,
State Capitol Building.

IN RE

## INTEREST ON DEPOSITS OF STATE FUNDS.

---

It is the duty of the State Treasurer to credit interest received by him on deposits of state funds to their respective funds, and not to the General Revenue Fund of the year in which the interest is received.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 10, 1899.

Sir—I am in receipt of your communication of the 5th instant, informing me that the Senate finance committee of the Twelfth General Assembly has adopted a resolution requesting my official opinion as to the lawful disposition of the moneys arising from the interest on deposits of state funds, and in reply I beg to advise you as follows:

The Constitution of this state contains the following provision:

"The making of profit, directly or indirectly, out of state, county, city, town, or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law."

Section 13, Article X.

A statute of this state, which was adopted in 1877, provided as follows:

"County treasurers shall be liable to a like fine [$1,000] for loaning out or in any manner using for private purposes, state or county funds in their hands, and the State Treasurer shall be liable to a fine of not more than ten thousand dollars

for a like misdemeanor, to be prosecuted by the Attorney General in the name of the state."

2 Mills' Ann. Stats., Section 3918.

I have been credibly informed that prior to the year 1891 it was the custom of the State Treasurers of this state to loan state funds and receive from banks, in which state funds were deposited, the interest thereon, and appropriate the same to their own private advantage.

A State Treasurer of this state, having been proceeded against by indictment upon the charge of loaning public moneys for private gain while occupying the office of State Treasurer, was, in a *habeas corpus* proceeding at the April, A. D. 1890, term, ordered discharged by the Supreme Court of this state.

In re Breene, 14 Colo., 401.

In that case it was held by the court that the act mentioned in the indictment was not an offense at the comomn law; that the above-quoted constitutional provision was not self-executing; that the only statutory authority in support of the prosecution was the above-mentioned statute, and that the penal provision therein was unconstitutional, because not clearly expressed in the title of the act.

"It is eminently proper, and, in view of Section 13, Article X, of the Constitution, it may be a legislative duty, to provide by statute that all interest paid by banks on public funds deposited with them, shall be placed to the credit of the state."

In re House Resolution, 12 Colo., 395, 398.
Moulton vs. McLean, 5 Colo. App., 454, 459.
State vs. Walsen, 17 Colo., 170.

In 1891 the Eighth General Assembly enacted further legislation upon this subject, and provided that thereafter the State Treasurers should account to

the state for all interest received by them in behalf of the state upon state funds.

Laws of 1891, page 196.

3 Mills' Ann. Stats., Sections 1790 and 1790a.

Laws of 1891, page 198.

3 Mills' Ann. Stats., 1790b-1790c.

The above statutes do not contain any provision or direction with reference to the disposition of said interest moneys; however, the following General Statutes appear to have been observed by the successive State Treasurers:

"That all sums of money remaining in the hands of the State Treasurer, other than that set apart by law for a special fund, shall be by said Treasurer carried to the general fund."

1 Mills' Ann. Stats., Section 1809.

"That all sums of money received by the State Treasurer, from the sales of laws and code; fees from Secretary of State, * * * or from any other source whereby the same is not set aside by law for a specific purpose, shall, on its receipt, be credited to the general state fund by the Auditor and Treasurer."

Laws of 1885, page 241, Section 2.

3 Mills' Ann. Stats., Section 1831b.

In the early part of the year 1892 Attorney General Maupin rendered the following official opinion to State Treasurer Carlile:

"Referring to your communication, * * * asking to what fund the money received as interest on deposit of state funds belongs, or what disposition should be made of it, it is my opinion that the interest should be turned into the general fund, for the respective fiscal years in which the interest is earned."

Opinions of Attorney General, 1891-1892, page 86.

With the above opinion I am unable to agree, and the reason for my dissent will be fully stated herein.

The several State Treasurers, probably as a matter of convenience in bookkeeping, have adopted the plan of temporarily crediting all interest to an account called "interest on deposits of state funds," and have thereafter transferred the same to the general revenue fund or expended it in the payment of interest upon a part of the bonded indebtedness of this state.

The biennial report of Treasurer Carlile shows receipts from interest on state funds amounting to $65,165.31 for the fiscal years 1891-1892. The same report shows that this entire sum was transferred to the general revenue fund of the fiscal years 1887, 1888, 1889, 1890, 1891 and 1892, as follows:

| | |
|---|---|
| Transferred to general revenue of 1887.... | $ 250.82 |
| Transferred to general revenue of 1888.... | 140.68 |
| Transferred to general revenue of 1889.... | 11,659.14 |
| Transferred to general revenue of 1890.... | 5,649.42 |
| Transferred to general revenue of 1891.... | 26,064.46 |
| Transferred to general revenue of 1892.... | 21,400.79 |

Report of State Treasurer, 1891-1892, page 13.

The said interest was earned during the years 1891 and 1892. It is apparent, therefore that the above opinion of the Attorney General was not followed to the extent of crediting the above sum of $65,165.31 to the general revenue fund for the respective fiscal years in which the interest was earned.

It is probable that the above apportionment of interest among the several fiscal years was made upon the basis of the amount of interest received from the moneys deposited in the several banks by the State Treasurer, belonging to the revenues of the above-mentioned fiscal years.

The biennial report of Treasurer Nance shows receipts from interest on state funds amounting to $55,765.47 for the fiscal years 1893-1894, and this sum

was apportioned and transferred to the general revenue fund of the fiscal years 1893-1894.

Report of State Treasurer, 1893-1894, pages 24 and 25.

The biennial report of Treasurer Mulnix shows receipts from interest on state funds amounting to $32,965.44 (including a balance of $448.89 received from the former State Treasurer) for the fiscal years 1895-1896, and the same was disbursed as follows:

| | |
|---|---|
| Interest paid on casual deficiency bonds | $ 3,000.00 |
| Interest paid on insurrection bonds | 2,818.00 |
| Transferred to general revenue of 1895 | 12,385.72 |
| Transferred to general revenue of 1896 | 13,761.72 |
| Unexpended balance in treasury Dec. 1, 1896 | 1,000.00 |

Report of State Treasurer, 1895-1896, page 15.

The biennial report of Treasurer Kephart shows receipts from interest from state funds amounting to $25,936.01 (including a balance of $1,000.00 received from the former State Treasurer), for the fiscal years 1897-1898, and this sum was disbursed as follows:

| | |
|---|---|
| Interest paid on insurrection bonds | $7,640.00 |
| Interest paid on casual deficiency bonds | 5,994.00 |
| Transferred to revenues of 1897 | 2,000.00 |
| Transferred to revenues of 1898 | 9,294.01 |
| Balance | 1,008.00 |

Report of State Treasurer, 1897-1898, page 13.

The State Treasurer was authorized and directed by statute to pay the first year's interest on the casual deficiency and Cripple Creek insurrection bonds out of the interest on deposits of state funds.

Laws of 1895, page 181, Section 6.
3 Mills' Ann. Stats., Section 1829j.

By a subsequent act the same officer was authorized and directed to pay the interest on said bonds for the years 1897 and 1898 out of the same fund.

Laws of 1897, page 136.

The several State Treasurers necessarily have in their hands and under their control, during their official terms of office, large amounts of the state funds, belonging to the general revenue funds of the several preceding years, or to special funds, such as the public school fund, the internal improvement fund, the university land fund or funds arising from the mill levies for state institutions. The moneys are deposited from time to time in the various banks of this state, and large sums are received as interest thereon from said banks.

The Constitution of this state contains the following provision:

"The treasurer shall keep a *separate account* of each fund in his hands; and shall, at the end of each quarter of the fiscal year, report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, *and the place where the same are kept or deposited.*"

Section 12, Article X.

In my opinion it is the duty of the State Treasurer to open an interest account with each of the special funds in his hands and with the general revenue fund of each fiscal year, in order that the interest received from the deposits of each thereof may be readily ascertained. I am of the further opinion that in the absence of a valid law directing any other lawful disposition of the interest received from the deposits of state funds, it is his duty to credit the interest received from the deposits thereof to the respective special funds and the interest received from the deposits of the general revenue fund to the general revenue fund of the respective fiscal years, and not to the fiscal year in which the interest was earned.

The accretions of these several funds certainly belong to and should be credited to the respective funds, and not to the general revenue fund of the particular year during which the interest was received or earned. One or two illustrations will serve to make this conclusion clear.

Since the year 1890 there has been at all times in the hands of the several State Treasurers of this state, of the revenues of the year 1889, a sum ranging in amount from $160,000.00 to $89,000.00. The interest received on this sum has been from time to time credited to the account known as the "interest on deposits of state funds," and afterwards transferred to the general revenue fund of the fiscal year during which the interest was received or earned, or has been used for the payment of interest upon a part of the bonded indebtedness of the state.

There are a large number of outstanding warrants of the year 1889 which have not been called and paid because of some question as to the validity of a part of said warrants. The validity of a part of the said warrants and the invalidity of others has already been determined by proceedings in court. These warrants are all drawing interest at the rate of six per cent. per annum, and it needs no argument to show that whatever sums may be received as interest upon the revenues of that year, should be credited to that year and should be available for the purpose of paying the principal and interest of the warrants of that year whose validity may hereafter be determined. Certainly there can be no justification for the present practice of holding the revenues of that particular year, and which are primarily available for the payment of the outstanding warrants for that year, loaning the same and using the interest for the purpose of paying the expenses of subsequent fiscal years.

Under the several acts of congress and the Constitution of this state, the interest received from the public school fund must be expended in the support and maintenance of the common schools of this state.

and no part of that fund, principal or interest, can be used or appropriated for any other purpose or transferred to any other fund.

Section 7, Enabling Act; U. S. Stats. at Large, 474.

U. S. Stats. at Large, 1883-1884, Chapter 20, page 10.

Sections 3, 5 and 10, Article IX, Constitution.

The State Treasurers of this state have at different times had large amounts of the public school funds in their hands awaiting investment in the bonds or warrants of this state, in the manner provided by law, and have during the time said moneys were so held by them, deposited the same in the various banks of this state and credited the interest received thereon to the account called "interest on deposits of state funds," and the interest has thereafter been transferred or expended in the manner hereinbefore set forth.

In my opinion it is the imperative duty of the State Treasurers to credit all such interest moneys to the public school income fund, and to cease the practice of crediting the same to other funds or diverting the same to other purposes.

What I have said by way of illustration in reference to the above-mentioned two funds is equally applicable to other funds. The interest received on deposits of moneys belonging to the general revenue fund for each particular fiscal year should be credited to or transferred to the general revenue fund of the particular year to which it belongs and of which it is an accretion. After the expenses of any particular fiscal year have been paid, the interest received from the deposits of the moneys belonging to the general revenue fund of that year may be lawfully appropriated or transferred by law in the same manner as any unexpended balance in the treasury belonging to that particular fiscal year, but in my judgment the

interest received by the State Treasurer upon the deposits in banks of moneys belonging to special funds, which are in the nature of trust funds, and applicable only to the payment of appropriations made in accordance with the terms and provisions of the trust, which interest represents the accretion thereof, cannot be lawfully appropriated to other purposes or transferred or diverted to purposes foreign to the trust.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To HON. H. H. SELDOMRIDGE,
Chairman of the Senate Finance Committee,
Capitol Building.

---

IN RE

## RELIEF BILL.

---

A bill providing for compensation by the state for property destroyed by a mob is unconstitutional, for the reason that such claim is without previous authority of law.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 17, 1899.

HON. COLE BRISCOE,
Chairman of the House Committee on Appropriations and Expenditures of the Twelfth General Assembly,
Denver, Colorado.

Dear Sir:—I am in receipt of your letter of recent date, enclosing House Bill No. 204, and requesting my official opinion upon the question whether or

not the parties for whose relief said bill is proposed to be passed have a valid claim upon the state for reimbursement for the losses sustained, and whether the legislature can legally appropriate money from the state treasury for the purpose set forth in the bill.

In reply thereto, I have the honor to submit the following:

The facts upon which the claim is predicated are set forth in the bill itself, and are in brief as follows:

In the months of July and September, 1894, a large number of sheep belonging to the claimants were destroyed in the counties of Garfield and Rio Blanco, in this state, by bands of armed men acting in a tumultuous and insurrectionary manner and in open defiance of the law of the state. The proper authorities of said counties were appealed to by these claimants to protect said property, but were not able to prevent its destruction.

A bill for the purpose of paying this claim was introduced in the Eleventh General Assembly, and, a question of its constitutionality having arisen, the same was referred to my predecessor in office, Attorney General Carr, with a request for an opinion. In the opinion given in response to said request, it was held that the proposed legislation was of the class inhibited by section 28 of article V of the state Constitution, for the reason that the claim made was without previous authority of law, and that therefore the payment proposed would be simply a donation, which is forbidden by section 34 of the same article of the Constitution.

Opinions of Attorney General for 1897-1898, p. 185.

The Tenth General Assembly passed a bill making appropriations for the relief of certain settlers in that portion of the state commonly known as the "rain belt region," who had been rendered destitute by failure of crops occasioned by lack of rainfall. The bill

was by the Governor submitted to the Supreme Court for an opinion upon its constitutionality. Upon a full consideration of the matter, the court held that the appropriation was inhibited by section 34 of article V of the Constitution.

In re Relief Bills, 21 Colo., 62.

Under date of February 13, 1899, in response to a request from the Senate judiciary committee of the Twelfth General Assembly for an official opinion upon the constitutionality of Senate Bill 126, I stated that, in my opinion, the same was unconstitutional. Said bill proposed to make an appropriation to be paid out of the state treasury for the relief of the widows and children who had been left destitute by the death of certain officers who were killed in attempting to arrest a gang of outlaws. In that opinion I called attention in detail to the opinions of the court and of the different Attorneys General of this state as to legislation prohibited by sections 28 and 34 of article V of our Constitution.

It is suggested, however, by beneficiaries under this bill that this is a claim which is clearly distinguishable from the other claims referred to above, and that it is founded on previous authority of law. It is argued that the word *law*, as used in said section 28, is not confined to the statute or constitutional law of the state, but is to be extended so as to include the whole body of the law. That the *law* devolves upon the state the duty of protecting the property of its citizens in return for payment of taxes. That a fundamental relation exists between the state and its citizens which is recognized by law, and that growing out of said relation, the duty on the one side of protection, and on the other of obedience and taxpaying, are reciprocal and legal duties. It is argued that the state, having failed to effectually perform its duty in the matter of protecting property, and in consequence thereof the citizen having suffered loss, a claim for in-

demnity arises based on authority of law within the meaning of the Constitution.

While it may be admitted that a state in the fundamental establishment of the relations between itself and its citizens does undertake to protect the property of the citizen, no case has been called to my attention where it has been held, and no authority where it has been stated, that the state goes so far as to absolutely insure the safety of such property. The doctrine upon this subject is well stated in *Levy vs. City of New York,* 1 Sandford (N. Y.), 465, 466, from which I quote as follows:

"It is the duty of the government to protect and preserve the rights of the citizens of the state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guaranty its citizens against all the casualties incident to humanity or to civil society; and we believe it has never been called upon to make good, by way of damages, its inability to protect against such misfortunes.

There would be no end to the claims against this city and state, if such an action as this is well founded. If a man were to be run over, and his leg broken by an omnibus racing in the street, he would forthwith sue the city for damages, because the corporate authorities neglected to enforce their ordinance against racing and furious driving in the public streets. So, if some miscreant, by placing a stick of timber on a railroad track, should cause the destruction of a passenger train, with great loss of life and limb; the legislature would be petitioned by the injured survivors, and the relatives of the deceased, for the damages thereby occasioned, on the ground, that the public servants should have enforced the statute enacted against such offenses.

There are innumerable illustrations of the application of the principle. It suffices to say, that no government, whether national, state or municipal, ever assumed, or was subjected to a general liability of this description."

The doctrine of this case is, I think, correct in principle and is well sustained by authority. The

courts, with few exceptions, hold that public corporations, such as towns, cities, counties, etc., are not liable in damages for any neglect or failure in those duties which are purely governmental, unless made so by statute. And this immunity is based upon the fact that such corporations, in so far as they exercise such sovereign functions as the enforcement of laws, are upon the same footing as the sovereign state.

2 Dillon on Mun. Corp. (3d Ed.), 959.

Nor for torts or negligence of their officers.

Com'rs vs. Bish, 18 Colo., 474.
Com'rs vs. Ball, 22 Colo., 125.

In the case of *Stephens vs. Colgan*, 91 Cal., 649, and also in *Rankin vs. Colgan*, 92 Id., 606, the court held that, since the statute did not show on its face the nature of the claim for the payment of which it provided, but simply that it was to pay a *claim* of the beneficiary against the state, the court was bound to presume that the legislature, before enacting the statute, had determined that the claim was legal and a proper one to be paid by the state; and that the legislature having so determined, and passed the bill, the court could not properly go outside of the bill itself for information in reviewing the acts of the legislature in passing upon the facts upon which the claim was based. It needs no argument to show that the doctrine of those cases cannot be applied to the bill under consideration here, in its present form, for the reason that it shows clearly upon its face all the facts upon which the claim is founded.

In many of the states statutes have been enacted making counties or municipalities liable for property damaged or destroyed by mobs. These statutes have been held constitutional.

Dillon on Mun. Corp., 959.

It was upon such a statute that actions on account of property destroyed in the Pittsburg riots were founded. Similar actions in Illinois are also based upon a statute.

County of Allegheny vs. Gibson, etc., 90 Penn. State, 397.

Coal Co. vs. City, 65 Ill. Appellate Ct. Rep., 571.

There is, however, no such statute in this state, and if there were it would not create any liability on the part of the state which would amount to a previous authority of law for this claim.

In answer to this inquiry I might have contented myself with calling the attention of your committee to the opinion of my predecessor upon this same claim above referred to. I have assumed, however, that your request for a second opinion from this office was made upon the theory that some new facts or authorities could be adduced which were not before fully considered. I have, therefore, gone into the matter at length. While I fully agree with Attorney General Carr, in that portion of the opinion cited above where he says,

"The preamble of the bill recites a state of facts which must appeal to the sympathy of the general assembly, or any other body of men who are prompted by instincts of justice,"

I also agree with him in the conclusion that damages of the character described in the bill cannot in any view of the matter be held to constitute a *claim* against the state sanctioned by "previous authority of law," not even when the term *law* as used in the Constitution is given the broadest interpretation contended for by claimants.

Very truly yours,

D. M. CAMPBELL,
Attorney General,
By DAN B. CAREY,
Assistant.

IN RE

## STATE BOARD OF AGRICULTURE.

---

The provision of the statute relating to the time of appointment of members of the State Board of Agriculture, is merely directory and incidental to the paramount duty of making the appointment. The appointing power may be used at any time before the adjournment of the Legislature.

---

State of Colorado.
Attorney General's Office.
Denver, Colorado, April 22, 1899.

HON. CHARLES S. THOMAS,
Governor of the State of Colorado,
Denver, Colorado.

Dear Sir—I have your favor of the 17th instant, in which you ask for my official opinion as to the validity of certain appointments of members of the Board of Agriculture. In reply thereto, I have the honor to submit the following:

The State Board of Agriculture is constituted and established, and the appointment of its members provided for, by section 55, Mills' Annotated Statutes. That portion which relates to the appointing power is as follows:

"The Governor, by and with the consent of the senate, on or before the third Wednesday of January of each biennial session of the general assembly, shall appoint two members of the board to fill the vacancies that shall next occur, which vacancies shall be so filled that at least one-half of the appointed members of the board shall be practical farmers."

Your letter states that Messrs. P. A. Amiss and Harlen Thomas were by you appointed as members

of said board, but that said appointments were made subsequent to the third Wednesday of January, 1899. You also state that said appointments were regularly submitted to the Senate and by that body duly confirmed. You ask whether, under the Constitution and the laws, this power of appointment may not be used at any time prior to the adjournment of the legislature.

In *People vs. Allen,* 6 Wendell (N. Y.), 486, a statute of that state was under consideration, which provided that "the commanding officer of each brigade of infantry shall, on or before the first day of June in every year, appoint a brigade court martial." This court martial was not appointed until July. The question passed upon by the Supreme Court in that case was, whether or not, under the law, the brigade commander had power to appoint after the first of June, there being no appointment made under the letter of the statute "on or before the first day of June." It was held that the provision as to time was merely directory and could not be construed as a limitation upon the appointing power. I quote as follows from the opinion in that case:

> "So it may be said of this case, that as there is nothing in the nature of the power showing that it might not be as effectually exercised after the first day of June as before, and as the act giving it contains no prohibition to exercise it after that period, the naming of that day was a mere direction to the officer in relation to the manner of executing his duty. There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was mentioned as a limitation."

The doctrine of the above case is mentioned with approval by the Supreme Court of Rhode Island, in a matter entitled, *In Re Census Superintendent,* 15 Rhode Island, 614. The question there arose upon a request submitted by the executive of the state to the Supreme Court, for an opinion as to the validity of the appointment of a census commissioner on January 5th, under a statute which provided that such com-

missioner should be appointed "at least six months previous to the date for taking the census," which statute also provided that said census must be taken on the first day of the following June. In that case it was held that the duty to appoint was paramount and essential, and that the limitation as to time was merely directory and incidental. The appointment was held to be valid.

Our statute above quoted imposes on the Governor an imperative and essential duty,—to appoint members of the board. There is nothing in the nature of that duty which prevents it from being performed as well after as before the third Wednesday in January. There is nothing in the language of the statute which prohibits an appointment at a later date, and nothing which in any manner indicates that the time mentioned was intended to operate as a limitation upon the appointing power.

As stated in your letter, your predecessors have rarely made appointments upon this board until after the time mentioned in the statute. At least one, and probably both of the members who are succeeded by your recent appointees, were appointed after the statutory time.

It is my opinion, therefore, that the provision of the statute relating to the time of making the appointment, is merely directory and incidental to the exercise of the appointing power, and that such power may properly be used at any time prior to the adjournment of the legislature.

Your letter requests a reply not later than the present date. I have made such search of the Colorado authorities as I might in the limited time at my disposal, but do not find that the question has been determined by our courts.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## STATE BOARD OF HEALTH.

---

Creation of.
Members appointed by the Governor; Term of office.
Appropriation for.

---

State of Colorado.
Attorney General's Office.
Denver, Colorado, May 5, 1899.

G. E. TYLER, M. D.,
Secretary of the State Board of Health,
Denver, Colorado:

Dear Sir—Your favor of the 3rd instant is received, wherein, under the direction of the State Board of Health, you make several inquiries relative to the appropriation made by the legislature to meet the expenses of said board. In reply thereto, I have the honor to submit the following:

The State Board of Health, as it now exists, was created by an act of the legislature, approved April 15, 1893. The members are appointed by the Governor for six years, and their terms of office expire January 31st.

The appropriations made by the different legislatures, are, by the act creating said board, directed to be expended in the manner deemed best by the board for carrying out the objects for which it was created.

The Twelfth General Assembly appropriated to meet the expenses of the board and to pay the salary of the secretary, the sum of three thousand dollars; fifteen hundred dollars for the year 1899 and fifteen hundred dollars for the year 1900. The fiscal year in

this state, under provision of the statute, begins on December 1st and ends November 30th.

1 M. A. S., Section 1854.

Appropriations are made by the legislature for the fiscal year in which the legislature meets and for the next ensuing fiscal year. The fiscal year of 1899 begun on December 1st, 1898.

In Re Appropriations, 13 Colo., 316, 324-325.

Constitution, Article X, Sections 2, 16.

In Re House Resolution No. 25, 15 Colo., 602.

So that the appropriation made by the Twelfth General Assembly was to pay the salary of the secretary and expenses of the board for the two years, beginning December 1st, 1898, and ending November 30, 1900.

The fact that the term of office of members of the board does not commence with the fiscal year does not affect the situation. The same is true of all the state officers and employees.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## STATE WAGON ROAD.

---

Commission created by S. B. No. 116, (Session Laws of 1899, page 148) can only acquire a completed road.

---

State of Colorado.
Attorney General's Office.
Denver, Colorado, May 15, 1899.

Dear Sir—I am in receipt of your official communication, under date of May 12, 1899, requesting my official opinion respecting the powers of the commission, created by an act passed at the twelfth session of the General Assembly of the State of Colorado, known as Senate Bill No. 116.

The said act is entitled "An Act to provide a state wagon road from Wagon Wheel Gap to one mile north of the town of Creede, in Mineral county, building necessary bridges, purchasing and covering what is known as the Wason Toll Road and making an appropriation therefor," approved April 22, 1899.

This act makes an appropriation of $12,000, or so much thereof as may be necessary "for the purpose of providing by purchase and construction a state wagon road, including the building of necessary bridges," and the act provides that "said wagon road and bridges shall be constructed and purchased under the superintendence of the Governor, State Engineer and chairman of the board of county commissioners of Mineral county, who shall constitute a commission for that purpose."

Section 1 contains the following provision:

"Provided, that if on making a survey and estimate of the cost of said wagon road and bridges, it is found that the amount

herein appropriated is not sufficient to complete said wagon road and bridges, then no part of the appropriation herein provided for shall be used, except so much as shall be necessary to pay for said survey and estimate, unless the Board of County Commissioners of Mineral County, or other responsible parties, shall furnish to the Commission herein provided for satisfactory evidence that such money shall be forthcoming on the demand of such Commissioners, or the Contractor, on the purchase and completion of said road and bridges."

Section 6 contains the following provision:

"The State Auditor be and is hereby authorized and directed to draw his warrant for the sum of twelve thousand dollars ($12,000), or so much thereof as may be necessary, *on certificate of the State Engineer that said road has been purchased and constructed according to contract.*"

I quote from your official communication as follows:

"The owners of the road refuse to make any conveyance or transfer until the sum of $10,000 is paid them in cash therefor. The commission established by the bill to carry out its purposes is among others composed of the Governor and State Engineer. Can this commission negotiate for the road under the bill, leaving the subject matter of the bridge to be hereafter determined? In other words, may we proceed at once to acquire the road before receiving bids and estimates upon the bridge construction? My own impression is that this can be done, but we feel reluctant to act without your opinion."

A careful examination of this act convinces me that the commission has no power to acquire the Wasson Toll Road before receiving bids and estimates upon the bridge construction. In my opinion it is the duty of the commission to first make a survey and estimate of the cost of said wagon road and bridges, and if it shall then be found that the amount appropriated by the said bill is not sufficient to complete the wagon road and bridges, then no part of the appropriation shall be expended, except so much thereof

as shall be necessary to pay for said survey and estimate, unless provision is made, in the manner provided by the Act, for the payment of the additional cost of said wagon road and bridges.

The evident purpose of the legislature in passing this act was to acquire a completed road at a total cost to the state not to exceed the amount of the appropriation therefor, and to guard against the possibility of the expenditure of state moneys upon an uncompleted project.

An examination of the many bills passed at the twelfth session of the General Assembly of the State of Colorado, providing for the purchase or construction of wagon roads, bridges and state wells, shows the same intent manifested by apt language in a majority thereof.

Any attempt on the part of the commission to purchase the said toll road, without first making the necessary survey and estimates, would, in my opinion, be as contrary to the spirit of the act and as violative of the expressed legislative intent, as the construction of the bridges without first making a survey of the road, or negotiating for the purchase of so much of the said wagon road as is already constructed.

In my opinion, the one conclusive reason why the commission cannot "proceed at once to acquire the road before receiving bids and estimates upon the bridge construction," is that the Auditor of State has no power or authority under the act to draw his warrant in payment therefor, until he has first been furnished with the "certificate of the State Engineer that said road has been purchased and constructed according to contract."

This has been determined by our Supreme Court in a case in which the judgment of the District Court of Arapahoe county, granting a writ of mandamus against the Auditor of State, commanding him to issue his warrant in payment of the expenses of constructing a state wagon road, under an act very sim-

ilar to the act in question, was reversed with directions to dismiss the petition. The Supreme Court held in that case that:

"The failure of the relator to comply with the requirements of section 7 of the act is equally fatal to his recovery. In that section the auditor is authorized to draw a warrant upon the treasury when he receives from the one who demands it a certificate of the board that the work has been duly completed. His power under the act is dependent upon the receipt of that certificate. He is authorized to act only on its presentation. There can be given to him, in the discharge of his official duty in the premises, no other sufficient evidence that the warrant has been earned, and that anybody is entitled to it. This certificate must be, on its face and by its terms, the act of the board which the statute has created. The auditor, under our system, is an officer charged with the duty of protecting the public treasury from unauthorized drafts upon it. How far he may go in defense of the public funds need not be determined. That he may require all the evidence prescribed by the statute, complete in all its formal and essential particulars, there is no doubt. He could not do less and properly discharge his official duty. According to the averments of the petition, no such certificate was presented, nor was one ever given to the auditor."

Schwanbeck vs. The People, 15 Colo., 64, 68.

Permit me to express my regret that the conclusion at which I have arrived at in this case does not coincide with your own present impression.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Charles S. Thomas,
Governor,
Capitol Building, City.

IN RE

## PUBLIC SCHOOL FUND.

---

The expense incurred by the State Superintendent of Public Instruction in preparing and having printed blank forms, registers and books for the use of teachers and school officers, must be paid by warrants drawn on the Printing Fund or General Contingent Fund, but the same shall be charged to the respective counties at cost and deducted from the amount apportioned to such county at the semi-annual apportionment of the Public School Fund.

It is the duty of the State Treasurer to transfer the amount so deducted from the Public School Fund to the General Fund.

The expense of printing school laws must be paid by warrants drawn on the Printing Fund or the General Contingent Fund.

---

State of Colorado.
Attorney General's Office.
Denver, Colorado, May 16, 1899.

Dear Sir—Your official communication under date of February 18, 1899, requesting my opinion in response thereto, was received on that date and was as follows:

"I respectfully ask your opinion in regard to the legality of the transfer of the sum of $1,363.93 from the Public School Income Fund to the General Revenue of 1898 as per attached notice from Hon. Geo. W. Temple, Auditor of State.

Some question has arisen as to whether any part of the school Fund, Permanent or Income, can be transferred to any other Fund under the Constitution of the State of Colorado.

Will you kindly furnish this Office, at your earliest convenience with an opinion on this matter, so that we may be governed in the future in regard to the distribution of this Fund."

The attached official communication from the Hon. Auditor of State, under date of January 12, 1899, was in the following words:

"I hereby certify to you that I have transferred on the books of this office, the sum of $1,363.93 from the Public School Income Fund to the General Revenue of 1898."

In response to my written request, under date of February 20, 1899, for further information upon this subject, I received your communication of February 21, 1899, from which I quote as follows:

"I understand that this money was used for printing blank reports which are distributed by the Supt. of Public Instruction to the various School Districts throughout the State." * * *

"The question in my opinion seems to be:—First, whether or not, any part of the Public School Income Fund, can be used by the Supt. of Public Instruction in payment of printing blanks furnished the School Districts throughout the State?

Second, whether or not, under the Constitution, any transfer of School Funds, Permanent or Income, to any other fund, would be legal?"

The legislature was then in session and the demand upon my time was such that I was unable at that time to give this matter the consideration which its importance deserved. Knowing that it did not necessarily call for your official action before the first of June, I notified you that with your consent, I would postpone further consideration of the matter until after the adjournment of the legislature. In the meantime substantially the same questions were informally presented to this office by the State Auditing Board.

The statutes of this state, relating to the duties of the State Superintendent of Public Instruction, adopted at the first session of the General Assembly after the adoption of the State Constitution, contain the following section:

"He shall have a general supervision of all the county superintendents and of the public schools of the state. He shall

prepare, have printed and furnish to all officers charged with the administration of the laws relating to public schools and to teachers, such *blank forms* and *books* as may be necessary to the discharge of their duties. But he shall not copy-right such forms, nor be directly or indirectly compensated by reason of the sale thereof. He shall have the laws relating to public schools printed in pamphlet form, and annexed thereto, forms for making reports and conducting school business, and shall supply school officers, school libraries and state libraries with a copy each. Said printing to be paid for out of the printing fund on the warrant of the auditor, on bills approved by the superintendent of public instruction, and attested by secretary of state."

G. L. of Colo., 1877, Section 2455.

Under the above section, the expense of printing blank forms, books and schools laws, was paid by warrants drawn on the printing fund. An examination of the several Session Laws of Colorado, will show that it was the uniform practice of the legislature for many years to insert in each general appropriation bill a specific appropriation for the printing required by law.

In 1879 the above section was amended and now reads as follows:

"He shall have a general supervision of all the county superintendents and of the public schools of the state. He shall prepare, have printed and furnished to teachers and all officers charged with the administration of the laws relating to public schools such *blank forms, registers and books* as may be necessary to the discharge of their duties, but he shall not copyright such forms, nor be directly nor indirectly compensated by reason of the sale thereof. All *registers and blank books* so furnished for the use of teachers and school officers shall be charged to the respective counties at cost, and the county superintendent of schools shall receipt for and distribute the same among the districts of his county as they may require; and the amount so charged against each county shall be deducted from the amount apportioned to such county at the semi-annual apportionment of the state school fund; and the superintendent of public instruction shall certify to the state treasurer the aggregate amount of such deductions, and the treasurer shall thereupon transfer

said amount from the school fund, subject to apportionment, to the general fund.

The superintendent of public instruction shall have the laws relating to public schools printed in pamphlet form, and annexed thereto forms for making reports and conducting school business, and shall supply school officers, school libraries and state libraries with a copy each. Said printing to be paid for out of the printing fund on warrant of the auditor, on bills approved by the superintendent of public instruction and attested to by the secretary of state."

Session Laws of 1879, page 161.
2 Mills' Ann. Stats., Section 3973.

Under the above amendment of 1879, it is made the duty of the State Superintendent of Public Instruction to prepare and have printed *blank forms, registers and books*, and it is provided that "all *registers and blank forms* so furnished for the use of teachers and school officers shall be charged to the respective counties at cost." I must construe this amended section to mean that not only *registers and blank books*, but also *blank forms*, shall be charged to the respective counties at cost.

The second paragraph of said section provides that the State Superintendent of Public Instruction shall have the school laws printed in pamphlet form for distribution. After a careful consideration of this section, construing it in the light of the said amendment, it is my conclusion, *first*, that the expense of preparing and printing such blank forms, registers and books as may be necessary shall be paid for, in the first instance, by warrants drawn by the Auditor on the printing fund, but shall be ultimately charged to the respective counties at cost, and the amount so charged against each county shall be deducted from the amount apportioned to such county at the semi-annual apportionment of the state school fund. *Second*, the cost of preparing and printing the school laws shall be paid for by warrant drawn by the Auditor on the printing fund, but shall not be charged

to the respective counties, nor deducted from the amount apportioned to such county at the semi-annual apportionment of the state school fund. *Third*, the State Superintendent of Public Instruction shall certify to the State Treasurer the aggregate amount of such deductions on account of the expense of preparing and printing such blank forms, registers and books, and the State Treasurer shall thereupon transfer said amount from the school fund to the general fund.

The General Assembly has not, at either of the last two biennial sessions, made a separate appropriation, in the general appropriation bills, for the printing required by law, but has made, in the general appropriation bills, a separate appropriation for the incidental and contingent expenses of the several departments of government and the various bureaus and officers connected therewith and for the printing of said departments and bureaus. I conclude, therefore, that the printing required by the above section shall be paid for by warrant drawn against the last mentioned appropriation, which is commonly called the "General Contingent Fund," and which is under the control of the State Auditing Board.

It follows from the foregoing that the expense incurred by the State Superintendent of Public Instruction in preparing and printing blank forms, registers and books, while paid for in the first instance out of the printing fund or out of the general contingent fund, is ultimately borne by the school fund, and an amount equal to the face value of the warrants drawn in payment thereof is transferred from the school fund to the general fund, which is commonly called the general revenue fund. The statute makes no provision for the interest which must accrue on the warrants from the date on which they are drawn to the date on which they are called and paid, and this interest must, therefore, be borne by the general fund, out of which such interest is paid, without reimbursement from the school fund.

When the transfer is made from the school fund to the general fund, the same is credited to the general fund as a part of the receipts or income of the general fund for the particular fiscal year, and is not, and in my judgment cannot, be properly credited back to the printing fund or general contingent fund. However, under the statute, I cannot see any escape from the conclusion that the printing fund or general contingent fund is to be out the amount of this expense, which, with the exception of the interest on the warrants, is ultimately gained by the general fund.

The Enabling Act grants to the state of Colorado certain sections of land in each township, to be disposed of in the manner therein provided, the proceeds to constitute a permanent school fund, and the interest only to be expended *in the support of common schools.*

Sections 7 and 14, Enabling Act; 18 U. S. Stats. at Large, 474.

The Constitution of this state contains the following provisions:

"* * * The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and *held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made;* and the general assembly shall provide for the sale of said lands from time to time; and for the *faithful application of the proceeds thereof in accordance with the terms of said grants.*"

Section 10, Article IX.

"The public school fund of the state shall forever remain inviolate and intact; the *interest thereon only shall be expended in the maintenance of the schools of the state,* and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. *No part of this fund, principal or interest, shall ever be transferred to any*

*other fund, or used or appropriated except as herein provided. * * *"*

Section 3, Article IX.

In my judgment the expense incurred in preparing and printing such blank forms, registers and books as may be necessary to enable the teachers and officers charged with the administration of the laws relating to public schools, to properly discharge their duties, is an expense which may be properly paid out of a trust fund created for the support and maintenance of common schools. If, therefore, the expense is a proper charge against the public school fund, as I believe it is, and said warrants might, in the first instance, with proper legislative authority, be drawn directly against said school fund for the payment of such expense, I cannot see any legal objection to the present cumbersome method provided by the statute for meeting this expense, namely, that of paying the expense in the first instance out of the printing fund and afterwards reimbursing the state or general fund for the amount of this expense, less interest, out of the school fund.

The last above quoted section of the Constitution declares that no part of the public school fund shall be transferred to any other fund, or used or appropriated, except as therein provided. In my judgment the said statute authorizes a lawful use of the school fund, the same being for the support and maintenance of the common schools, and does not, therefore, amount to such a transfer as is forbidden by the Constitution. The transfer which is forbidden by the Constitution is such a transfer as will amount to a use or appropriation or diversion of the fund for some purpose other than the support and maintenance of the common schools. The transfer which is authorized by the statute is by way of an indirect payment of a lawful

expense properly chargeable to said fund, and is not a diversion of the fund to a purpose foreign to the trust.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. J. H. Fesler,
State Treasurer,
Capitol Building, City.

---

IN RE

## STATE BOARD OF INSPECTION COMMISSIONERS.

---

The State Board of Inspection Commissioners has no authority to appoint stock inspectors in excess of the number prescribed by the Statute. And neither such board nor the regularly appointed cattle inspectors can appoint deputies or assistants and clothe them with the necessary authority to carry out the provisions of the stock inspection law.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 18, 1899.

A. J. WALDRON,
Secretary of the State Board of Inspection Commissioners,
Denver, Colorado.

Dear Sir:—I am in receipt of your letter of May 13th, enclosing a resolution adopted by your board in regard to the employment of stock inspectors. In reply thereto I have the honor to submit the following:

The preamble of said resolution states that the requirements of the law passed by the Twelfth General Assembly, known as Senate Bill 114, will make it necessary to employ at certain seasons of the year a greater number of stock inspectors than the ten provided for by the statutes. The question raised by the resolution and by your letter, upon which you ask for an official opinion, is, whether or not the State Board of Inspection Commissioners has authority, under the law, to appoint a greater number of stock inspectors than ten, or whether it has authority to employ deputies or assistants for said inspectors, provided at all times it keeps within the limits of the fund provided for the payment of the salaries of said inspectors?

The act of 1879, upon this subject, provides as follows:

"It shall be the duty of said board to employ competent cattle inspectors, not to exceed six 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 shipping of cattle. * * *"

Session Laws of 1879, page 179, Section 21.

The act of 1881 amends the above provision in regard to the number of inspectors, and provides that the board shall employ inspectors not exceeding eight in number at any one time.

Session Laws of 1881, page 235, Section 20.

By the act of 1885 this provision was again amended as to the number of inspectors, and by that act it was provided that it should be the duty of said board to employ inspectors not exceeding ten in number at any one time.

Session Laws of 1885, page 337, Section 2.
2 M. A. S., Section 4233.

It is provided by section 4234, Mills' Annotated Statutes, that there shall be levied and assessed each year upon all the taxable property of the state, one-fifteenth of a mill on each dollar of valuation, to provide for the payment of the expense incurred in the inspection of stock.

Section 4233, above referred to, provides that the stock inspectors appointed by the board thereunder shall receive for their services not to exceed the sum of one hundred dollars per month during the time of their actual service. You state in your communication that the sum of twelve thousand dollars is the sum set apart for the payment of expenses of said inspection. I assume that these figures, being the same as those mentioned in the resolution of your board referred to, are arrived at by an estimate of the amount which may be expected to be produced by the one-fifteenth of one mill tax, provided for by the statute.

The law passed by the Twelfth General Assembly, referred to above as Senate Bill 114, makes it the duty of all owners of cattle and horses who propose to move such stock out of this state, to hold the same at some convenient place for inspection, and requires all persons having in charge any such stock destined to be moved out of the state, to make application either to the State Board or to a regularly authorized inspector, to have such stock inspected, naming in said notice a time and place where the stock may be found for that purpose. The law also provides that the inspector who is regularly applied to by such owner, or in case the application is made to the Board of Commissioners, the inspector who is by them designated for that particular work, shall make an inspection of the brands and marks of such stock, and provide the owners or carriers of such stock with a certificate signed by himself; and also provides that such inspector shall make a report of the result of such inspection, under oath, to the secretary of the State Board of Inspection Commissioners at least once in thirty days, and oftener if required by said secretary so to do.

The State Board of Inspection Commissioners is a board created by statute, and its powers and duties are defined and prescribed by statute. It seems to me quite clear that it has no authority to employ stock inspectors except such authority as may be found in the words of the statute. The statutory language in this case is clear and plain, to the effect that said board shall employ inspectors to the number of ten, but no more at any one time. I think that the appointment of eleven inspectors at any one time would be as clearly in excess of the authority of the board as the appointment of a hundred. The legislature has from time to time recognized the necessity of increasing the number of inspectors to be appointed by the board. This necessity has always been met by legislative action. It must be presumed that the legislature was satisfied that the number provided by the act of 1885, would be sufficient to carry out the provisions of the act passed at its recent session, otherwise it would have provided for an increase in the number, as it has done on former occasions. In any event the course of legislation upon this subject, and the language of the statute clearly indicate a legislative intent to limit the power of appointment to the number stated. The fact, if fact it be, that the law as it stands works a hardship or inconvenience upon stock owners or shippers, is an argument in favor of its amendment, but cannot affect its construction.

As to the matter of appointing deputies or assistants: the statute makes no provision for any such officer. Aside from the question whether or not the board would have the right to pay such an appointee out of the inspection fund, provided as above stated, I think it is quite clear that the duties of the inspector cannot be performed by a deputy. The inspector is required to make an inspection of the stock and to make and sign a certificate to the owners or carriers of said stock, and to make a report under oath to the secretary of the board of the result of such inspection. The law passed by the Twelfth General Assem-

bly, above referred to, provides penalties for the failure of owners and carriers of stock to comply with its provisions with reference to inspection and with reference to obtaining a certificate of the stock inspector thereon, and in my opinion a certificate made by a deputy or assistant would not comply with the requirements of that law.

It is my opinion, therefore, that the State Board of Inspection Commissioners is without authority to employ a greater number of stock inspectors than that mentioned in the statutes, namely, ten, and that neither said board nor said inspectors can appoint deputies or assistants and clothe them with the power necessary to carry out the provisions of the law upon this subject.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

---

IN RE

## PARIS EXPOSITION.

---

The Acts of 1895 and 1899 create two separate commissions to represent this State at the World's Fair to be held in the City of Paris in the year 1900, the first with general powers and the second with the authority to make a display of the mineral products of the State only.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 20, 1899.

Dear Sir—I am in receipt of your official communication, under date of May 16, 1899, in which you advise me, that under and by virtue of the provisions

of Senate Bill No. 294, passed at the tenth session of the General Assembly of the State of Colorado, (Session Laws of Colorado, 1895, page 255), his Excellency, Governor McIntire, appointed three commissioners to represent the State of Colorado at the World's Fair to be held in the city of Paris in the year 1900; that said commissioners made a report to the Eleventh General Assembly in the year 1897; that during the session of the Twelfth General Assembly, said commissioners reported to you that no appropriation would be required to effectuate the purposes of their appointment, which report was communicated by you to the said Twelfth General Assembly; that the Twelfth General Assembly of the State of Colorado passed an Act entitled:

"An Act to provide for the collection, management and display of the Mineral Products of the State of Colorado, at the Paris Exposition in 1900; Creating a Board of Paris Exposition Commissioners and making an appropriation therefor," Approved April 12, 1899,

which said Act is known as House Bill No. 266, and that under the provisions of said Act you have appointed the five commissioners therein provided for, who, together with the chief executive, constitute the "Board of Paris Exposition Commissioners of the State of Colorado."

I note your request, in the following language, for my official opinion:

"In order, however, to set at rest any question which may arise between the two said boards, I respectfully request an opinion from you.

1st. Whether, under the act of 1895, the commissioners then appointed are empowered to do anything more than report to the General Assembly of 1897 except it be to represent the state at the fair.

2d. Whether such representation, as provided in Section 1, in any manner conflicts or interferes with the duties or authority of the board created by the act of 1899? and

3d. Whether the act of 1895 is repealed in whole or in part by that of 1899?"

Section 1 of the Act of 1895, authorizes and directs the appointment of "three commissioners, who shall be citizens of the State of Colorado, to represent the State of Colorado at the World's Fair, to be held in the city of Paris, in the Republic of France, in the year of our Lord nineteen hundred."

Section 2 of said Act provides that:

"It shall be the duty of said commissioners to make such suggestions for the proper presentation of the interests of the State of Colorado, at said World's Fair, to the next General Assembly of the State of Colorado, as they may think will further the interests of the State of Colorado."

The said Act of 1895 contains no enumeration of powers and no other specification of the duties of the commissioners.

Section 4 of said Act provides that:

"Said commissioners shall receive no compensation, either for services rendered, or expenses incurred in the exercise of their duties, unless specially provided for by law."

Section 2 of said Act makes it the duty of said commissioners to make suggestions for the proper presentation of the interests of the State of Colorado at the said World's Fair, to the Eleventh General Assembly. This is the only duty which is specifically provided for by that statute. To my mind it was the evident intention of the legislature, at the time of the passage of said act, to subsequently enact further legislation upon this subject. Doubtless it was the intention to act upon the future suggestions of said commissioners, although the legislature seems not to have done so.

Answering your first inquiry, I am of the opinion that the duty of reporting to the Eleventh General Assembly is but an incident to their general powers and duties as commissioners, and that the duty of making said report is not the sole or only duty imposed upon them by said act nor the limit of their

power in that behalf, and that said commissioners, in addition to making a report to the Eleventh General Assembly, are authorized and empowered, under the said Act of 1895, to represent the State of Colorado at the World's Fair to be held in the city of Paris in the year nineteen hundred. The legislature having failed to enumerate or specify their powers and duties in that behalf, the particular manner in which they shall represent the state is left to their judgment and discretion, subject to the limitations imposed by the subsequent Act of 1899, hereinafter mentioned.

In answering your second and third inquiries, it will be necessary to carefully examine the several provisions of the Act of 1899, and to apply thereto certain well recognized principles of construction.

The said Act of 1899 is entitled:

"An Act to provide for the collection, management and display of the mineral products of the State of Colorado at the Paris Exposition of 1900; Creating a Board of Paris Exposition Commissioners and making an appropriation therefor."

Section 1 of said Act provides:

"That for the purpose of exhibiting the mineral resources of the State of Colorado at the Paris Exposition of 1900, a commission is hereby constituted, to be designated 'The Board of Paris Exposition Commissioners of the State of Colorado,' * * *."

Section 3 of said Act provides that:

"Each of the members of said board appointed by the Governor as aforesaid shall be thoroughly familiar with the mining industry of the State of Colorado in its several branches, with its mineral resources."

Section 4 of said Act gives the board authority to solicit and collect voluntary cash subscriptions and donations from counties, towns and mining districts, as well as from companies, corporations, associations

and individuals, "for the purpose of preparing and exhibiting at the Paris Exposition of 1900 a suitable display of the mineral products of the State of Colorado."

Section 6 of said Act is as follows:

"The said board shall have charge of the interests of the state and its citizens in the preparation and exhibition at the Paris Exposition of 1900 of the mineral products of the state collected and turned over to them by any of the organizations of this state under the provisions of this act, *and all other matters relating to the Paris Exposition of 1900.* It shall communicate with the officers of said exposition and obtain and disseminate throughout the state through the medium of the newspapers of the state and otherwise, all necessary and interesting information regarding said exposition, *and in general have and exercise full authority in relation to the participation of this state and its citizens in the Paris Exposition of 1900.*"

Sections 7 and 8 of said Act provide, among other things, that the secretary shall report to the Governor upon the mineral collections, displays, materials and data collected; that the board shall collect data regarding the mining industry, also maps and photographs of the various mining sections of the state, and "shall have authority to collect and arrange an exhibit of the mineral productions of the State of Colorado, which shall be placed on exhibition at the Paris Exposition of 1900, under the charge and control of the said board."

Section 11 of said act authorizes said board to call on the various state institutions for assistance in collecting minerals and for the loan of the mineral collections of said institutions.

Section 14 of said act provides that "all acts and parts of acts in conflict herewith are hereby repealed."

A careful examination of the said act of 1899, together with the original bill as printed by the House of Representatives, and the amended bill as printed by the same body, fails to disclose any reference to any subject other than a display of the mineral products of

this state, or any authority in said exposition commissioners to represent the state by any other than a mineral exhibit, except that contained in section 6, above set forth.

The following quotations from the authorities clearly and accurately state the rules of statutory construction to be applied to cases of this kind.

"Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the affect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance. Implied repeals are not favored. One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed. Such is the general doctrine, in which all of the cases concur."

Sutherland on Statutory Construction, Section 138.

"Repeals by implication are not favored and will not be decreed, unless it is manifest that the legislature so intended. As laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the subject, it is reasonable to conclude that in passing a statute it was not intended to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is not only irreconcilable, but also clear and convincing, and following necessarily from the language used, unless the later act fully embraces the subject matter of the earlier, or unless the reason for the earlier act is beyond peradventure removed."

23 Am. and Eng. Ency. of Law, 489-492.

"It is not enough to justify the inference of repeal that the later law is different; it must be contrary to the prior law. It is not sufficient that the subsequent statute covers some or even all the cases provided for by the former, for it may be merely affirmative, accumulative or auxiliary; there must be positive repugnancy; and even then the old law is repealed by

implication only to the extent of the repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

### Sutherland on Statutory Construction, Section 152.

"But repeal by implication is not favored. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

### Endlich on the Interpretation of Statutes, Section 210.

"As it is the function of the Legislature to express the national will by means of statutes, it is essential that the legislature should know what is the existing state of the law whenever any statute is passed, and it is always presumed that the Legislature possesses such knowledge. The language of every enactment must be so construed, as far as possible, as to be

consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it, but requires the courts 'to uphold the prior law, if the two acts may well subsist together.' "

Endlich on the Interpretation of Statutes, Section 182.

"In all matters of repeal resulting by implication, from an affirmative act except where the intent, appearing from a design to substitute the new law for the old, in toto, is clearly to the contrary, it must be remembered that the repeal extends only so far as the provisions of the statutes affecting each other are inconsistent; the old law being, in all other respects, left in full force and effect. Whatever portions of the old law may be incorporated with the new, as being consistent with the latter, must be deemed to remain in force."

Endlich on the Interpretation of Statutes, Section 205.

"If two statutes on the same subject are mutually repugnant and irreconcilable, the later act without any repealing clause operates, in the absence of expressed intent to the contrary, as a repeal of the earlier. But even in such case, the old law is repealed by implication *only pro tanto* to the extent of the repugnancy; and generally speaking, such parts of the prior act as may be incorporated into the subsequent statute consistently therewith, must be considered in force."

23 Am. and Eng. Ency. of Law, 479-482.

"Affirmative statutes which contain no reference to existing statutes, either to amend or repeal them, import that the lawmaker has no conscious purpose to affect them, unless by congruous addition. On the other hand, when there is inserted in a statute a provision declaring a repeal of all inconsistent acts and parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted before. There is a repeal to the extent of any repugnancy in either case, but no farther. The latter is sometimes classed with express repeals."

Sutherland on Statutory Construction, Section 147.

"Where an act is passed covering the whole of a particular subject or field of legislation, it is customary to insert a general clause repealing 'all acts or parts of acts inconsistent therewith.' Such a clause is effective in repealing inconsistent enactments. Only such acts on the same subject or parts of such acts clearly inconsistent and irreconcilable with the provisions of the repealing act are rendered invalid, and only to the extent of the conflicting provisions."

23 Am. and Eng. Ency. of Law, page 477.

"If two statutes can be read together without contradiction, or repugnancy, or absurdity or unreasonableness, they should be read together, and both will have effect."

Sutherland on Statutory Construction, Section 151.

"Repugnancy in principle merely, between two acts, forms no reason why both may not stand. Nor is one statute repealed by the repugnant spirit of another; nor for conflict with an unconstitutional provision."

Sutherland on Statutory Construction, Section 137.

The latter part of said section 6 gives to the said Board of Exposition Commissioners charge of all matters relating to the Paris Exposition of 1900, and declares that said board shall "in general have and exercise full authority in relation to the participation of this state and its citizens in the Paris Exposition of 1900."

At first blush ths might seem to have the effect of investing the said Board of Exposition Commissioners, created by the act of 1899, with full and exclusive authority in relation to the representation from the state of Colorado and its exhibit at the Paris Exposition. The purpose and object of said act of 1899 is to provide for a display of the mineral products of the state, and a reasonable construction of the above langnage in section 6 would result in holding that the general powers therein given are limited

by the scope of the said act of 1899, and that therefore the said Board of Exposition Commissioners are invested with exclusive powers in relation to the mineral exhibit only. I prefer, however, to rest my opinion upon safer grounds. The Constitution of this state provides that

> "No bill, * * * shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Section 21, Article V.

Our Supreme Court has held that

> "So much of any act as is not directly germane to the subject expressed in the title, is without force; that the provision * * *, is a mandatory declaration of an essential condition to the validity of legislative enactments."

Central and Georgetown Road Company vs. The People, 5 Colo., 39, 41.

If the latter part of the said section 6 is given a literal construction, and it is held that the language used gives to the said Board of Exposition Commissioners general powers, then it is evidently a subject not clearly expressed in the title of the act, and consequently void.

Holding, as I do, that so much of said section 6 as attempts to confer general powers upon said Board of Exposition Commissioners is void, that language cannot, therefore, be considered for the purpose of determining whether or not the act of 1899 is in conflict with the act of 1895, and would, therefore, result by reason of the conflict in repealing the former act, and cannot be considered for the purpose of invoking the repealing clause in section 14.

The general purpose and scope of the text of the act of 1899, with the exception of that part of section

6 above referred to, is fully in accordance with its title, but the implied effect of the said language in section 6 is not so embraced, neither is it clearly expressed in the title of the act of 1899, nor is it germane to the subject therein mentioned.

Miller vs. Edwards, 8 Colo., 528.

Mulnix vs. Life Insurance Co., 23 Colo., 71, 80.

"No repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force. Thus, where the constitution requires the subject of enactment to be indicated in its title, it was held that an act was not to be deemed repealed by a later repugnant one, whose subject-matter, however, on the point of such inconsistency, was germane to nothing in its title."

Endlich on the Interpretation of Statutes. Section 192, citing Miller vs. Edwards, 8 Colo., 528.

"It has been said that a repeal of all laws inconsistent with a statute does not affect laws inconsistent with such parts thereof as are themselves unconstitutional and void."

Endlich on the Interpretation of Statutes. Section 192. (Note.)

"A prior statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one."

23 Am. and Eng. Ency. of Law, page 476, citing Miller vs. Edwards, 8 Colo., 528.

When the unconstitutional portion of section 6 is eliminated, the two acts may, in my judgment, stand together. I therefore answer your second inquiry by saying that the representation as provided by section 1 of the act of 1895 in no manner conflicts with or interferes with the duties or the authority of the Board

of Exposition Commissioners created by the act of 1899. The Board of Exposition Commissioners created by the said act of 1899 has full and exclusive power and authority in the matter of the collection, management and display of the mineral products of the state, but has no authority to make any other display or to represent the state of Colorado in any other manner at the Paris Exposition.

Answering your third inquiry, it is my opinion that the act of 1895 is not repealed in whole, but is repealed in part, by the act of 1899, and the commission provided for by the act of 1895 is deprived, by the act of 1899, of all power or authority over the display of the mineral products of the state at the Paris Exposition.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Charles S. Thomas,
Governor,
Capitol Building, City.

IN RE

## THE STATE BOARD OF HEALTH.

---

The State Board of Health has no authority to send a special health officer into a County or Municipality and charge the expense of so doing to such county or municipality.

The State Board of Health, when acting in place of any county board as provided by Section 3456f, 3 M. A. S., may incur such expense, and such only, to be charged to the county, as might properly be incurred by said local board to be paid by the county.

Two members of the county board of health acting informally have no power to bind the county by a contract to pay the expense of a special health officer sent to such county by the State Board.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 23, 1899.

G. E. TYLER, M. D.,
Secretary Colorado State Board of Health,
Denver, Colorado:

Dear Sir—Your favor of the 15th instant is received, in which you ask for my opinion upon certain questions therein stated, as to the authority of the State Board of Health. In reply thereto I have the honor to submit the following:

I deem it proper to call your attention to the fact that it is not part of the duty of the Attorney General under the statute to render official opinions to the State Board of Health, and that consequently opinions so given can be considered only as legal advice.

I quote from your letter as follows:

"In case the local health officers, that is, the board of County Commissioners, do not take proper measures to suppress

an outbreak of small-pox, * * * has the State Board a right to send in a special health officer and collect the expenses from the county?"

The board of county commissioners of each county in our state, is by law constituted a board of health for that county, and the powers and duties of such board when acting as a board of health, are fixed and prescribed by Division 3, Chapter 101, page 930, 3 Mills' Annotated Statutes.

Section 3546f, Mills' Annotated Statutes, third volume, is as follows:

"In the event of the local board of health of any community being unable or unwilling to efficiently or promptly abate a nuisance, or to prevent the introduction or spread of any contagious or infectious disease the State Board of Health shall have full power to take such measures as will insure the abatement of the nuisance, or prevent the introduction or spread of disease. The State Board of Health may, for this purpose, assume all the powers conferred by law on the local board of health; or the state board of health may, at its discretion, bring suit against or prosecute any local board of health for a wilful failure to enforce the laws of this state in regard to health, and the expense of carrying out such orders shall be borne by the local board of health so failing to enforce the law."

By the provisions of the above section, it will be seen that in a case of failure on the part of the local board of health to take sufficient measures to prevent the introduction or spread of smallpox, the State Board of Health has authority to take charge of the matter and to do what is necessary to be done in the premises, and is, for that purpose, clothed with the authority given by law to the local board of health.

By reference to said division 3 of chapter 101, above mentioned, it will be seen that the local board of health is authorized to take such measures and adopt such regulations as shall to them seem necessary for the purpose of preventing the introduction or spread of contagious diseases endangering the public health, and to incur certain expenses to be paid

by the county, in the execution of the health laws and in carrying out and enforcing its own orders and regulations.

It seems quite clear, therefore, that when conditions arise which, under the provisions of section 3546f, above quoted, authorize the State Board of Health to take the matter in hand and act as the county board is authorized to act, the State Board may incur such expenses to be charged to the county, and such only, as the county board, if properly acting, might have incurred and properly have had charged to the county. In this connection it should be noted that the board of county commissioners when acting as a board of health, has no powers except those conferred by statute upon such board of health, unmodified and unchanged by the fact that such board is at the same time a board of county commissioners.

It will further be seen, by reference to section 3546f, above copied, that the State Board has authority to bring suit against or prosecute any local board of health for wilful failure to enforce the laws of this state in regard to health, and that, in that case, the local board of health may be required to bear the expenses of carrying out the orders of the State Board in the premises. I do not think this section can be construed to authorize a charge against the county, but must be regarded as providing a penalty for failure of the members of the local board to do their duty.

Section 3546e, Mills' Annotated Statutes, third volume, provides that the State Board of Health may call upon the local board to designate a person to act as health officer in the jurisdiction of said local board, which officer shall then act under the advice of the State Board. As I understand this provision, it makes the local health officer named by the local board, upon the request of the State Board, the agent of the State Board for the particular locality within the jurisdiction of said local board. Under all the circumstances, I do not think the law authorizes the State Board to

send a special health officer into a county and to charge the expense of so doing upon the county. It is a general rule that counties are not liable in any case unless made so by statutory provision. The law does not provide for a special health officer, but it does provide for the appointment of a regular health officer in each county or municipality, who shall act as the agent and executive officer of the State Board in that particular county or municipality. The only authority given by the statute to the State Board of Health to incur expense to be paid by the county or municipality, is that contained in the section above referred to, which clothes the State Board, under certain circumstances therein named, with the same authority in the suppression of disease and the care of the public health, as is given to local boards of health, and such authority must be exercised in the manner prescribed by the statutes granting it in order to make the county liable.

You further state that a verbal agreement was made between your board and two county commissioners of a certain county, by which the State Board was to send a special health officer into said county and by which the expense thus incurred was to be paid by the county, and ask to be informed how to proceed in order to collect said expense from the county.

It may be questioned whether or not the county board of health has any authority in any case, to bind the county by such a contract. I think it is quite clear, however, that no such authority rests in the members of the board acting informally. While this arrangement may have been such as would bind the two county commissioners personally, I do not think the county could thus be made liable.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## SPECIAL MEETING OF ELECTORS OF SCHOOL DISTRICT.

---

NOTICE: A notice of a special school district meeting which is signed and posted by the District Treasurer instead of by the Secretary, is not for that reason invalid, though the practice is to be condemned.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 25, 1899.

HON. HELEN L. GRENFELL,
State Superintendent,
Denver, Colorado.

Dear Madam—I am in receipt of your favor of the 22d instant, in which you ask for my official opinion as to the legality of a special meeting of the electors of a third-class school district, which meeting was called in the manner stated in your letter, as follows:

"At a regularly called meeting of the school board all members were present and a motion to call a special meeting was carried by a vote of two to one. The secretary of the district refused to post the notices for the special meeting, which were then posted by the treasurer over his own signature. Will the meeting be illegal because the notices were not signed by the secretary?"

In reply thereto I have the honor to submit the following:

The duties imposed by statute upon the school district secretary are in part as follows: "The secretary of each school board shall cause written or printed notice to be posted specifying the day and

place or places of such (regular) election." "The general provisions of section 44 * * * shall be applicable to all school elections, whether general or special or for whatever purpose held." "He shall give the required notice of all regular and special meetings as herein authorized."

Section 44, School Act (Section 4008, 3 M. A. S.).

Section 46, School Act (Section 4010, 3 M. A. S.).

Section 56, School Act (Section 4020, 2 M. A. S.).

Section 62 of the School Act (Section 4026, 2 M. A. S.), provides as follows:

"In any district of the third class, the board of directors may at any time call a special meeting of the electors of such district, for any of the purposes specified in section sixty-two (sixty-three) of this act, and it shall be their duty to call such meeting if petitioned so to do by ten (10) legal voters of the district. Notices, specifying the time, place and object of such meeting shall be posted in three (3) public places, one of which shall be at the place of meeting, at least twenty (20) days prior to the time of holding such meeting."

Clearly it is by law made the duty of the secretary of third class districts to give the notice required by section 62 above. The question to be determined is, whether or not such meeting can be legally assembled with authority to transact business where the secretary refuses to perform his official duty in the matter of giving notice. The question is one which, so far as I have found, has never been raised or determined. An explanation of this lack of precedent in the matter may be found in the provisions of our school act. Under these provisions, a district secretary failing to perform his official duty is liable therefor upon his official bond, under the provisions of section 54 of the school act. (Section 4019, 2 M. A.

S.) Under the provisions of section 59 of the school act (Section 4023, 2 M. A. S.), his neglect or refusal to perform his official duty works a forfeiture of his right to compensation, and such failure or neglect, after being directed to act by a majority of the school board, subjects him to criminal prosecution.

Under the facts stated in your letter, it is apparent that the school board acted regularly under the provisions of section 62 above quoted, in the matter of calling the election, and the only question is as to the sufficiency of the notice.

A special school meeting convened without notice or upon a notice which fails to comply substantially with the statutory requirements, is invalid. For the purposes of this opinion, it is assumed that the notice in question is unobjectionable as to form and contents, as well as in the matter of the time and place of posting. The only question is, whether or not the fact that it was signed by the treasurer of the school district, and not by the secretary, makes it invalid. It is quite clear from section 62 of the school act, above set out, when construed with other portions of said act, that the validity of special elections and the business transacted thereat is made to depend upon the question whether or not the electors of the district have been properly notified and given an opportunity to be present and participate in such meeting. It will be noted that the statute, section 62 above, does not directly provide that the notice shall be signed by the secretary, but the direction that he shall "give" such notice unquestionably contemplates his signature attached thereto. In my opinion, however, the notice should not be held to be invalid for the irregularity alone which you have stated; certainly not where it appears that no injustice was done by such irregularity

The method adopted of giving the notice in question is, of course, to be condemned. It would seem that a vigorous enforcement of the laws above referred

to relating to delinquent officers would have a decided tendency to prevent this question from arising in future.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

---

IN RE

## MUTUAL FIRE INSURANCE COMPANIES.

---

A domestic Mutual Fire Insurance Association is subject to the supervision of the Insurance Department after discontinuing business until the affairs of the association have been settled up and its policies then in force shall have expired.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 29, 1899.

Dear Sir—I beg to acknowledge the receipt of your official communication, under date of May 23, 1899, which is in part as follows:

"A mutual fire insurance company incorporated pursuant to the laws of Colorado and regularly admitted to do business in the state by the Insurance Department thereof and in the possession of a certificate of authority to that effect covering the year 1899, advises the department, through its Vice President, that it has decided to transact no more business; makes formal application for withdrawal and returns the certificate of authority heretofore issued.

"I beg to request an answer to the following question: Are the responsibilities of the Insurance Department with respect to such a company and the public concluded by the action indi-

cated above and does such a company, having taken the action indicated, stand to this department as if it had never been admitted to do business?"

The statutes of this state establishing an insurance department for the state of Colorado, and regulating insurance companies doing business therein, are defective and incomplete, and afford the Commissioner of Insurance but slight guidance and direction in the discharge of his duties. The insurance department is charged with the execution of all laws in relation to insurance companies doing business in the state of Colorado.

Our Supreme Court has said that,

"The purpose of the legislature in providing for the organization and maintenance of a State Insurance Department was to protect the interests of the large number of persons within the State who patronize corporations engaged in the business of insurance. Both joint-stock companies and mutual associations are recognized. * * *"

Spruance vs. Farmers' and Merchants' Insurance Co., 9 Colo., 73, 76.

The Supreme Court, in the same case, in speaking of mutual fire insurance associations, made use of the following language:

"They are subject to all provisions of the act that may be found 'applicable.' They must make annual reports to the superintendent of insurance, showing their assets, liabilities, moneys received and expended, character of business, etc. The superintendent of insurance has almost unlimited power in the investigation of their affairs and management."

Spruance vs. Farmers' and Merchants' Insurance Co., 9 Colo., 73, 79.

While the statutes are silent as to the powers of the Insurance Department over domestic mutual fire insurance associations that have discontinued business in this state, I am of the opinion that the declara-

tion by an association of its intention to cease doing business in the state does not relieve the Insurance Department of all responsibility in the premises, but that the authority of the department over such association continues to the same extent as theretofore existing, until such time as the affairs of such association shall have been settled up and its policies then in force shall have expired or been cancelled.

By surrendering its certificate of authority to do business the association deprives itself of the right to solicit or write any new business in this state, but I do not believe that such action on the part of the association relieves your department of all responsibility or deprives you of all supervision over the association. In my opinion, it is your duty to exercise the same supervision over the association which you have heretofore exercised under the statutes until such time as its affairs shall be completely settled up, its outstanding policies shall have expired or have been cancelled, and it shall cease to do any further business with its policy holders.

Very respectfully yours,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. H. H. Eddy,
Deputy Superintendent of Insurance,
Capitol Building, City.

IN RE

## RELIEF BILLS.

Payable in the order of the taking effect of the several acts.

State of Colorado,
Attorney General's Office.
Denver, Colorado, June 9, 1899.

Dear Sir:—During our conversation of yesterday and today I was placed, by you, in possession of the following facts:

The Twelfth General Assembly of the state of Colorado passed fourteen separate acts, all of the same general character, each making an appropriation for a particular purpose therein specified, and all of which have been classified by you for convenience as "Relief Bills." Ten of said acts contain emergency clauses, and they therefore took effect immediately upon the executive approval thereof. The same were approved between the 13th day of April, A. D. 1899, at 9:45 o'clock a. m. of said day, and the 29th day of April, A. D. 1899, at the hour of 11:55 o'clock a. m. of said last mentioned day. The remaining four acts were approved between the 13th and the 20th days of April, A. D. 1899, and, being without emergency clauses, do not take effect for a period of ninety days from and after the dates upon which they were respectively approved.

The aggregate amount of the appropriations contained in said fourteen acts exceed the sum of twelve thousand dollars, and there is now a surplus in the state treasury, of the revenues of the fiscal year 1895, of less than two thousand dollars; the said surplus, for the said fiscal year 1895, being all of the surplus

revenues of any fiscal year now in the state treasury which is applicable to the payment of the said "Relief Bills."

One of the said ten relief bills is for services rendered to the legislative department in the year 1899, and is specifically made payable out of the revenues of the fiscal year 1899. Another one of said ten relief bills is specifically made payable out of the surplus revenues of the fiscal year 1895, and the remaining eight of said relief bills are all made payable out of any moneys in the state treasury of the revenues of *any* fiscal year, not otherwise appropriated.

In response to your request for my official opinion as to the order in which the said "Relief Bills" shall be paid, I beg to advise you that the surplus revenues of any fiscal year remaining in the state treasury, after the payment of all of the expenses of that year and all of the appropriations made by the legislature for that year, may be appropriated by the legislature for any lawful purpose or ordered by law to be transferred to the credit of any other fiscal year.

In re House Resolution, 15 Colo., 602.

In the payment of said "Relief Bills," assuming that the same are for valid claims against the state, it is your duty to draw your warrants in payment thereof, for the full amount appropriated by each act, in the order in which the same took effect, to the extent of any revenues in the state treasury available for that purpose. The mere fact that one of said ten acts passed with an emergency clause and is specifically made payable out of the surplus revenues of the year 1895, does not give to that act a preference over other acts making appropriations out of any moneys in the state treasury of the revenues of any fiscal year, not otherwise appropriated, but said act must be paid, if at all, in the order of its taking effect.

It will not be necessary, at this time, to determine the order of the payment of the said four acts

which were not passed with emergency clauses, for the reason that there is not now sufficient surplus revenues with which to pay the appropriations made by said ten acts which have already taken effect.

Very truly yours,

DAVID M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. George W. Temple,
Auditor of State,
Capitol Building, City.

---

IN RE

## THE COLORADO INSANE ASYLUM.

---

The office of superintendent of the Colorado Insane Asylum, as created by the Act of 1879, is abolished by the Act of 1899, (Session Laws of 1899, page 257), and the Board of Lunacy Commissioners are authorized by law to appoint a superintendent who shall hold his office during their pleasure.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, June 15, 1899.

Dear Sir—I have the honor to submit the following reply to your official communication of recent date, requesting my opinion as to the proper construction to be placed upon certain provisions of Senate Bill No. 123, entitled:

"An Act to amend an act entitled 'An Act to Establish the Colorado Insane Asylum, and providing for its Location.' Ap-

proved February 8, 1879, and repealing certain acts in conflict herewith," Approved April 18, 1899.

Section 1 of "An Act to Establish the Colorado Insane Asylum, and providing for its Location," Approved February 8, 1879, provides for the establishment of the Colorado Insane Asylum.

2 M. A. S., Section 2969.

Section 2 of said act of 1879, provides that:

"The management of said asylum shall be by a superintendent and a board of three commissioners, who shall together have full control thereof, as hereinafter provided. The superintendent and board of commissioners shall be appointed by the governor, and no more than one of said commissioners shall be appointed from the same judicial district, and the superintendent shall hold his position for a term of six years; and the commissioners first appointed shall hold, one for six years, one for four years, and one for two years, and afterward each commissioner shall be appointed for the term of six years; so that one commissioner shall be appointed and hold for the full term of six years. The superintendent shall give a bond to the state, in the sum of three thousand dollars, conditioned that he will honestly and faithfully discharge all of his legal duties according to law. The superintendent shall be a regularly graduated physician, and he shall reside at the asylum. He shall receive a salary of two thousand dollars per annum, payable quarterly. The commissioners shall receive a salary of six hundred dollars per annum, payable quarterly; and they shall hold regular meetings at the asylum each quarter, for the transaction of the business of the asylum. The superintendent and board of commissioners shall prescribe and publish such rules for the management of the affairs of the asylum and its inmates as experience and observation shall prove beneficial. They shall have power to employ all subordinates necessary to do the business of the asylum. The superintendent shall receive and discharge all persons placed in charge of the asylum under the provisions of this act. The board of commissioners shall not be required to act as such until the asylum is open for the reception of inmates, excepting as hereinafter specified. The superintendent shall be superintendent of construction of the asylum building, and shall have care of the

grounds and everything belonging to the asylum, and he shall enter upon his duties as soon as he is appointed."

## 2 M. A. S., Section 2970.

I am officially advised by your communication, that "the term of office of the present superintendent does not expire until 1903, while those of the present board expire in 1901, 1903, and 1905, respectively."

Section 1 of said act of 1899 (Senate Bill No. 123), vests the management of the asylum in a State Board of Lunacy Commissioners, to be composed of three members, who shall be appointed by the Governor and confirmed by the Senate.

Section 2 of said act of 1899, provides that:

"The Board of Lunacy Commissioners shall have full control and supervision of all the property and over the grounds and buildings of the institution, and shall have the entire government and management of the same. They shall prescribe and publish all rules and by-laws for the management of the affairs of the asylum and its inmates, and for the government of its officers and employes. * * *"

Section 4 of said act of 1899, provides that:

"The commissioners shall appoint a superintendent who shall hold his office during their pleasure, and who shall be a physician, a graduate of an incorporated medical college, of at least ten years' experience in the actual practice of his profession and with at least five years' actual experience in a hospital for the treatment of the insane. The superintendent shall reside at the asylum and shall give his entire time and attention to the discharge of his official duties and shall receive such compensation as shall be fixed by the commissioners, not to exceed the sum of three thousand dollars ($3,000) per annum and maintenance. He shall give a bond in the sum of five thousand dollars ($5,000), conditioned for the honest and faithful discharge and performance of his duties, said bond to be approved by the commissioners. * * * Provided, that nothing in this act shall be construed as affecting the tenure of office of the present superintendent for causes originating prior to the passage of this act."

Section 8 of said act of 1899, provides that:

"Section two (2) of an act entitled 'An act to establish the Colorado Insane Asylum and providing for its location,' Approved February 8, 1879, and all acts and parts of acts in conflict herewith are hereby repealed."

The said act of 1899 does not contain an emergency clause, and does not, therefore, take effect until ninety days after the date of the executive approval thereof.

In my judgment, the gist of your inquiry is contained in the closing paragraph of your official communication, which presents the following question:

"Whether the proviso to Section 4 can interfere with the performance by the commissioners of their duty to immediately appoint a superintendent to hold office during their pleasure, as soon as the act takes effect?"

It may not be inappropriate, in this connection, to say that the present management of the Colorado Insane Asylum was the object of an official investigation made by the State Board of Charities and Corrections in the fall of 1898. The management of said institution was also the object of an investigation by a legislative committee appointed by the Twelfth General Assembly during its session in the early part of the present year.

The records of the Senate of the Twelfth General Assembly show that said proviso was attached to said section 4, during the final passage of said Senate Bill No. 123, through the Senate.

Section 8 of said act of 1899, contains a direct, positive, express and absolute repeal of section 2 of said act of 1879, which provides for the appointment of a superintendent and a board of three commissioners. This repeal, therefore, operates to extinguish the present board of commissioners and to abolish the present office of superintendent, under the said act of 1879.

The meaning of the phrase "Tenure of Office," may be determined from the following authorities:

"Tenure, in its general sense, is a mode of holding or keeping. Thus, we speak of the tenure of an office, meaning the manner in which it is held, especially with regard to time."

Black's Law Dictionary, page 1161, title "Tenure."

"The manner of holding or exercising the duties of an office; also the duration or term of office."

Anderson's Dictionary of Law, page 1021, title "Tenure of Office."

"Tenure of office—The word tenure, in this connection, includes the duration or term of office, as well as the manner of holding."

25 Am. and Eng. Ency. of Law, page 948.

"The word tenure in this connection means nothing more than the right to, or the manner of holding the place."

Ex Parte Herrick, 78 Ky., 23, 32.

A statute authorizing the appointment of commissioners of deeds declared that they should hold their offices by the same tenure as justices of the peace; who, under the Constitution, held their offices for four years. In construing this statute, the court made use of the following language:

"It was contended by the counsel for the defendant that the term *tenure* designated only the manner of holding the office; that holding by the same tenure as justices of the peace meant that the commissioners should hold their office in the same manner, and be displaced for the same reasons. I apprehend this is too restricted a definition of the term, and that it was intended to include the duration of the term of office, in addition to the manner of holding, and so the word is understood in the constitution."

People vs. Waite, 9 Wend. (N. Y.), 58.

The only question of construction which arises, in this connection, is the effect of the proviso to section 4 of said act of 1899, upon the tenure of office of the present superintendent.

Where the proviso of an act is directly repugnant to the purview of it, the proviso should stand and be deemed a repeal of the purview.

Farmers' Bank vs. Hale, 59 N. Y., 53.

Sutherland on Statutory Construction, Sections 160 and 221.

1 Kent's Commentaries, 463 (14th Ed.).

"There is a distinction between the effect of a repugnant saving clause and a repugnant proviso. Whether any sound reason exists for the distinction or not, it seems to be recognized as a settled rule. A saving clause is only an exception of a special thing out of the general things mentioned in the statute, and if repugnant to the purview is void. (Potter's Dwarris, 117.) The office of a proviso is more extensive. It is used to qualify or restrain the general provisions of an act, or to exclude any possible ground of interpretation as extending to cases not intended by the legislature to be brought within its purview. (Id., 118, note and cases cited; 1 Kent Com., 463, note a.) And if repugnant to the purview it is not void, but stands as the last expression of the legislature. (Id.; 23 Maine, 360.)"

Farmers' Bank vs. Hale, 59 N. Y., 53, 59.

"A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. * * * But there is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. It was held by all the Barons of the Exchequer, in the case of *The Attorney-General v. The Governor, and Company of Chelsea Water Works* (Fitzg. 195) that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it. But it may be remarked upon this case of *Fitzgibbon*,

that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected."

1 Kent's Commentaries, 463 (14th Ed.).

"A saving clause in a statute, in the form of a proviso, restricting in certain cases the operation of the general language of the enacting clause, is not void because such proviso may be repugnant to the enacting clause of the same statute."

Savings Institution vs. Makin, 23 Maine, 360 (Syllabus).

I do not deem it necessary, in this opinion, to determine whether or not the proviso to section 4 of said act of 1899, is in fact a proviso or a saving clause in the form of a proviso, for the following reasons, among others: First, if it is a saving clause in the form of a proviso, it does not render the act so inconsistent as to be destructive of itself, and it is not, therefore, so directly repugnant to the purview of the act as to be absolutely and wholly void; and, second,

"The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy."

1 Kent's Commentaries, 463 (14th Ed.), note b, citing:

Savings Institution vs. Makin, 23 Maine, 360.

Sutherland on Statutory Construction, Section 221.

Endlich on the Interpretation of Statutes, Section 185.

The proviso to section 4 is in the following language:

"Provided, that nothing in this act shall be construed as affecting the tenure of office of the present superintendent *for causes originating prior to the passage of this act.*"

Had the legislature omitted the words, "For causes originating prior to the passage of this act," then it might have been said, with good reason, that the proviso being directly repugnant to the purview of the act, must stand and be deemed a repeal *pro tanto* of the purview of the act, and it would have been equivalent to a declaration by the legislature that nothing in the act shall be construed as affecting the present superintendent, either as to the duration or term of his office, or the manner of holding his office.

The words, "For causes originating prior to the passage of this act," are words of common use and are to be taken in their natural, plain, obvious and ordinary signification and import.

1 Kent's Commentaries, 462 (14th Ed.).

When these words are given their natural meaning, the said proviso in no way conflicts with section 8 of said act of 1899, which, by repealing the statute creating the office of superintendent of the Colorado Insane Asylum, has the effect of abolishing the office.

In my opinion, the office of superintendent of the Colorado Insane Asylum, as provided for by the said act of 1879, is abolished by the said act of 1899, and the proviso to section 4 of said act of 1899 does not have the effect of preventing the Board of Lunacy Commissioners from, at any time, appointing a su-

perintendent who shall hold his office during their pleasure.

Sutherland on Statutory Construction, sections 222, 223 and 225.

Endlich on the Interpretation of Statutes, section 186.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Charles S. Thomas,
Governor,
Capitol Building, City.

---

IN RE

## INDEBTEDNESS OF STATE INSTITUTIONS.

---

The Governor can not, in case of emergency, authorize the officers of any state institution to contract an indebtedness on behalf of the institution, where such indebtedness would be in excess of the revenues of the state for that fiscal year.

The legislature being inhibited, by the Constitution, from making appropriations or authorizing expenditures in excess of the revenues, can not, by statute, lawfully empower the Governor to authorize expenditures by state institutions, in excess of the revenues of the state for any fiscal year.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, July 5, 1899.

Dear Sir—I have the honor to acknowledge the receipt of your official communication, under date of June 27, 1899, which is in part as follows:

"A number of the state institutions, particularly the Insane Asylum and the University are in sore straits in consequence of the lack of funds with which to continue in operation. Each has been the recipient of appropriations by the last Assembly, but the prospect for revenue with which to meet them is remote.

"I am requested by the representatives of these institutions to exercise the power conferred upon me by Section 4112, Mills' Annotated Statutes, and authorize the contraction of such indebtedness as may be absolutely necessary for the maintenance and support of these institutions until such time as the General Assembly shall meet."

I note the specific request contained in your communication for my official opinion, advising you as to your powers and duties in the premises, and in response thereto I beg to submit the following reply:

The statutes of this state provide as follows:

"The various officers designated by law to control and direct the fiscal affairs of the several state institutions, shall not, within any year, contract any indebtedness in excess of the amount named in any appropriation made for the support of any state institution during that time; *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. The officers of any state institution supported by the levy of any special tax, shall contract no indebtedness in any year in excess of 80 *per centum* of the gross amount of the levy made for that year, from which to support that institution."

Session Laws of 1887, page 411, section 1.
2 M. A. S., Section 4112.

"That it shall be unlawful for any officer of any state institution of this state to incur or contract any indebtedness for, on behalf of, or in the name of such state institution, or in the name of the state, in excess of the sum appropriated by the general assembly for the use or support of such institution for the fiscal year. Nor shall any officer of any state institution draw any money from the state treasury unless the same shall be abso-

lutely needed and required by such institution at the time, and then only upon the warrant of the state auditor."

Session Laws of 1889, page 380, section 1.
2 M. A. S., section 4114.

"Any person offending against the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding three hundred dollars, in the discretion of the court."

Session Laws of 1889, page 380, section 2.
2 M. A. S., section 4115.

The statutes of this state also provide that, for the support and maintenance of certain state institutions, there shall be levied and assessed upon all the taxable property within the state in each year, certain fractional mill levies, as follows:

For the "University of Colorado," one-fifth of one mill.

2 M. A. S., section 4602.

For the "Colorado School for the Deaf and Blind," formerly called the "Institute for the Education of the Mute and Blind," one-fifth of one mill.

2 M. A. S., section 3256.

For the "State Agricultural College," one-fifth of one mill.

1 M. A. S., section 36.

For the "State School of Mines," one-fifth of one mill.

2 M. A. S., section 4080.

For the "Colorado Insane Asylum," one-fifth of one mill.

2 M. A. S., section 2974.

For the "State Normal School," one-sixth of one mill.

3 M. A. S., section 4134b.

It must be borne in mind that the funds arising from the said fractional mill levies are not sufficient for the proper support and maintenance of said state institutions, and the General Assembly, from time to time, usually at each biennial session, makes separate specific appropriations from the general revenues of the state, for the support and maintenance of said state institutions, which said specific appropriations are in addition to the said mill levies. The above named institutions, therefore, have for their support and maintenance, not only the said mill levies, but separate specific appropriations, in such amounts as to the members of the General Assembly may, from time to time, seem necessary and proper.

Mill levies are nothing more or less than continuing appropriations, which are subject to repeal or modification by any General Assembly. Their advantages are that they relieve the General Assembly from the necessity of making and renewing particular appropriations at each biennial session, and they afford the several state institutions a more or less stated, fixed and definite income. Their disadvantages, in complicating and disarranging the financial affairs of the state, are well understood by the executive officers of the state, and the Supreme Court of this state has said that their abolition would greatly simplify the administration of the financial affairs of the state.

People vs. Board of Equalization, 20 Colo., 220, 233.

The first part of said section 4112 forbids the officers in charge of the fiscal affairs of any state institution from contracting any indebtedness, on behalf of the institution, in excess of the appropriation made for that institution for each particular year. This wise provision was enacted for the purpose of pre-

venting the officers of the state institutions from plunging them into debt, or from exceeding their appropriation or income for any particular year. Said sections 4114 and 4115, which were adopted two years later, make the same matters, which were forbidden by said section 4112, unlawful and punishable as a misdemeanor.

The proviso of said section 4112 permits the Governor, in cases of emergency, to authorize any state institution to contract such indebtedness as in his judgment shall be absolutely necessary for the maintenance and support of the institution until such time as the legislature shall meet.

Report of Attorney General Carr, 1897-1898, page 68.

The Chief Executive must determine for himself, in the first instance, what constitutes an emergency in any particular case. The conclusion at which I have arrived in this opinion renders it unnecessary for me to attempt to give a definition of the word "emergency," or to answer either of the four following questions which may arise under said statute:

Is it a case of emergency and can the Governor authorize a state institution to contract indebtedness:

(1) Where an appropriation for the support of a particular institution has been made and exceeded before the end of the fiscal year? (2) Where, by reason of a deficiency in the state revenues, only a part of the appropriation for a particular state institution will be available for its use? (3) Where, by reason of a deficiency in the state revenues, no part of the appropriation for a particular state institution will be available for its use? And (4) Where the General Assembly has adjourned without making an appropriation for a particular state institution, and the failure to make an appropriation manifestly arose either through a mistake or inadvertence, or, in consequence of the rush of business invariably attendant upon the closing days of the session of the legislature,

and not through a legislative intent to leave the said state institution without any provision for its support and maintenance?

The last part of said section 4112 forbids the officers of any state institution supported by the levy of a special tax, i. e., a mill levy, from contracting any indebtedness in any one year in excess of 80 *per centum* of the gross amount of the levy for that particular year. The uncertainty as to the aggregate valuation which will be fixed by the several assessing officers upon all property in this state, for the purpose of taxation, coupled with the uncertainty as to the amount of the particular tax which shall ultimately be found to be uncollectable, rendered necessary the adoption of the above provision for the purpose of preventing the officers of the various state institutions from over-estimating the proceeds of their mill levies, and from exceeding the income to be derived therefrom.

During the fiscal years 1895 and 1896 the Colorado Insane Asylum had a deficit of $32,818.52, and during the same period the State Reformatory had a deficit of $8,605.10. I am not advised as to the facts with reference to said deficits, but I must presume that the same arose in cases of emergency, and that the contraction of the indebtedness was authorized by executive order.

The Eleventh General Assembly made separate appropriations out of the surplus revenues of the fiscal years 1895 and 1896 for the payment of the same.

Session Laws of 1897, page 82, Section 2.

Session Laws of 1897, page 86, Section 1.

It appears from the report of the Auditor of State that $13,337.75 of the above appropriation for the Insane Asylum still remains unpaid.

Biennial Report Auditor of State, 1897-1898, page 29.

Report of Attorney General Carr, 1897-1898, page 104.

During the fiscal year 1898 His Excellency, Governor Adams, notified my immediate predecessor in office that there would be a deficit for that year in the appropriations for the support and maintenance of the State Penitentiary and the State Reformatory, and requested an official opinion as to his duties in the premises. In response thereto he was officially advised that he was empowered by said section 4112 to enter an executive order declaring that an emergency exists and authorizing the contraction of such indebtedness by said institutions as, in his judgment, was absolutely necessary for their maintenance and support until such time as the General Assembly should meet. He was further advised that it would be proper, after the issuance of the executive order, for the officers of said institutions to issue vouchers for such indebtedness, to be approved in the ordinary way, and also to be approved or countersigned by the Chief Executive.

Report of Attorney General Carr, 1897-1898, page 68.

State Auditor Lowell reported to the Twelfth General Assembly that deficits should be provided for by that body, as follows:

| | |
|---|---|
| Penitentiary | $26,134.12 |
| Reformatory | 21,961.96 |
| Insane Asylum | 18,726.44 |
| Boys Industrial School | 4,795.08 |
| Total | $71,617.60 |

Biennial Report Auditor of State, 1897-1898, page 6.

The Twelfth General Assembly passed the following appropriations for the payment of the deficits of said institutions:

| | |
|---|---|
| S. B. No. 74, for the Penitentiary, payable "out of any monies in the State Treasury not otherwise appropriated" | $25,704.02 |
| S. B. No. 104, for the Reformatory, payable "out of the surplus revenues of 1897 and 1898, but if there is not sufficient money in said surplus revenue fund for the years 1897 and 1898" then the balance to be paid "from any other monies in the treasury not otherwise appropriated" | 22,631.08 |
| S. B. No. 143, for the Colorado Insane Asylum, payable "out of any monies in the State Treasury not otherwise appropriated" | 18,636.44 |
| H. B. No. 73, for the State Industrial School, payable "out of any monies in the State Treasury belonging to the revenues of 1897 and 1898, not otherwise appropriated" | 4,795.08 |
| Total | $71,766.62 |

There is a slight discrepancy, which I am at present unable to explain, between the above figures of the Auditor of State and the above amounts appropriated by the Twelfth General Assembly.

I have been credibly informed that the said deficits for the said four state institutions were each authorized by executive order, and I must assume that the executive orders therefor were issued in conformity to the above-cited opinion of my predecessor.

There is no provision of law by which vouchers issued as evidence of indebtedness contracted by state institutions for the purpose of covering deficits may draw interest, and the holders thereof, who are commonly employes of the various state institutions, and merchants who have furnished supplies and provisions for the maintenance and support of said institutions, must hold their vouchers without interest until such

time as they may be paid by state warrants, regularly drawn by the Auditor of State, against appropriations which may thereafter be made for their payment by some future General Assembly.

The present Auditor of State has recently informed me that, in his judgment, there will be no surplus revenues for the years 1897 and 1898, after the payment of all of the appropriations for those years. It follows, therefore, if the Auditor's present judgment is correct, that such of the above appropriations for the payment of the deficits of said state institutions as are specifically made payable out of the surplus revenues of 1897 and 1898, cannot and will not be paid, notwithstanding the said appropriations therefor, and if they can ever be lawfully paid (a question of some doubt, as I shall show hereafter), it must be after another appropriation therefor has been made by some future General Assembly. As to such of the above appropriations for the payment of said deficits as are made payable "out of any moneys in the state treasury not otherwise appropriated," I can confidently say that there are no surplus revenues in the state treasury of any previous year or years which can be applicable for their payment. If paid at all "out of any moneys in the state treasury not otherwise appropriated," they must be paid out of the surplus revenues of some future year or years, and in the present financial condition of this state, the prospect of surplus revenues for future years is extremely remote. I shall show hereafter that if there shall be no surplus revenues for the years 1897 and 1898, available for their payment, then it is at least doubtful if they can ever be lawfully paid by any legislative act.

The Constitution of this state contains the following provisions:

"The general assembly shall provide by law for an annual tax, sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year."

Section 2, Article X, Constitution.

"It is made the imperative duty of the legislature under this section to provide by law a tax sufficient to defray the estimated expenses of the state government for each fiscal year."

People vs. Board of Equalization, 20 Colo., 220, 230.

In re Appropriations, 13 Colo., 316, 326.

A command which has been honored more in the breach than in observance in late years.

"The rate of taxation on property, for state purposes, shall never exceed four mills on each dollar of valuation."

Section 11, Article X, Constitution.

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

Section 16, Article X, Constitution.

Under the above sections of the Constitution, it has been held by the Supreme Court of this state that

"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."

In re Appropriations, 13 Colo., 326, 327, 328.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Henderson vs. People, 17 Colo., 589, 590.

People vs. Board of Equalization, 20 Colo., 220, 230.

Report Attorney General Jones, 1889-1890, pages 31-45.

Report of Attorney General Maupin, 1891-1892, page 32.

After the payment of the expenses of the executive, legislative and judicial departments of the state government for any fiscal year, together with the interest on any valid public debt, all of which are "preferred," all other appropriations take effect and must be paid in the order of the taking effect of the legislative acts making such appropriations. Priority of the date of the taking effect of the acts making appropriations must govern, after preferred appropriations are discharged.

Goodykountz vs. People, 20 Colo., 374, 377.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91, 97, 100, 101.

Mill levies, which are in the nature of continuing appropriations, take effect in the order in which they were passed by the legislature, and are fixed as of the date of the taking effect of the several legislative acts, after giving preference to all preferred appropriations, or mill levies which are or may be preferred.

People vs. Board of Equalization, 20 Colo., 220, 228, 229, 231.

In the case of appropriations of the same grade, made by separate bills bearing the same date, priority must be given as of the time of day of the taking effect of the several acts.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

"It may be competent for the legislature to provide that, in case of deficiency, the public funds shall be pro-rated between claimants of the same grade."

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

The Eleventh General Assembly passed the following act, regulating the order of payment of appropriations in case the revenues of the state should be insufficient to meet the appropriations made by the General Assembly:

"Section 1. In case the available revenues of the State for any fiscal year are insufficient to meet all the appropriations made by the General Assembly for such year, such appropriations shall be paid in the following order:

First: The ordinary expenses of the legislative, executive and judicial departments of the State Government, and interest on any public debt, shall first be paid in full.

Second: Appropriations for all institutions, such as the Penitentiary, Insane Asylum, Industrial School and the like, wherein the inmates are confined involuntarily, shall be next paid.

Third: Appropriations for educational and charitable institutions.

Fourth: Appropriations for any other officer or officers, bureaus and boards, to be paid pro rata, if there be not sufficient funds to pay in full.

Fifth: All other appropriations made pro rata out of the General Fund shall next be paid from all revenues available to meet such appropriations."

Session Laws of 1897, page 21.

In re State Board of Equalization, 24 Colo., 446, 454.

An inspection of the above act will show that the General Assembly provided for pro rating only in cases of a deficiency of the revenues arising in the fourth or fifth classes. Doubtless it was believed by that body at that time that there would never be a deficiency of revenues in either of the first three classes.

During the years 1897 and 1898 it was believed for a time, with good reason, that a deficiency would occur in the third class, and that there would be no moneys available for the payment of any of the appropriations falling in either of the fourth or fifth classes. This doubtless led to the passage by the Twelfth General Assembly of House Bill No. 514, by which the third paragraph of the above act was amended to read as follows:

"Third. Appropriations for educational and charitable institutions; Provided, That in case there is (are) not sufficient revenues for any fiscal term to meet in full the appropriation for educational and charitable institutions, after providing for the necessary amounts appropriated according to paragraphs first and second of this act, then in that event whatever there may be to apply on account of said appropriations for said educational and charitable institutions, shall be distributed among all of said institutions appropriated for (under this clause of said act) pro rata according as the amount appropriated for each of said institutions shall bear to the total amount available for all of said educational and charitable institutions for said fiscal term."

Session Laws of 1899, page 21.

The effect of the above statute is, in event of a deficiency of the revenues, to create a different classification and to authorize a different order of payment of appropriations from that fixed by judicial decision in the absence of a statute fixing the order of payment in such cases.

I have been recently informed by the Honorable Auditor of State that, according to the best estimate of the probable revenues of the state for the fiscal years 1899 and 1900, which he is now able to make, there will be no money whatever to pay any part of the specific appropriation for the State University, amounting to $110,000.00 (H. B. No. 207), for the fiscal years 1899 and 1900, or any part of the specific appropriation made by the Twelfth General Assembly for the support and maintenance of any of the educational or charitable institutions of this state for said

years, and that it is his present judgment that there will be a deficiency in the second class, which embraces the appropriations for the support and maintenance of the Penitentiary, Reformatory, Industrial School, Insane Asylum and other institutions where the inmates are involuntarily confined. In short, there will be sufficient moneys with which to pay the first class and almost all of the second class, but no moneys with which to pay any appropriation falling in the third, fourth or fifth classes.

The Colorado Insane Asylum received at the hands of the Twelfth General Assembly a specific appropriation, in addition to its mill levy, of $50,000.00 for the fiscal years 1899 and 1900, for general support and maintenance, not more than $30,000.00 of which is made available for the fiscal year 1899. (S. B. No. 143.)

The Honorable Auditor of State has recently informed me that the said $30,000.00 for the fiscal year 1899 was exhausted during the first six months of the present fiscal year. All of the moneys, in addition to the said $30,000.00 available for the support of the Insane Asylum for the fiscal year 1899, are such as may be derived from a possible anticipation of its mill levy for the year 1899, and I have been credibly informed that this sum, if received, will not be sufficient for the reasonable support and maintenance of that institution until the close of the fiscal year 1899, on November 30, 1899. If the said institution is not permitted to anticipate its mill levy for the current fiscal year, then it is without a dollar for its support and maintenance from the present time until November 30, 1899.

Owing to the inadequate provision made by the General Assembly for the support and maintenance of the Insane Asylum, that institution has been confronted in the past, as I have shown above, with successive deficiencies in each successive biennial period. In 1897, at the urgent request of the officers of that

institution, the Auditor of State requested an opinion from my predecessor as to whether or not the Insane Asylum could lawfully anticipate its mill levy. I may state here, upon the information of the Auditor of State, that prior to that date all funds derived by said six state institutions from their respective mill levies were cash funds, and no warrants were drawn against the same until the tax levied had been collected and the money was in the state treasury. Under this practice, all warrants drawn against the said mill levies were cash warrants and were paid immediately upon presentation out of the moneys then in the state treasury, but the moneys so derived from the said mill levies, which were then in the state treasury and available for the payment of cash warrants drawn thereon, were derived from the levy of the tax of the preceding year, it being well understood that, under our revenue system, the taxes levied in any one particular year are not paid by the taxpayer, and consequently do not reach the state treasury, until the following year.

My predecessor held that said institution might lawfully anticipate its mill levy; that the State Auditor might issue warrants against the fund to be derived from the mill levy during the year in which the levy was made, and which would bear interest at the rate of six per cent. per annum until the date of their payment, which would necessarily be some time the following year.

Report of Attorney General Carr, 1897-1898, page 104.

Without discussing, or even questioning, for the purpose of this opinion, the soundness of the above opinion as a matter of law, it seems to me that it was at least bad policy to establish the precedent of allowing a state institution to anticipate its mill levy and issue time warrants bearing interest in place of cash

warrants as theretofore. The present Auditor of State has not, I believe, as yet determined whether or not he will allow the said institution to continue the anticipation of its mill levy for the future, or force it back to a cash basis. If he should adopt the latter course, then the institution will not receive the benefit of its mill levy until the year 1900, at which time the levy for the year 1899 will have been collected and covered into the state treasury. The institution having already anticipated its income from its mill levy for the year 1898, during the year 1898, it cannot, as heretofore, avail itself during the year 1899 of the proceeds of the taxes which were levied in 1898, and which would now (1899) be in the state treasury and available for its use, had it not anticipated its levy last year.

Under the above cited constitutional provisions, it has been repeatedly held by the Supreme Court of this state that the General Assembly is inhibited in absolute and unqualified terms from making appropriations or authorizing expenditures for the ordinary expenses of the state government, in excess of the total tax then provided by law and applicable for such appropriations and expenditures, unless that body shall provide for levying a sufficient tax within the constitutional limits to pay the same within such fiscal year.

In re Appropriations, 13 Colo., 316, 322.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

In re Continuing Appropriations, 18 Colo., 192, 193.

Institute vs. Henderson, 18 Colo., 98, 105.

In re Board of Equalization, 24 Colo., 446, 450.

People vs. Scott, 9 Colo., 422, 430.

It has been further held that such excess appropriations are absolutely void and that

"They create no indebtedness against the State, and entail no obligation, legal or moral, upon the people, or upon any future General Assembly."

In re Appropriations, 13 Colo., 316, 323, 324, 328.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Henderson vs. People, 17 Colo., 589, 591.

In re Loan of School Fund, 18 Colo., 195, 200.

Legislative Appropriations, 19 Colo., 58, 62.

People vs. Board of Equalization, 20 Colo., 220, 231.

"What we have said of the legislative department in respect to making appropriations or authorizing expenditures in excess of constitutional authority applies with equal force to the executive department in recognizing or dealing with legislation affecting the public revenues."

In re Appropriations, 13 Colo., 316, 325.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

In speaking of Sections 11 and 16 of Article X of the Constitution, the Supreme Court of this state has used this language:

"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."

People vs. May, 9 Colo., 80, 92.

In re Loan of School Fund, 18 Colo., 195, 200.

Casual deficiencies of the revenue may be lawfully provided for to the amount of $100,000.00.

Section 3, Article XI, Constitution.

In re Contracting of State Debt, 21 Colo., 399.

In re Casual Deficiency, 21 Colo., 403.

The limit of casual deficiency bonds was reached by the issue of 1895, and no further relief can be had in that way.

Session Laws of 1895, page 178.

"No appropriation in excess of the constitutional limit, as above explained, can thus [by Casual Deficiency Bonds] be provided for."

In re Appropriations, 13 Colo., 316, 325.

Under our financial system it cannot be positively known, in advance, what the revenues of the state will be for a particular year. The amount of the revenues cannot be estimated with certainty until September, when the abstracts of assessment from the several counties are in the hands of the Auditor of State, when all equalizations have been made and completed, and the valuation of all property in the state has been fixed for the purposes of taxation.

A reasonably accurate estimate of the probable revenues of the state for any particular biennial period may be made, and is required by law to be made by the Auditor of State previous to the meeting of the General Assembly in biennial session.

1 M. A. S., Section 1820.

There is no absolute criterion by which it can be positively known, at the date of making the appropriations by the legislature, whether such appropriations will be in excess of the revenues of the state for a particular biennial period. The General Assembly

must exercise its own judgment in the first instance, but this judgment should be guided by the reasonable estimates of the Auditor of State and the committees of the General Assembly. If by reason of error of judgment, or for any other cause, appropriations are made in excess of the revenues, such appropriations are mere nullities.

In re Appropriations, 13 Colo., 316, 323, 324.

The estimate of the retiring Auditor of State, together with the subsequent estimate of the present Auditor of State, shows that the Twelfth General Assembly, by its appropriations, exceeded the revenues of the state for the fiscal years 1899 and 1900 by a large sum, probably as much as $500,000.00, and that there will be no revenues available with which to pay any of the appropriations falling within either the third, fourth or fifth classes, with a probable shortage in the second class.

All of the appropriations made by the Twelfth General Assembly, which are payable out of the revenues of the fiscal years 1899 and 1900, and which shall hereafter be found to be in excess of the actual revenues of the state for those years, are absolutely void. Under these circumstances it is manifest that the General Assembly, if now in session, could make no lawful additional appropriation for the support and maintenance of the Insane Asylum, or the State University, or for any other purpose, *without first providing additional revenues sufficient in amount to meet the same*, and any such appropriation, if made without first providing additional revenues sufficient in amount to meet the same, would be absolutely null and void. The legislature being inhibited by the Constitution from making appropriations or authorizing expenditures in excess of the revenues, it follows as an elementary proposition that the legislature cannot, by statute, lawfully empower the Chief Executive to authorize expenditures in excess of the revenue.

My conclusion is, that any action by the Chief Executive at the present time and in the present condition of the state finances, under section 4112, authorizing any of the state institutions to contract an indebtedness for necessary support and maintenance, would be an authorization by the Chief Executive to contract an indebtedness in excess of the revenues of the fiscal year 1899, and such indebtedness, so contracted, would be absolutely void and would entail no obligation, legal or moral, upon the people, or any future General Assembly, to pay the same.

Report of Attorney General Engley, 1893-1894, page 386.

The officers of the several state institutions are forbidden by statute, under penalty, to create any indebtedness in excess of the appropriations for their respective institutions, and under the present condition of the state finances, not only the Chief Executive, but the legislature, are equally powerless to create an additional indebtedness for any state institution or for any other purpose, *until such time as the legislature shall first provide, by law, for additional revenues, sufficient in amount to meet such additional indebtedness.*

It is apparent from what has been said above that any indebtedness which the Chief Executive might, under the present circumstances, authorize a state institution to contract, would be absolutely void, and would create no legal or moral obligation upon the state to pay the same. The Constitution provides that "No bill shall be passed * * * providing for the payment of any claim made against the state without previous authority of law."

Section 28, Article V, Constitution.

The above provision would prevent the legislature from subsequently passing a relief bill for the purpose of paying any such indebtedness contracted,

not only without previous authority of law, but in defiance of the constitutional provision which forbids the contracting of any indebtedness in excess of the revenues.

The conclusion at which I have arrived renders it unnecessary for me to answer your specific inquiries with reference to your powers and duties under said section 4112.

The bonded indebtedness of this state alone amounts, at the present time, to $993,500.00, or nearly one million dollars. Upon this bonded indebtedness the state began paying interest in the year 1890 to the amount of $2,625.00, and the interest has steadily increased each year with the increasing amount of the bonded indebtedness, until in the year 1898 it amounted to the sum of $38,240.00. Annual levies must be made for the purpose of providing for the payment of the principal of the said bonded indebtedness, beginning in the year 1899 and continuing each year, with the exception of the years 1910, 1911 and 1912, to the year 1922. To provide for the payment of the bonded indebtedness of the state, both principal and interest, for the next eight years, will require levies to be made as follows:

| 1899 | 1900 | 1901 | 1902 |
|---|---|---|---|
| $ 68,240.00 | $ 98,240.00 | $158,240.00 | $158,240.00 |
| 1903 | 1904 | 1905 | 1906 |
| $158,240.00 | $128,240.00 | $129,715.00 | $ 61,840.00 |

After the year 1906 the necessary annual levies will gradually decrease in amount to the year 1922, when the last of the present bonded indebtedness of the state will have matured.

Not only is it imperatively necessary for the General Assembly to provide additional revenues for the purpose of meeting the now rapidly maturing bonded indebtedness of the state, which must be paid when due, there being no provision for refunding the same, but another fact must not be lost sight of,

namely: This is a growing young state, and its growing state institutions, educational, charitable, penal and reformatory, necessarily require increased appropriations for their maintenance and support.

In the year 1893 the total valuation of all taxable property in the state was $238,722,417.00. In the year 1898 the total valuation of all taxable property in the state was $192,243,080.00, the decrease in valuation for five years being $46,479,337.00, or over 20 per cent.

The Constitution limits the levy for state purposes to four mills on each dollar of valuation. The decrease in the revenues of the state, consequent upon the decreased valuation, amounts, at four mills on each dollar of valuation, to $185,917.35 in each year. It needs no argument to convince any person that with rapidly increasing obligations the state cannot long remain solvent in the face of such decreasing revenues.

During the past four years the state has been able to meet its obligations only by reason of the unexpected increase in the amount of receipts in the Secretary of State's office consequent upon an enormous increase in the number of articles of incorporation filed, and by reason of the increased receipts in the insurance department consequent upon the imposition of a heavy tax upon insurance companies.

During the years from 1893 to 1898 the total valuation of railroad, telegraph and telephone property in this state, as fixed by the State Board of Equalization, remained substantially the same, and has been largely increased for the present year. All of the decrease in the total valuation has, therefore, been made by the several county assessors.

Prior to the year 1891 the statutes of this state provided that the levy in any county for ordinary county revenue, including the support of the poor, should not be more than 10 mills on each dollar of valuation.

2 M. A. S., Section 3768.

In said last-mentioned year the limit was removed.

Session Laws of 1891, page 289, Section 1.
Session Laws of 1891, page 112, Section 4.

From the year 1893 to the year 1898 the aggregate valuation of property in this state, as fixed by the several county assessors, has steadily decreased, while the mill levy for ordinary county revenue, including the support of the poor, has increased until in the year 1898, in some of the counties, the mill levy was as follows: 15, 16, 17, 18, 26 and 43 mills respectively.

It is apparent that there is some connection between the increased county levies and the decreased valuations. The decreased valuations are offset and the growing needs of the counties are provided for by an enormous increase in the mill levies for county purposes.

The total county levy for all purposes in some of the counties of this state, for the year 1898, was as follows: 27, 30½, 35½, 39, 40 1-10, 41 9-10, 43, 43½, 47, 48½ and 57½ mills respectively.

The total levies for all purposes, including state, county, school and municipal, in some of the counties in this state, run from 40 to 90 mills on the dollar. Of this levy the state receives but four mills for all purposes, including the support of the state institutions. It is apparent that the burdens of taxation are not for state purposes, and that the taxpayer does not have cause to complain of his taxation for state purposes, but rather for county, school and municipal purposes, more especially county purposes.

All of the above figures have been obtained from the records in the office of the Auditor of State.

The financial condition of this state has been steadily growing worse for the past twelve or fifteen years. Well-informed persons have, for the past several years, foreseen financial disaster for the state, and have predicted the early coming of the crisis which it seems has been reached at the present time.

There is one remedy for the financial ills of the state, and only one, namely: the legislature must provide increased revenues for the state. The enlightened public sentiment of this state will not tolerate a proposition to close the doors of the educational and charitable institutions of the state, of which the people are now justly proud, and a spirit of humanity will prevent the inmates of institutions where they are involuntarily confined, as for example, the Penitentiary, Reformatory and Insane Asylum, from suffering from the want of food, clothing, fuel, and the common necessaries of life. To close these institutions is simply out of the question.

In conclusion, I beg to call your attention to the following language of the Supreme Court of this State, in a case decided in July, 1898:

"In view of something said in oral argument, we may be permitted to add what may not be inappropriate, though not strictly germane to the specific interrogatories. We are not unmindful of the constantly increasing seriousness of the state's financial condition, and of the desire of the executive officers directly charged with the duty of conducting the various departments and institutions to secure revenue for their reasonable support. The mill rate which the legislature may authorize to be levied for all state purposes is fixed by the constitution. The valuation of the taxable property, as returned by the county assessors, is gradually decreasing, whereas every intelligent person knows that the actual value is increasing. The expenses of the state government, and of the various state institutions, are growing, and sinking funds for the payment of the interest and principal of our bonded debt must be provided for if we are to maintain our credit; but, under present conditions, this can not be done without encroaching upon other fixed mill levies, and still further crippling our state institutions. Unless the general assembly gives relief (which, unquestionably, either directly or indirectly, is within its power), there is nothing less than financial disaster ahead. To keep piling up debts without any provision for liquidation is unwise policy, and it is time to stop. These are not idle words of an alarmist. They are measured and deliberate expressions, warranted by the facts. It is not our province to legislate, but the startling disclosures which the governor's communication contains justify us in saying that one

effectual remedy (we do not say there may not be others) the general assembly may furnish. A law, containing suitable provisions for its enforcement, might be passed restricting the boards of county commissioners to a low mill levy in providing for the support of county, municipal, and district government for public schools. If the county assessors should still refuse to perform their plain duty, as the communication claims they do now, but persist in violating their oath by assessing property at less than its full cash value, the county commissioners would be obliged to increase their valuations of taxable property in order to meet local expenses, and thus the state would get the benefit of the increased valuation for state purposes. * * * The limitations of the constitution apply to the judicial as well as to the other departments of government, but apparently this is sometimes overlooked, when the nature of these appeals is considered. The remedy for the evils from which the state suffers lies with the legislature, which, in our judgment, it may give, and still observe all constitutional limitations."

In Re Assessment of Property by State Board of Equalization, 25 Colo. 296; 53 Pac. (Colo.), 1056, 1057, 1058.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Charles S. Thomas,
Governor,
Capitol Building, City.

IN RE

## CORPORATE NAMES.

The Secretary of State is forbidden, by statute, to receive or file certificates of incorporations for two domestic corporations bearing the same name.

State of Colorado,
Attorney General's Office.
Denver, Colorado, July 14, 1899.

Dear Sir—I have the honor to acknowledge the receipt of your official communication of recent date, which is as follows:

"I desire for use in this office to have a written opinion upon the following question:

The Canon City and Cripple Creek Railway Company filed articles of incorporation in this office September 6th, A. D. 1892 at 3 o'clock, P. M.

A request is made upon me this day for the filing of an incorporation by the name of The Canon City and Cripple Creek Railroad Company.

Now, what I desire to know does the last name conflict with the former filing and can I, and shall I accept the name of The Canon City and Cripple Creek Railroad Company for filing in this office?"

The particular statute of this state which controls your official action in matters of this character, is as follows:

"When the certificates shall have been filed as aforesaid, the secretary of state shall record and carefully preserve the same in his office, and a copy thereof duly certified by the secretary of state under the great seal of the state of Colorado, shall be evidence of the existence of such a company, *but no certificate*

*shall be filed or received for two corporations bearing the same name.*"

1 M. A. S., section 475.

Under the above statute, you are forbidden to receive or file certificates of incorporation "for two corporations bearing the *same name.*" It certainly cannot happen that certificates of incorporation for two proposed corporations *bearing the same name,* will be tendered to you for filing at the same instant of time. If, at any time, a certificate of incorporation is tendered to you for filing, and upon an examination of the records in your office you find that the *same name* has been adopted by a previous filing, you must reject the tender and decline and refuse to file the certificate.

The State vs. McGrath, 92 Mo., 355, 356.

If the name is *not the same* as that of some corporation whose certificate of incorporation has been previously filed in your office, then the above statute allows you no discretion whatever, and you must receive and file the certificate.

The evident purpose of the above statute was to prevent confusion in the records of your office, and to guard against mistakes on the part of the public consequent upon the existence of two or more corporations in this state bearing the same name.

You will observe that the above statute deals only with domestic corporations and not with foreign corporations. The latter, before they are authorized or permitted to do any business in this state, are required to make certain filings in your office.

3 M. A. S., section 499.
1 M. A. S., sections 500 and 501.
Section 10, Article XV, Constitution.

It is immaterial, therefore, that two or more foreign corporations seeking to make filings in your office

should bear the same name, or the same name as that of some domestic corporation, whose certificate of incorporation may have been previously filed in your office.

It certainly cannot be a matter of any difficulty to determine whether or not the name of a proposed corporation whose certificate of incorporation is tendered to you for filing, is identical with that adopted by a corporation whose certificate of incorporation has been previously filed in your office, and yet, strange as it may seem, the question as to whether or not two names are identical, where there is a change of a single word in the name, has been submitted to this office for oral opinion, by your various clerks and employees, and those of your predecessor, on an average of at least once each four weeks, for two and one-half years past. It is unnecessary to add that the opinions expressed by this office, upon the above question, have always been the same. I am very glad, therefore, to have the opportunity of furnishing you with a written opinion upon this question, in order that the same may, as you suggest, be kept on file in your office, for your guidance and that of your several subordinates, as well as those of your successors in office.

It seems clear to me that where there is a change of a single word, the two names *are not the same* or are not identical. For twenty-two years, and ever since this territory became a state, your office has received and filed certificates of incorporation of hundreds of incorporations where there has been a difference of but a single word in the name. All of the principal railroads in this state have, at some time during their existence, reorganized and reincorporated by changing their name from "railroad" to "railway," or vice versa; there being no other change in the name, and their certificates of incorporation have been received and filed in your office. Permit me to suggest, therefore, that a change in that behalf, by executive ruling, at this late day might be ill advised.

The *nisi prius* courts in this state have frequently non-suited the plaintiffs or quashed the summons where the complaints were brought against a "railroad" company and the summons was served upon the officers of a "railway" company, or vice versa. Such rulings, therefore, are authority for the proposition that in such cases the names are not the same.

Under the letter of the statute you are forbidden to receive or file certificates of incorporation for two corporations bearing the same name, and it can make no possible difference that the corporate existence of one corporation appears to have expired by limitation of time. The name still remains as a permanent part of the records of your office. Under our existing statutes, such a corporation may have a right to extend its corporate existence, and in addition to this, there is no way in which you can be officially advised that the affairs of the corporation, the term of whose existence appears to have expired by limitation of time, have been settled up, and that said corporation has ceased to exist for all purposes.

The following section of the statutes of this state, after providing the manner in which domestic corporations may change their name, contains the following proviso:

"That in changing the name of any corporation, under the provisions hereof, no name shall be assumed or adopted by any corporation *similar to, or liable to be mistaken for, the name of any other corporation, organized under the laws of this State, or of the laws of the territory of Colorado.* * * *"

1 M. A. S., section 625.

Under the above section, you are, in my judgment, vested with an official discretion to determine whether or not the name assumed or adopted *is similar to, or liable to be mistaken for*, the name of any other existing domestic corporation.

1 Thompson on Corporations, sections 298 and 299.

The State vs. McGrath, 92 Mo., 355, 358.

This discretion, however, can only be exercised, under the statute, in the case of a change of the name of a domestic corporation.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. Elmer F. Beckwith,
Secretary of State,
Capitol Building,
Denver, Colorado.

---

IN RE

## INSURANCE COMPANIES.

---

The "Special Adviser's Contract," is a contract with an agent of the Company for the performance of services. It is separate and distinct from any contract of insurance issued by the Company, and is not, upon its face, a special insurance contract. It is an instrument which may be used in such manner as to violate section 2232 of Mills' Annotated Statutes.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, July 17, 1899.

Dear Sir—I have the honor to acknowledge the receipt of your official communication of recent date, with enclosures, in which you advise me that complaint has been made to your department that The State Life Insurance Company, a mutual life insurance company, organized under and by virtue of the laws of the State of Indiana, is violating the statutes

of this state (special reference being made to 1 Mills' Annotated Statutes, section 2232), in the issuance of a certain "Special Adviser's Contract," and I quote from your communication as follows:

"It is contended that the issuance of these contracts gives to certain members (policy holders) of the company privileges not accorded to all, and therefore, destroys the mutuality of the company. * * *

"In view of all the complaints made and the constant citing of the action of the Commissioner of Insurance of Indiana, I feel it incumbent upon me to ask you, as the legal advisor of this department, whether the issuance by this company of such a contract as I have enclosed, marked, with the application, 1 & 2, is in violation of the law of this State?"

The application for appointment as Special Adviser contains the following:

"I hereby stipulate and agree that if I am appointed, I will aid in promoting the Company's business as its authorized agent; that I shall upon written request, advise the Company as to the fitness and desirability of agents and applicants for agencies, furnish confidentially such information as I may possess regarding the personal habits of applicants for insurance, and those of lapsed policyholders who apply for reinstatement, and such information as may come to my knowledge regarding claims against the Company which might assist in protecting the Company from fraudulent and false claims.

This application is based upon the condition that I shall receive such compensation as others who may be appointed to similar positions, which compensation shall be duly set forth in my contract of appointment. * * *

"This agreement is entered into * * * with the express understanding that I shall not be required to take a policy of insurance in said Company as a condition for securing the appointment herein applied for."

Article I of the "Special Adviser's Contract" provides that the number of special advisers shall not exceed five hundred.

Article III of said contract provides for the annual payment to the Special Adviser of a certain com-

pensation "from the expense element of its premiums," based upon the amount of insurance in force, the "said payment being his compensation for his services as such Special Adviser and for no other consideration."

On the 13th day of February, 1899, the said The State Life Insurance Company was reorganized and reincorporated under the provisions of the act of February 10, 1899. (Acts of 1899, page 40.)

The statutes of the state of Indiana, the articles of reorganization and reincorporation, together with the by-laws of said company, confer authority upon the directors of said company to enter into contracts with agents, representatives and local advisers of the company.

In my judgment, the said "Special Adviser's Contract" is a contract with an agent of the company for the performance of services. It is entirely separate and distinct from any contract of insurance issued by said company, and is not, upon its face, a special insurance contract. It does not, in my judgment, violate any of the provisions of the insurance law of the state of Colorado.

The section of the statutes of this state relating to life insurance companies doing business in this state, above referred to, is as follows:

"No life insurance company doing business in the state of Colorado shall make or permit any distinction or discrimination in favor of individuals, between insurants (the insured) of the same class and equal expectation of life, in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes. Nor shall any such company or any agent thereof, make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereof,

or any valuable consideration or inducement whatever not specified in the policy contract of insurance. The penalty for violating this section shall be a fine of two hundred and fifty dollars; and the superintendent of insurance shall revoke the certificate of authority of any agent convicted of the violation of this act, and shall not grant the agent so convicted a license as agent for the term of three years thereafter."

1 M. A. S., Section 2232.

Opinions of Attorney General Carr, 1897-1898, page 238.

The agents of life insurance companies doing business in this state may violate the above statute in many ways, as by discriminating in favor of individuals, or by offering valuable considerations or inducements to the insured, which are not specified in the policy contract of insurance.

In my judgment, the said "Special Adviser's Contract" is an instrument which may be used by agents as one of the many ways of violating the said section of our statutes, and if, as a matter of fact, any of the agents of The State Life Insurance Company are making use of said contract for the purpose of discriminating in favor of individuals, or as a means of offering valuable considerations or inducements to the insured, or for the purpose of allowing a rebate of premiums payable upon policies of insurance, or for any of the other purposes forbidden by said statute, then such use of said contract is, in my judgment, a violation of the laws of this state.

Respectfully,

D. M. CAMPBELL,
Attorney General.

By CALVIN E. REED,
Assistant.

To Hon. H. H. Eddy,
Deputy Superintendent of Insurance,
Capitol Building,
Denver, Colorado.

IN RE

## LIFE INSURANCE COMPANIES.

---

Domestic joint stock life insurance companies are required to have a capital of $100,000.00 fully paid in in cash or in some one or more of the classes of securities in which such companies are by law authorized to invest. Promissory notes cannot be counted as any part of such capital.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, August 1, 1899.

HON. H. H. EDDY,
Deputy Superintendent of Insurance,
Denver, Colorado.

Dear Sir:—I am in receipt of your letter of recent date, in which you call attention to the requirements of section 2226, 1 M. A. S., which provides for the issuance of a certificate by the Superintendent of Insurance, to insurance companies, upon compliance by said companies with certain conditions, among others that of having a capital stock of $100,000, for companies such as the one referred to in your letter, "fully paid in."

You further state as follows:

"Citizens of Colorado desiring to organize a stock life insurance company have asked this department whether a capital stock in an amount required by law with $50,000 paid in in cash and $50,000 paid in in unquestionable notes would be a substantial meeting of this requirement."

The question to be determined here is, whether or not the provision of the statute referred to, which requires insurance companies to have a certain amount

of stock "fully paid in," is satisfied by a part payment in cash and part payment in good notes. It may be observed that, if this requirement can be satisfied by having $50,000 in cash and $50,000 in good notes, it would be satisfied by any smaller amount of cash supplemented by an amount in notes sufficient to aggregate $100,000, and, indeed, if notes are sufficient to meet the requirements of the statute as any part of such capital stock, there is no reason to say that the whole amount might not be paid in good notes.

Section 2220, 3 M. A. S., is in part as follows:

"No joint stock fire or life insurance company shall be permitted to do any business in this state unless it is possessed of an actual paid up cash capital as follows: fire insurance companies of not less than two hundred thousand dollars, and life insurance companies, not less than one hundred thousand (100,000) dollars. No joint stock insurance company organized for any purpose other than fire or life insurance shall be permitted to do any business in this state unless possessed of an actual paid up cash capital of not less than one hundred thousand dollars."

Section 2226, 1 M. A. S., is in part as follows:

"Whenever such capital stock has been subscribed, and not less than the amount required by this act shall have been fully paid in, they shall notify the superintendent of insurance, who shall cause an examination to be made, either by himself or some disinterested person especially appointed by him for the purpose, who shall certify under oath that the provisions of this act have been complied with by said company as far as applicable thereto."

In your letter you state that it is contended that section 2220, above quoted in part, refers only to foreign companies. In this I cannot agree. The language itself directly negatives such an application. The language is, "No joint stock fire insurance company," etc.

Even if it were true that said section was intended to apply only to foreign companies, it seems to

me that the language of section 2226, 1 M. A. S., can only be satisfied by a payment in cash, or in some one or more of the classes of securities which such companies are authorized to invest in, as provided by section 2221, 1 M. A. S. It is needless to say that these securities do not include unquestionable promissory notes.

The question here is substantially the same as that presented to the Supreme Court of Nebraska by the Auditor of that state. The law in that state, as in this, requires insurance companies to be possessed of a certain amount of capital. In reply to the Auditor's question as to whether or not bankable notes could be counted as part of such capital, the court, after enumerating the securities in which such companies are by law authorized to invest, concludes that as bankable notes are not included, no part of such capital stock can legally consist of such notes.

In re Babcock, 21 Neb., 500, 502.

Very truly yours,

D. M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## SCALP BOUNTIES.

---

The appropriation, for the years 1895 and 1896, for the payment of scalp bounties has been exhausted.

The legislature made no appropriation for the payment of scalp bounties for the years 1897 and 1898, or for the years 1899 and 1900.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, August 2, 1899.

Dear Sir—I have the honor to submit this opinion upon the following questions, submitted by you during our interview on Monday last:

First—Is the Auditor of State authorized by law to draw warrants, in payment of bounties, against the fund provided by section 17 of H. B. No. 95, passed at the twelfth session of the General Assembly of the state of Colorado? (Session Laws of 1899, page 193.) And,

Second—If so, is he authorized to draw warrants upon said fund accruing during the fiscal years 1899 and 1900 in payment of bounties earned during the fiscal years 1895, 1896, 1897 and 1898?

The Ninth General Assembly of the state of Colorado passed an act "To provide for the destruction of wolves, coyotes and mountain lions, and to provide a premium therefor, and to make an appropriation to pay the same, and to repeal all acts and parts of acts in conflict herewith," approved April 8, 1893.

Session Laws of 1893, page 68.

Section 1 of said act provides a premium of one, two and three dollars respectively for each coyote,

wolf or mountain lion killed within the state of Colorado, "to be paid as hereinafter provided."

Section 3 of said act provides, "That all such bounties shall be paid by the State Treasurer in the manner and form hereinafter provided for in this act."

Section 4 of said act provides, among other things, that the scalps of the animals killed shall be delivered to the county treasurers of the several counties, who shall issue to the person delivering the scalps,

> "An order upon the Auditor of the State of Colorado for the amount due such person under the provisions of said act. And upon receipt of said order the Auditor of the State shall draw his warrant in favor of such person upon the Treasurer of the State who shall pay the same out of moneys in the treasury not otherwise appropriated."

Section 7 of said act makes an appropriation of ten thousand dollars for each of the fiscal years 1893 and 1894, for the purpose of carrying out the provisions of the act.

The Tenth General Assembly of the state of Colorado made an appropriation of four thousand dollars for each of the fiscal years 1895 and 1896, for the payment of bounties on wolves, coyotes and mountain lions.

Session Laws of 1895, page 38.

No appropriation was made for that purpose by either the Eleventh General Assembly in 1897 or the Twelfth General Assembly in 1899.

It appears from the biennial report of Auditor Parks that warrants to the amount of $5,468.00 were drawn against the scalp bounty fund of 1893 and 1894.

Biennial Report of the Auditor of State, 1895-1896, page 61.

There being a large deficiency in the revenues of the fiscal years 1893 and 1894, the Tenth General Assembly of the state of Colorado passed an act provid-

ing for the issuance of bonds to the amount of $100,000.00, the same being the constitutional limit for that purpose, for the payment of deficits resulting from the casual deficiency of revenues for the years 1893 and 1894.

Session Laws of 1895, page 178.

A large number of claims for scalp bounties were allowed and paid out of said casual deficiency bond fund.

It appears from the biennial report of Auditor Parks that warrants were drawn against the scalp bounty fund to the amount of $8,000.00, for the fiscal years 1895 and 1896, the same being the full amount of said appropriation.

Biennial Report of the Auditor of State, 1895-1896, page 61.

I learn from you that orders upon the Auditor of State, by the several county treasurers, have been filed in your department by the holders thereof, for bounties earned during the fiscal years 1895, 1896, 1897, 1898 and 1899.

The Twelfth General Assembly of the state of Colorado passed an act,

"To provide for the Branding and Marking of Live Stock, for Taxing Brands and Marks and for the Recording of Brands or Marks, to Provide Penalties for Violations Thereof, and to Repeal all Acts and Parts of Acts in Conflict Herewith."

Approved April 6, 1899.

Session Laws of 1899, page 188.

Section 17 of said act provides as follows:

"The fund accruing in the hands of the secretary of state, less the fees and costs by virtue of the foregoing sections, shall be devoted to the printing and publishing of the state brand book, and authorized copies thereof, as herein provided. The residue of such fund shall constitute a standing fund out of which boun-

ties shall be paid in accordance with law for the destruction of wolves, coyotes and mountain lions in this state, and the same shall annually and not later than the first Tuesday of December of each year be turned over by the secretary of state to the treasurer of the state as a special deposit and accretion to the bounty fund for this purpose."

The Constitution of this state provides that,

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof."

Article V, Section 33, Constitution.

The Institute vs. Henderson, 18 Colo., 98, 101.

Goodykoontz vs. Acker, 19 Colo., 360, 363.

"No set form of words is necessary to constitute an appropriation; it is sufficient if the legislative intent to appropriate money for a specific purpose clearly appears from the statute, * * *."

Goodykoontz vs. Acker, 19 Colo., 360, 363.

In re Continuing Appropriations, 18 Colo., 192, 193.

Beshoar vs. Las Animas County, 7 Colo. App., 444, 450.

"Under no circumstances will an appropriation be interred from doubtful or ambiguous language."

In re Continuing Appropriations, 18 Colo., 192, 193.

The Institute vs. Henderson, 18 Colo., 98, 103.

Goodykoontz vs. Acker, 19 Colo., 360, 365.

If sections 1, 3 and 4 of the said act of 1893 were to be considered alone, there would be some ground

for an argument that the language of said sections is sufficient to constitute a continuing appropriation.

In re Continuing Appropriations, 18 Colo., 192.

Goodykoontz vs. Acker, 19 Colo., 360, 363.

People vs. Goodykoontz, 22 Colo., 507.

In order to ascertain the legislative intent, it is necessary, in construing the said act of 1893, to consider section 7 thereof, which makes a specific appropriation for the payment of bounties for each of the fiscal years 1893 and 1894. Construing the entire act of 1893, it is manifest that it was not the intention of the legislature to provide a continuing appropriation, unlimited in amount, for the purpose of paying scalp bounties; but it was the intention of the legislature, as evidenced by said section 7, to provide a specific appropriation for that purpose. The act of 1895 (Session Laws of 1895, page 38), which makes a specific appropriation for the payment of scalp bounties for each of the fiscal years 1895 and 1896, is an additional evidence of said legislative intention.

In the absence of a legislative appropriation for the payment of scalp bounties for the fiscal years 1897 and 1898, as well as for the fiscal years 1899 and 1900, I am of the opinion that the Auditor of State is not authorized by law to draw warrants for the payment of the same.

1 M. A. S., Section 1827.

People vs. Auditor, 2 Colo., 97.

It remains to be considered whether or not section 17 of the said act of 1899 constitutes such an appropriation. While said section creates a standing fund "out of which bounties shall be paid in accordance with law," I am of the opinion that said section does not constitute an appropriation of the moneys in said fund for the payment of scalp bounties. I arrive

at this conclusion for several reasons: First, an appropriation is not to be inferred from doubtful or ambiguous language; second, the Supreme Court of this state, in construing the bounty acts of 1881 and 1883, held that under Article V, Section 33, of the State Constitution, which provides that "No money shall be paid out of the treasury except upon appropriations made by law, * * *."

"It is doubtful if these bounty statutes should be held to comply with the clause requiring an appropriation; but it is not necessary for us to determine this question in view of the provision for payment without a warrant, to be found in each of these acts."

The Institute vs. Henderson, 18 Colo., 98, 103.

Third—If it was the intention of the legislature to make an appropriation, in section 17 of said act of 1899, for the payment of scalp bounties, then it is clear that such legislation is not embraced in the title to said act of 1899, and is in violation of Sections 21 and 32 of Article V, of the State Constitution.

In re House Bill No. 168, 21 Colo., 46, 49, 51.

In answering your second question, as to whether or not you are authorized to draw warrants against the scalp bounty fund, accruing during the fiscal years 1899 and 1900, for the payment of bounties earned in previous years, your attention is respectfully called to the fact that the appropriation of $4,000.00 for each of the fiscal years 1895 and 1896 has been exhausted by the payment of scalp bounty warrants for those years.

The statutes of this state provide that,

"No warrant shall be drawn by the auditor, or paid by the treasurer, unless the money has been previously appropriated by

law; nor shall the whole amount drawn for or paid under one head ever exceed the amount appropriated by law for that purpose."

1 M. A. S., Section 1827.

The appropriation for the payment of scalp bounties for the fiscal years 1895 and 1896 having been exhausted by warrants drawn for that purpose, you cannot draw any additional warrants in payment of scalp bounties for those years.

In view of the conclusion at which I have arrived, it is unnecessary to determine whether or not scalp bounties for the years 1897 and 1898 could be paid out of the scalp bounty fund created from the revenues of the fiscal years 1899 and 1900, provided that fund had been appropriated for that purpose.

Yours respectfully,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. George W. Temple,
Auditor of State,
Capitol Building, City.

IN RE

## INTEREST ON PUBLIC SCHOOL FUND.

---

Interest accruing upon the Public School Fund in the hands of the State Treasurer, belongs to that fund and cannot be transferred to any other fund.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, October 21, 1899.

HON. CHARLES S. THOMAS,
Governor of the State of Colorado,
Denver, Colorado:

Dear Sir—I am in receipt of your favor of the present date in reference to the question of the proper disposition to be made of the interest accruing upon the Public School Fund in the hands of the State Treasurer.

I quote therefrom as follows:

"The committee appointed to examine the books of the Treasurer reports the accounts in good condition, but calls my attention to the fact that the interest upon the School Fund is paid by the Treasurer into the General Revenue, and used for the purpose of meeting appropriations upon that fund.

It is my opinion, without having examined into the question, that interest upon this fund is an income from it, which under the organic act and the statutes should be paid into the Income School Fund and not into the General Revenue Fund."

In reply thereto I have the honor to submit the following:

On March 10, 1899, I rendered an opinion in response to a request from Hon. H. H. Seldomridge, Chairman of the Senate Finance Committee of the

Twelfth General Assembly, covering the whole question of the disposition of interest accruing upon the different funds in the hands of the State Treasurer. In that opinion I reached the conclusion that interest accruing upon the Public School Fund belongs to that fund. I quote from said opinion as follows:

"Under the several Acts of Congress and the Constitution of this State, the interest received from the Public School Fund, must be expended in the support and maintenance of the common schools of this State, and no part of that fund, principal or interest, can be used or appropriated for any other purpose or transferred to any other fund.

Section 7, Enabling Act; U. S. Stats. At Large, 474.

U. S. Stats. At Large, 1883-1884, Chapter 20, page 10.

Sections 3, 5 and 10, Article IX, Constitution.

* * * * *

In my opinion, it is the imperative duty of the State Treasurer to credit all such interest moneys to the Public School Income Fund."

Inasmuch as that opinion was deemed to fully cover the subject there treated, and dealt with his official duties, a copy thereof was on that date delivered to Hon. John H. Fesler, Treasurer of the State of Colorado, for his information and convenience, and will doubtless be found on file in his office.

Respectfully,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## ARMORY FOR THE NATIONAL GUARD OF COLORADO.

The Governor of the State of Colorado is authorized, under the Statutes, to rent an armory for the use of the National Guard of Colorado.

State of Colorado,
Attorney General's Office.
Denver, Colorado, November 4, 1899.

HON. J. C. OVERMYER,
Adjutant General of the State of Colorado,
Denver, Colorado:

Dear Sir—I am in receipt of your communication, in which you ask to be informed whether or not the Governor of the State of Colorado is authorized, under our statutes, to rent an armory for the use of the National Guard of Colorado. In reply thereto I have the honor to state as follows:

In the act passed by the Eleventh General Assembly of this state, relative to the National Guard of this state, the question you ask is answered affirmatively in the following section thereof:

"The Governor may authorize the employment of clerks and the hiring of officers, and armories, the purchase of fuel, lights, stationery and books for the military service, for the use of heads of departments, recruiting officers, etc. He may also authorize the hiring of store rooms for the safe keeping of public stores at such place or places as he shall designate until an arsenal or magazines shall be secured by the State."

Session Laws of 1899, page 196.

Very truly yours,
D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## SALARIES.

---

The short appropriation bill passed by the Twelfth General Assembly and approved February 20th, 1899, is a statute complete within itself, and payments made thereunder are fully protected thereby and cannot be affected by any subsequent statute.

Where the short appropriation fixes a higher rate of salary than the long appropriation, the former rate should be paid for the first four months of the fiscal year in monthly installments, and the latter rate should be paid in monthly installments for the remainder of the year.

Where the short appropriation fixes a lower rate of salary than the long appropriation, such a monthly salary should be paid for the last eight months of the fiscal year as when added to the amount paid under the short appropriation bill for the first four months, will aggregate a sum equal to the annual salary fixed by said long appropriation.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, December 27, 1899.

HON. GEORGE W. TEMPLE,
Auditor of State of the State of Colorado,
Denver, Colorado:

Dear Sir—I am in receipt of your communication of recent date, in reference to the salaries of various employees of the different departments of the state government.

The Twelfth General Assembly passed an appropriation bill in the early part of the legislative session, providing for the payment of the expenses of the different departments of the state government, for the first four months of the fiscal year 1899. For convenience this appropriation will be termed herein

the short appropriation. It also passed, at the close of said session, a general appropriation bill, providing for the payment of like expenses for the remainder of the biennial period, which appropriation will hereinafter be termed the long appropriation.

In a number of instances the salary fixed by the short appropriation is at a higher rate per year than that fixed by the long appropriation, and in other instances these conditions are reversed.

You ask to be informed whether an employee whose salary was by said short appropriation fixed at a certain sum, and by the long appropriation fixed at a lower sum, is entitled to pay for the first four months at the former rate, and for the remaining eight months of the fiscal year at the latter rate, or whether he is entitled to payment for the first four months at the former rate and for the remaining eight months at such a rate as will aggregate a sum equal to the difference between the aggregate paid him for the first four months and the annual salary fixed by the long appropriation.

You also ask to be informed whether an employee whose salary is fixed by the long appropriation at a higher rate than that fixed by the short appropriation, should be paid at the rate fixed by the said short appropriation for the first four months, and then paid for the remaining eight months of the fiscal year at the rate fixed by the long appropriation, or whether he should be paid for the last eight months at such a rate as will aggregate the difference between the amount paid for the first four months and the annual salary appropriated by the long appropriation.

I will consider the former situation first, and for that purpose will assume that "A" is an employee of one of the state departments, whose salary for the first four months of the fiscal year was fixed by said short appropriation at eight hundred and thirty-three dollars and thirty-three cents, and whose annual salary was fixed by said long appropriation at twenty-two hundred and fifty dollars.

Sections 1 and 2 of said short appropriation act read as follows:

"That there is hereby appropriated out of any money in the treasury, not otherwise appropriated, for the purpose of paying a part of the ordinary and contingent expenses of the executive, legislative and judicial departments of the State, and the officers and employes thereof, for the fiscal year 1899, the sum of $103,359.54, as follows: * * *"

"The above appropriations are intended to provide for the expenses of the several departments mentioned, for the first four months of the current fiscal year, to-wit: From December 1, 1898, to March 31, 1899, inclusive."

Section 1936 of Mills' Annotated Statutes refers to the salaries of the different state officers, and section 1937 reads as follows:

"The salaries aforesaid shall be payable in monthly installments at the end of each and every month from the date of the qualification of the said officers respectively, for their respective offices, and upon request the auditor shall draw warrants upon the state treasurer accordingly in favor of the several officers aforesaid."

I am informed that under the above statute, it has been the practice of the state government to pay the employees, as well as the officers in the several departments of state, monthly salaries, based upon the short appropriation for the months which said appropriation covers, and thereafter, for the remainder of the year, to pay them salaries based on the long appropriation for the respective offices.

We must assume that when the short appropriation was made by the legislature, it had in view these monthly payments of the salaries of the different employees, as it specifically names the months of December, 1898, and January, February and March, 1899. Therefore, we must assume that the legislature intended that the salary of "A," mentioned above, should be paid to him in monthly installments of two hundred and eight dollars and thirty-three cents per

month, if earned by him under the appropriation. If "A" performed the services for which he was employed and received his monthly salary of two hundred and eight dollars and thirty-three cents, he received what he was entitled to under the short appropriation, no more and no less, and yourself, as Auditor, will be protected fully by the payment under the said statute, and no subsequent act of the legislature could affect the payment made thereunder for the same, if the labor was performed. The statute making said appropriation is full and complete within itself for the time which it covers. It is a perfect, complete appropriation for the first four months of the fiscal year, and has exactly the same force and potency to protect payments made under it as the long appropriation statute.

People ex rel. vs. Spruance, 8 Colo., 314.

Section 1 of the long appropriation act reads as follows:

"That the following sums, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury, belonging to the general revenue fund, not otherwise appropriated, for the salaries and expenses of the executive, legislative and judicial departments of the state for the fiscal years 1899 and 1900, less the amount already paid from the appropriation of one hundred and three thousand three hundred and fifty-nine dollars and fifty-four cents ($103,359.54), made by the Twelfth General Assembly and approved February 20th, 1899."

Your inquiry calls for the construction and application of the words, "less the amount already paid from the appropriation of one hundred and three thousand three hundred and fifty-nine dollars and fifty-four cents ($103,359.54), made by the Twelfth General Assembly and approved February 20th, 1899."

I understand that similar language in the acts of former General Assemblies, has heretofore been construed by your predecessor, acting under the ad-

vice of my predecessor, but I find no report thereof in this office.

The question is, do the words "less the amount already paid," mean that the total appropriation for the first four months of the fiscal year, in the case which I have supposed above, shall be deducted from the twenty-two hundred and fifty dollars fixed by the long appropriation as the annual salary, and the remainder be paid in eight equal monthly payments for the remainder of the first fiscal year; or do these words mean that the appropriation of twenty-two hundred and fifty dollars by the long appropriation bill reaches back to the beginning of the fiscal year, fixes the entire salary and contemplates only the deduction of four months' salary already paid, at the rate of twenty-two hundred and fifty dollars per annum, instead of at the rate of twenty-five hundred dollars per annum, thus leaving a balance in said appropriation sufficient to pay a monthly salary for said remaining eight months, of one hundred and eighty-seven dollars and fifty cents, or at the rate of twenty-two hundred and fifty dollars per year?

Let us test the first construction: The short appropriation bill appropriated, as we have seen, in the case supposed, the sum of eight hundred and thirty-three dollars and thirty-three cents as salary for the first four months of the fiscal year, and that amount should properly have been paid to "A" for said first four months' services. Now, suppose that said long appropriation act, instead of appropriating twenty-two hundred and fifty dollars as an annual salary, had appropriated but fifteen hundred dollars. Then, under this construction, the full amount already paid must be deducted from said fifteen hundred dollars, leaving a balance of only six hundred and sixty-six dollars and sixty-seven cents for that fiscal year under the long appropriation. In that case, "A" would be entitled, applying the monthly payments construction, to one hundred and twenty-five dollars per month. In a little more than five months the balance

remaining in said fund as aforesaid would be exhausted, leaving nearly three months of the year entirely unprovided for. There being nothing to pay "A" for his services the remainder of the year, he could certainly not serve the state and the state would thereby be deprived of absolutely necessary services for nearly three months. This, in my opinion, is a result which we are not at liberty to assume to have been intended by the legislature in the enactment of the long appropriation statute.

While this is a supposed case, it fairly represents the conditions which exist in a number of actual cases.

I conclude, therefore, that "A" was entitled, under the short appropriation bill, to the sum of eight hundred and thirty-three dollars and thirty-three cents for his services for said four months, and that said short appropriation statute fully protects you in the payment of the same; that he was thereafter entitled to draw a monthly salary at the rate of twenty-two hundred and fifty dollars per year; that the words "less the amount already paid" mean the amount already paid at the rate of twenty-two hundred and fifty dollars a year for the four months; that said appropriation made by the long appropriation bill reaches back to the beginning of the year for the purpose only of computation and of directing the Auditor in ascertaining the amounts to be paid, and that the amount over and above this rate appropriated by said short appropriation bill, is entirely separate and independent from the amount appropriated by the long appropriation bill, and is not touched or affected by said latter bill.

Any other construction placed upon this statute might and would involve the different departments of the state government in such extreme difficulties and inconveniences as to preclude the possibility of our assuming the consequences to have been intended by the legislature. So, also, any other construction would leave the Auditor of State without protection

for his official acts in drawing warrants under the short appropriation bill.

Upon the other hand, where the long appropriation bill has fixed the salary of an employe at a higher rate than that fixed by the short appropriation bill, it seems to me quite clear that the intention of the legislature was that said employe should have the same compensation for the first year as for the second year of the biennial period, for the same labor and services. It is true that, under our Constitution, it is beyond the power of the legislature to pass any bill for the purpose of giving any extra compensation to any public officer, servant or employe after such services shall have been rendered.

Constitution, Article V, Section 28.

People ex rel. vs. Spruance, 8 Colo., 314.

Yet the intention of the legislature above referred to should be put into effect, and such employe should be paid such a monthly salary for the remaining eight months of the first fiscal year as will aggregate, when added to the amount paid him under the short appropriation for the first four months, a sum equal to the amount fixed by the long appropriation bill as his annual salary.

This construction of the statute is further supported by the fact that the legislatures of former years, in their respective appropriation bills, used exactly the same language as we find in the statute here under consideration, excepting in so far as different words were necessary to express the correct dates and amounts, and that your predecessors in office have adopted the above construction and acted upon it. It must, therefore, be assumed that the legislature, in enacting this statute, took into consideration the known course of procedure then in vogue upon this subject.

Yours respectfully,

DAVID M. CAMPBELL,
Attorney General.

IN RE

## POWER OF GOVERNOR TO ENTER INTO LEASE FOR STATE ARMORY.

---

The statute which authorizes the Governor among other things to hire armories for the use of the National Guard, does not fix any limit as to the time for which contracts for such hiring are to run. There is, therefore, no time limitation upon leases which the Governor is authorized to make on behalf of the State.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, January 17, 1900.

HON. J. C. OVERMYER,
Adjutant General of the State of Colorado,
Denver, Colorado.

Dear Sir:—I am in receipt of your letter of recent date, in which you ask for my opinion upon the following question:

"Has the Governor of the State of Colorado the right to enter into a lease, extending beyond the term for which he is elected, for an armory for the use of the National Guard of Colorado?"

In reply thereto I have the honor to state as follows:

Section 5 of article IV, of the act of 1897, provides that the Governor may authorize the appointment of clerks, and the hiring of offices and armories, the purchase of fuel, lights, stationery, etc., and also the hiring of store rooms for the safe keeping of public stores until an arsenal or magazines shall be secured by the state.

It is evident that, under this statute, the Governor acts in his representative capacity as the chief officer of the state. It is well settled that, so long as he acts within the scope of his authority, the contract so made is the contract of the state and binding upon it. The authority is purely statutory. For its extent and limitations we must look to the statute referred to. It will be observed by reference to the said section that there is no limitation of any kind as to the time for which a contract of hiring may be entered into. In my opinion it is clear that, under this statute, the contract of hiring cannot be affected by the expiration of the term of the Governor under whose authority the same was made.

In my opinion, therefore, a lease for an armory may properly be entered into under the authority of the Governor, as provided in said section, and said lease need not be limited in time to the term of the Governor so authorizing the same.

Respectfully,

DAVID M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## CLAIM OF L. P. McGWIRE.

---

Under Sec. 2122 of 2 M. A. S., a member of the National Guard of Colorado who was injured while serving as such, is entitled to the same compensation as he would be under U. S. Army regulations, and where such regulations provide for a cash commutation instead of an artificial limb such provision also applies to members of the National Guard.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, January 18, 1900.

HON. J. C. OVERMYER,
Adjutant General of the State of Colorado,
Denver, Colorado.

Dear Sir:—I am in receipt of your letter of the 16th instant, requesting my opinion as to the legality of the claim of L. P. McGwire for seventy-five dollars, in lieu of an artificial limb, and in reply thereto I have the honor to state as follows:

It appears from your letter and from the records of your office that said McGwire, while he was an officer of the National Guard of Colorado, and while he was in the active service of the state in that capacity, in September, 1896, was injured, and as a result lost a limb. He was thereafter placed upon the regular invalid pension roll of the state and has been drawing a pension since that time.

The statute under which the claim is made is section 3122, 2 M. A. S., and reads in part as follows:

"Every member of the national guard who shall be wounded or disabled, or in the past two years has been so disabled, in performance of any actual services to the state, such as in the case

of riots, tumult, breach of peace, resistance to process, invasion, insurrection or imminent danger thereof, or whenever called upon in any lawfully ordered parade, drill, encampment or inspection, shall, on due proof of the fact, as herein provided, be placed on the list of invalid pensioners of the state, and shall receive out of any moneys in the treasury of this state, not otherwise appropriated, upon the certificates of the surgeon-general, the audit of the adjutant-general and the approval of the governor, the like pension or reward that persons under similar circumstances receive from the United States."

The only question, therefore, to be determined, is whether such claim would be a proper one to be allowed to a person under similar circumstances by the United States government. The federal regulation upon that subject at that time was as follows:

"Every officer, enlisted man, or employee of the military forces of the United States who, in the line of duty or through disease contracted in service, shall have lost a limb or the use of a limb will receive once every three years an artificial limb or appliance, or commutation therefor if he shall so elect, under such regulations as the Surgeon-General of the Army shall prescribe. The money value allowed as commutation is, for a leg, $75; for an arm, foot, and apparatus for resection, $50."

Section 1467, U. S. Army Regulations, 1895.

It therefore appears that if said McGwire elects to take the commutation price of an artificial leg in lieu of such artificial leg, his claim of seventy-five dollars is proper and should be paid.

Very truly yours,

D. M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## POWER OF GOVERNOR TO REMOVE APPOINTIVE OFFICERS OF THE STATE OF COLORADO.

---

The Governor has power to remove officers who hold their position under appointment, for incompetency, neglect of duty, or malfeasance in office.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 3, 1900.

HON. CHARLES S. THOMAS,
Governor of the State of Colorado,
Denver, Colorado.

Dear Sir:—With reference to the matter of the removal of the Coal Mine Inspector, called to my attention this morning, I have given it as careful an examination as possible within the short time for considering the same, and the result of my conclusion I give below.

I quote from the Session Laws of 1885, as follows:

"And from the names that may be certified by them the Governor shall appoint the Inspector of Mines, provided for in this act. * * * As often as vacancies in said office of said Inspector of Mines shall occur by death, resignation or malfeasance in office, which shall be determined in the same manner as in the case of any other officer of the state government."

Session Laws of 1885, page 142.

This statute does not fix the term of office in so many words, but another statute passed by the same General Assembly provides that the term of office of the state officers thereafter appointed by the Gover-

nor, except those whose terms of office are otherwise fixed by the law, shall commence on the first Wednesday of April next after their appointment, and shall continue for a term of two years, subject to the right of the Governor at any time to remove such incumbent for incompetency, neglect of duty or malfeasance in office.

Session Laws of 1885, page 330.

In the case of *Trimble vs. The People*, 19 Colo., 198, it was held that, under the statute, the cause that may be sufficient to warrant removal is to be determined by the Governor. No mode of inquiry being prescribed, he is at liberty to adopt such mode as to him shall seem proper, without interference upon the part of the courts. The Governor was not bound to examine witnesses under oath, or otherwise, although it was eminently proper that he should do so. He might have resorted to other means for ascertaining whether a cause for removal existed, and the refusal to allow counsel to be heard is not a fatal objection to the Governor's action, as he might have proceeded *ex parte*. A number of decisions are cited in the opinion in the above case. See, also,

People vs. Wilcox ex rel., 20 Ill., 187.

When a party accepts appointment under the statute above referred to from the hand of the Governor in this state, the conditions of such appointment are that it is subject to the right of the Governor at any time to remove such incumbent for incompetency, neglect of duty or malfeasance in office.

It appears that the Governor, in the absence of any form having been prescribed by statute to the contrary, may adopt any method he sees fit to determine a question of incompetency, neglect of duty or malfeasance in office by one of his appointees.

Yours respectfully,

DAVID M. CAMPBELL,
Attorney General.

IN RE

## COUNTY HIGH SCHOOL STATUTE.

---

In the act of 1899, authorizing counties of the fourth and fifth classes to establish county high schools, the words "as classified by law with reference to the salaries of district attorneys and county officers" make the act applicable to counties which may be found in those classes at the time when such counties seek to avail themselves of the provisions of the act.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, February 10, 1900.

HON. HELEN L. GRENFELL,
State Superintendent of Public Instruction,
Denver, Colorado.

Dear Madam:—I am in receipt of your letter of recent date, in which you request an opinion as to the proper construction of the language of section 1 of an act to provide for the establishment and support of high schools in counties of the fourth and fifth classes, and especially of the words "any county of the fourth or fifth class as classified by law with reference to the salaries of district attorneys and county officers."

In reply thereto I have the honor to state as follows:

The act referred to will be found at page 226 of the Session Laws of 1899. It went into effect on July 7, 1899.

In 1891 the legislature passed an act dividing the counties of the state into five classes, for the purpose of providing for and regulating the compensation of county and other officers. (Session Laws of 1891, page 307.)

In 1899 the act of 1891 was amended. The county of Fremont was removed from the fourth class to the third class, and the county of Larimer was removed from the third class to the fourth class. (Session Laws of 1899, page 331.) By section 14 of the same act an entirely independent classification, dividing the counties into seven classes, was made, for the purpose of regulating the amount of compensation of county superintendents of schools. (Session Laws of 1899, page 337, section 14.) This act went into effect July 10, 1899.

The question submitted by your letter for determination is, which one of these three classifications was referred to by the legislature in the statute under consideration?

The language of the act, so far as the same is relevant to the present purpose, is as follows:

> "At any general election subsequent to the passage of this act, the question of organizing any county of the fourth or fifth class as classified by law with reference to the salaries of district attorneys and county officers into one school district for high school purposes shall be submitted * * *"

It will be noted that the act of 1891 was still in force when the act under consideration went into effect, July 7, 1899. It will also be noted that, strictly speaking, there is no statute which classifies the counties with reference to the salaries of district attorneys. Manifestly the legislature did not refer to the classification made by section 14 of the act of 1899, for the reason that that is not a classification for the purpose of fixing the salaries of county officers, but only of one county officer, namely, that of county superintendent of schools. The question to be determined is, therefore, whether the legislature referred to the classification of counties in force at the time of the passage of the act or to any classification of counties which might thereafter be made with reference to the salaries of county officers.

The only language in said act which refers to or fixes any time is found in the opening sentence: "At any general election subsequent to the passage of this act." The general rule is that where the legislature in passing an act uses the broad term "as provided by law," or any similar terms, it will be held to mean the law upon the subject which may be in force at the time when the provisions of such act are to be put into effect, and not the particular provisions of law which were in force at the time of the passage of the act. This construction will prevail unless something can be found in the act itself which indicates a different intent on the part of the legislature.

Kugler's Appeal, 55 Pa. St., 123, 125.
Harris et al. vs. White, 81 N. Y., 532, 545.
Jones et al. vs. Dexter, 7 Florida, 276, 280-283.

Under this rule the words, "as classified by law," found in the act under consideration, I think clearly indicate that the counties authorized to take advantage of the act are those which may be found in the fourth and fifth classes as classified with reference to county officers at the time when such counties seek to take advantage of the provisions of the act, and not those which were in the fourth and fifth classes at the time when the act went into effect. If the latter had been the intention of the legislature, such intention could readily have been made manifest by the use of apt words for that purpose.

As the law now stands, all the counties in the state come within its provisions with the exception of Arapahoe, El Paso, Pueblo, Boulder, Fremont, Lake, Pitkin, Las Animas and Weld.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## STATE REVENUE AND PAYMENT OF APPROPRIATIONS.

---

Session Laws of 1897, page 21, and 1899, page 21, providing for the order of payment of appropriations, in case of a deficiency of the revenues considered and construed.

A comprehensive review of the state finances.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 21, 1900.

Sir—I have the honor to acknowledge the receipt of the following official communication from your excellency:

"STATE OF COLORADO,
Executive Chamber.
DENVER.

March 12th, 1900.

HON. D. M. CAMPBELL,
Attorney General.

Dear Sir: The Act of April 14th, 1897, regulating the order of the payment of appropriations, provides *inter alia*, that where the available revenues for any fiscal year are not sufficient to meet all appropriations there shall be paid, first, the ordinary expenses of the legislative, executive and judicial departments, with interest on any public debt, and, second, appropriations for all institutions such as the penitentiary, the insane asylum, the industrial schools, and the like, where the inmates are confined involuntarily, the other appropriations being grouped in successive order.

By the Act of April 18th, 1899, $25,000 was appropriated from any money in the State Treasury for the purpose of constructing suitable buildings for a home for the State Industrial School for Girls, or for paying rent and other necessary improve-

ments and appliances for the said School until the said buildings are completed. The said act also appropriates $5,000 for the payment of rents, and making necessary improvements and repairs upon such buildings as may be secured for the years 1899 and 1900, or until the fund therein provided for shall become available.

By section 3 of the act the Auditor is authorized to issue certificates of indebtedness, to draw interest at the rate of 6% per annum, for the payment of vouchers issued by the Board of Control, and drawn upon said fund for the purposes mentioned in section 2 of the act.

The lease heretofore held by the Board having control of this school expired on the 10th instant, and the owners of a part of the premises included in the enclosure are not willing to renew their lease, but have demanded possession of their property. The Board of Control has in view other and more desirable quarters, which can be obtained upon conditions quite favorable to the State, if payment can be provided therefor.

I am to-day in receipt of a letter from the Secretary making inquiry whether the appropriation provided for in section 2 is now available for the purpose of purchasing a home, and whether the Board may contract to purchase the land, paying a rental therefor until the appropriation can be obtained with which to purchase same. Also whether any part of the appropriation can be used to purchase an engine to make necessary improvements to provide a water plant for the premises.

To my mind the answer to these queries largely depends upon the larger question whether the appropriation made by section 2 [3] of the act of 1899 may be considered as an appropriation falling under the second class as provided by the act of 1897. I have therefore respectfully to request that you at once inform me:

First: Whether the appropriation of $25,000 in the act of April 18th, 1899, concerning the Industrial School for Girls, is one falling within the second class as provided by the act of 1897?

Second: Is this appropriation available only out of the revenues of 1899 and 1900, or is it a continuing appropriation?

Third: Can the State Auditor issue certificates of indebtedness against the same in whole or in part in payment of vouchers approved by the Board of Control, as provided in section 2, and if in part only, to what extent can same be issued?

Fourth: Under the statute can the Board of Control contract to purchase land for a permanent home, paying rental there-

for until an appropriation can be obtained with which to purcase same?

I presume this question is not important if you should determine the entire appropriation to be at once available through the issuance of certificates by the Auditor.

I would also be pleased to have your opinion upon the inquiry whether the purchase of an engine to make necessary improvements for a water plant is within the scope of the appropriation.

I enclose you herewith the letter of Secretary Gabriel for your further information. I would be obliged if you can reply to this communication by Thursday next, as I may be required to leave the city shortly thereafter.

Very respectfully,

CHARLES S. THOMAS,
Governor."

The enclosed letter to which you refer is as follows:

"STATE INDUSTRIAL SCHOOL FOR GIRLS.

Sarah C. Irish, Supt. John H. Gabriel, Secretary,
Denver, Colo.

Montclair, Colo., March 12, 1900.

His Excellency
CHARLES S. THOMAS,
Governor.

My Dear Sir: The Board of Control of the State Industrial School for Girls instructs me to write you to inquire if you can assist us in learning whether the appropriation provided for the State Industrial School for Girls by the last legislature (Laws 1899, p. 97, § 2) for $25,000 can be used for the purpose of purchasing a house now erected upon a certain tract of land, and if we may contract to purchase the land, paying a rental therefor until an appropriation can be obtained with which to purchase the same. And likewise if any part of the said appropriation can be used to purchase an engine to make the necessary improvements to provide a water plant for the said premises.

Any information that you may be able to give us or assistance rendered, will be very greatly appreciated.

Yours very respectfully,

JOHN H. GABRIEL,
Secretary."

The inquiries contained in your official communication and the accompanying letter present two principal questions: First, is the said appropriation of $25,000 now available for the purpose for which the appropriation was made; and, second, to what extent does the said act of 1899 (Session Laws of 1899, page 97) clothe the board of control with power to purchase or contract for a site, together with suitable buildings, for the use of said Industrial School?

Owing to the present condition of the state finances, and the fact that the Twelfth General Assembly passed, and the Executive approved, appropriation bills to the amount of more than $500,000 in excess of the estimated revenues of the state for the fiscal years 1899 and 1900, the question as to whether or not, as a matter of law, said appropriation of $25,000 is now available, can only be determined after a very careful consideration of the revenue system of this state and a construction of the acts of 1897 and 1899 (Session Laws of 1897, page 21; Session Laws of 1899, page 21), regulating the order of payment of appropriations, in the light of the constitutional provisions of this state as interpreted by our courts.

The following extended quotation is taken from an official opinion (In re Indebtedness of State Institutions) which I had the honor to render to your Excellency under date of July 5, 1899:

"The Constitution of this State contains the following provisions:

"The general assembly shall provide by law for an annual tax, sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year."

Section 2, Article X, Constitution.

"It is made the imperative duty of the legislature under this section to provide by law a tax sufficient to defray the estimated expenses of the state government for each fiscal year."

People vs. Board of Equalization, 20 Colo., 220, 230.

In re Appropriations, 13 Colo., 316, 326.

A command which has been honored more in the breach than in the observance in late years.

"The rate of taxation on property, for state purposes, shall never exceed four mills on each dollar of valuation."

Section 11, Article X, Constitution.

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

Section 16, Article X, Constitution.

Under the above sections of the Constitution it has been held by the Supreme Court of this state that,

"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."

In re Appropriations, 13 Colo., 326, 327, 328.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Henderson vs. People, 17 Colo., 589, 590.

People vs. Board of Equalization, 20 Colo., 220, 230.

Report of Attorney General Jones, 1889-1890, pages 31-45.

Report of Attorney General Maupin, 1891-1892, page 32.

After the payment of the expenses of the executive, legislative and judicial departments of the state government for any fiscal year, together with the interest on any valid public debt, all of which are "preferred," all other appropriations take effect and must be paid in the order of the taking effect of the legislative acts making such appropriations. Priority of the date of the taking effect of the acts making appropriations must govern, after preferred appropriations are discharged.

Goodykoontz vs. People, 20 Colo., 374, 377.
Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91, 97, 100, 101.

Mill levies, which are in the nature of continuing appropriations, take effect in the order in which they were passed by the legislature, and are fixed as of the date of the taking effect of the several legislative acts, after giving preference to all preferred appropriations, or mill levies which are or may be preferred.

People vs. Board of Equalization, 20 Colo., 220, 228, 229, 231.

In the case of appropriations of the same grade, made by separate bills bearing the same date, priority must be given as of the time of day of the taking effect of the several acts.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

"It may be competent for the legislature to provide that, in case of deficiency, the public funds shall be pro-rated between claimants of the same grade."

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

The Eleventh General Assembly passed the following act regulating the order of payment of appro-

priations in case the revenues of the state should be insufficient to meet the appropriations made by the General Assembly.

"Section 1. In case the available revenues of the State for any fiscal year are insufficient to meet all the appropriations made by the General Assembly for such year, such appropriations shall be paid in the following order:

First: The ordinary expenses of the legislative, executive and judicial departments of the State Government, and interest on any public debt, shall first be paid in full.

Second: Appropriations for all institutions, such as the Penitentiary, Insane Asylum, Industrial School and the like, wherein the inmates are confined involuntarily, shall be next paid.

Third: Appropriations for educational and charitable institutions.

Fourth: Appropriations for any other officer or officers, bureaus and boards, to be paid pro rata, if there be not sufficient funds to pay in full.

Fifth: All other appropriations made pro rata out of the General Fund shall next be paid from all revenues available to meet such appropriations."

Session Laws of 1897, page 21.
In re State Board of Equalization, 24 Colo., 446, 454.

An inspection of the above act will show that the General Assembly provided for pro-rating only in cases of a deficiency of the revenues arising in the fourth or fifth classes. Doubtless it was believed by that body at that time that there would never be a deficiency of revenue in either of the first three classes. During the years 1897 and 1898 it was believed for a time, with good reason, that a deficiency would occur in the third class, and that there would be no moneys available for the payment of any of the appropriations falling in either of the fourth or fifth classes. This doubtless led to the passage by the Twelfth General Assembly of House Bill No. 514, by which the third paragraph of the above act was amended to read as follows:

"Third. Appropriations for educational and charitable institutions; Provided, That in case there is (are) not sufficient revenues for any fiscal term to meet in full the appropriation for educational and charitable institutions, after providing for the necessary amounts appropriated according to paragraphs first and second of this act, then in that event whatever there may be to apply on account of said appropriations for said educational and charitable institutions, shall be distributed among all of said institutions appropriated for (under this clause of said act) pro rata according as the amount appropriated for each of said institutions shall bear to the total amount available for all of said educational and charitable institutions for said fiscal term."

Session Laws of 1899, page 21.

The effect of the above statute is, in event of a deficiency of the revenues, to create a different classification and to authorize a different order of payment of appropriations from that fixed by judicial decision in the absence of a statute fixing the order of payment in such cases."

Prior to the passage of the said act of 1897, regulating the order of payment of appropriations, the order of payment thereof, in all cases, whether or not there was a shortage of revenues in any fiscal year, as well as the status of all excess appropriations, had come to be fairly well understood by the executive departments of the state government. Under the several decisions of our Supreme Court it was the duty of the Auditor of State to first classify as preferred claims the legislative, executive and judicial appropriations, together with all appropriations for the payment of interest upon any valid public debt. The several mill levies provided for by law were next classified in the order of the passage of the several acts providing for the same, and all other appropriations were then scheduled and classified in the order of the taking effect of the several acts carrying appropriations.

The Auditor of State first estimated the probable revenues for each fiscal year, and after the aggregate valuation for the purpose of taxation of all the taxable property in the state had been ascertained and the

levies for state purposes fixed, he was then able to determine with a reasonable degree of accuracy the amount of the revenues for each successive fiscal year.

All appropriations which, under the above classification, were ascertained to be in excess of the revenues of the state for any particular year were then known to be absolutely void.

It has been held by the Supreme Court that in the absence of a legislative preference, appropriations for the state educational, reformatory or penal institutions have, in case of a deficiency of the revenue, no precedence over other appropriations.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 97.

I again quote from my said opinion of July 5, 1899, as follows:

"Under the above cited constitutional provisions, it has been repeatedly held by the Supreme Court of this state that the General Assembly is inhibited in absolute and unqualified terms from making appropriations or authorizing expenditures for the ordinary expenses of the state government in excess of the total tax then provided by law and applicable for such appropriations and expenditures, unless that body shall provide for levying a sufficient tax within the constitutional limits, to pay the same, within such fiscal year.

In re Appropriations, 13 Colo., 316, 322.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

In re Continuing Appropriations, 18 Colo., 192, 193.

Institute vs. Henderson, 18 Colo., 98, 105.

In re Board of Equalization, 24 Colo., 446, 450.

People vs. Scott, 9 Colo., 422, 430.

It has been further held that such excess appropriations are absolutely void and that,

"They create no indebtedness against the State, and entail no obligation, legal or moral, upon the people, or upon any future General Assembly."

In re Appropriations, 13 Colo., 316, 323, 324, 328.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Henderson vs. People, 17 Colo., 589, 591.

In re Loan of School Fund, 18 Colo., 195, 200.

Legislative Appropriations, 19 Colo., 58, 62.

People vs. Board of Equalization, 20 Colo., 220, 231.

"What we have said of the legislative department in respect to making appropriations or authorizing expenditures in excess of constitutional authority applies with equal force to the executive department in recognizing or dealing with legislation affecting the public revenues."

In re Appropriations, 13 Colo., 316, 325.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

In speaking of Sections 11 and 16 of Article X of the Constitution, the Supreme Court of this state has used this language.

"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."

People vs. May, 9 Colo., 80, 92.

In re Loan of School Fund, 18 Colo., 195, 200."

The General Assembly having, from time to time, by separate acts, provided for not less than eight sep-

arate fractional mill levies for the support of the several state institutions and for other state purposes, which mill levies range in amount from one-fifteenth of a mill to one-half of a mill on each dollar of valuation, and aggregate in amount one and twenty-three-thirtieths mills, the Supreme Court has held that if the remaining two and seven-thirtieths mills are insufficient to provide for the ordinary expenses of the state government, including the expenses of the legislative, executive and judicial departments, together with interest upon any valid public debt (and the principal of any valid public debt which must be paid within the four mill limit for state purposes, *In re Board of Equalization*, 24 Colo., 446), the last mill levy or levies in point of time of the passage of the act or acts providing for the same are void.

"Those levies which the legislature has attempted to authorize after the constitutional limit of four mills was reached fall under the constitutional inhibition and must be treated as void."

People vs. Board of Equalization, 20 Colo., 220, 231.

In re Board of Equalization, 24 Colo., 446, 453.

With constantly decreasing state revenues, consequent upon a decreased valuation, and increasing expenses of the state government, resulting from the growth and development of the state, as well as from a rapidly maturing bonded indebtedness, it long since became apparent to the executive officers of the state, as well as to the members of the General Assembly, that the time was fast approaching when the state would be unable, by reason of a deficiency of revenues, to meet all the appropriations made by the General Assembly, and it was understood that the last appropriations in point of time would fail for want of revenues with which to meet them.

During the biennial period covering the fiscal years 1893 and 1894 there was a deficiency in the state

revenues resulting in claims against the state which were liquidated by the issuance of casual deficiency bonds to the amount of one hundred thousand dollars.

Session Laws of 1895, page 17.

Section 3, Article XI, Constitution.

In re Contracting of State Debt, 21 Colo., 399.

In re Casual Deficiency, 21 Colo., 403.

During the biennial period covering the fiscal years 1895 and 1896 it was found that the appropriation for the Soldiers' and Sailors' Home must fail for the want of revenue to meet the same.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86.

Doubtless it was this situation, and the knowledge that appropriations for some of the most essential and necessary state purposes, or for the support of state institutions, might fail of payment for the want of revenues, in the event that such appropriations should fall last in point of time, which led to the passage of the said act of 1897, regulating the order of payment of appropriations in case the available revenues of the state for any fiscal year should be insufficient to meet all the appropriations made by the General Assembly for such year.

This act has never been construed by the courts. While there may be some question as to its validity, it will be assumed that it is the duty of the executive officers to obey strictly the terms of the statute, and for the purpose of this opinion the act will be presumed to be valid in every respect.

The following mill levies have been provided for and the proceeds thereof appropriated by statute. The date of the passage of the several acts providing for and appropriating the same being indicated in parentheses:

For the "University of Colorado," one-fifth of one mill.

2 M. A. S., Section 4602. (1877.)

For the "Colorado School for the Deaf and Blind," formerly called the "Institute for the Education of the Mute and Blind," one-fifth of one mill.

2 M. A. S., Section 3256. (1877.)

For the "Colorado Insane Asylum," one-fifth of one mill.

2 M. A. S., Section 2974. (1879.)

For the "State School of Mines," one-fifth of one mill.

2 M. A. S., Section 4080. (1881.)

For the "Stock Inspection Fund," one-fifteenth of one mill.

2 M. A. S., Section 4234. (1881.)

For the "State Agricultural College," one-fifth of one mill.

G. L. 1877, Section 8. (1877.)
Session Laws of 1879, page 158. (1879.)
1 M. A. S., Section 36. (1883.)

For the "Capitol Building Fund," one-half of one mill.

2 M. A. S., Section 3851. (1883.)
1 M. A. S., Section 355. (1889.)
3 M. A. S., Section 355. (1893.)
People vs. Board of Equalization, 20 Colo., 220, 231.

For the "State Normal School," one-fifth of one mill.

3 M. A. S., Section 4134b. (1895.)
Session Laws of 1899, page 105. (1899.)

For state purposes (general revenue) (levy to be fixed by the State Board of Equalization).

G. L. 1877, Section 2283. (1877.)

2 M. A. S., Section 3851. (1883.)

2 M. A. S., Section 3768. (1885.)

3 M. A. S., Sections 3768, 3849. (1891.)

People vs. Board of Equalization, 20 Colo., 220, 230.

Goodykoontz vs. The People, 20 Colo., 374, 377.

For "Capitol Building Bond Sinking Fund" (levy to be fixed by the State Board of Equalization).

1 M. A. S., Section 324. (1883.)

Session Laws of 1891, page 51, Section 6. (1891.)

At the September, A. D. 1899, meeting of the State Board of Equalization, the following state tax for the year 1899 was ordered by that board to be levied pursuant to law:

1. For state purposes (general revenue and interest on bonds), 2 1-12 mills on the dollar. (First class, so far as appropriated for the payment of preferred claims.)

2. For Mute and Blind, one-fifth mill on the dollar. (Third class.)

3. For University, one-fifth mill on the dollar. (Third class.)

4. For Agricultural College, one-fifth mill on the dollar. (Third class.)

5. For School of Mines, one-fifth mill on the dollar. (Third class.)

6. For Insane Asylum, one-fifth mill on the dollar. (Second class.)

7. For Stock Inspection, one-fifteenth mill on the dollar. (Fourth class.)

8. For Capitol Building and interest on Capitol Building bonds, one-half mill on the dollar. (Fifth class.)

9. For Normal School, one-fifth mill on the dollar. (Third class.)

10. For Capitol Building bond sinking fund, three-twentieths mill on the dollar. (First class.)

Total, four mills.

11. Interest on insurrection bonds (authorized by decision of the Supreme Court), one-tenth mill on the dollar. (First class.)

12. For Spanish-American war (fixed by statute), one-fifth mill on the dollar. (First class.)

The fund derived from said fractional mill levies has been appropriated by the legislature for the payment of claims against the state, which, under the said act of 1897, regulating the order of payment of appropriations, fall within each of the five classes as indicated above by the words in parentheses.

Number 1 above was issued for the purpose of meeting the expenses of the three departments of state, interest on casual deficiency bonds and the general expenses of the state covered by specific biennial appropriations falling within any of the classes from the second to fifth, inclusive, provided, of course, that the levy will produce sufficient funds for the years 1899 and 1900 with which to meet said specific appropriations. So much of the proceeds of this levy as are appropriated for the payment of preferred claims must be classified as of the first class.

Number 2, for the Mute and Blind Institute; number 3, for the University; number 4, for the Agricultural College; number 5, for the School of Mines, and number 9, for the Normal School, all being for charitable or educational institutions, the appropriations of the proceeds thereof fall within the third class. Number 6, for the Insane Asylum, the same being an institute where the inmates are involuntarily confined, the appropriation of the proceeds thereof falls within the second class; number 7, for the stock

inspection fund, falls within the fourth class, "for any other officer or officers, bureaus and boards;" number 8, "for Capitol Building and interest on Capitol Building bonds," being levied for the completion and furnishing of the Capitol Building, falls within the fifth class.

It will be noted that this levy is also made for "interest on Capitol Building bonds." A levy to provide a fund for the purpose of paying interest on the Capitol Building bonds properly belongs in the first class, and until within the past three years the State Board of Equalization has annually made a separate levy, in accordance with the statutes, of a fractional part of a mill for that purpose.

1 M. A. S., Section 324.
Session Laws of 1891, page 51, Section 6.

During the past three years, owing to the fact that there has usually been a deficiency in the general revenue, the State Board of Equalization has *arbitrarily* required the Board of Capitol Managers to allow the interest on the Capitol Building bonds to be paid out of the half-mill levy for the "Capitol Building Fund."

Number 10, for "Capitol Building Bond Sinking Fund," is levied for the purpose of creating a sinking fund with which to pay the principal of the Capitol Building bonds at the maturity thereof, and which are now outstanding to the amount of $600,000.

1 M. A. S., Section 324.
Session Laws of 1891, page 51, Section 6.

Number 11 was levied for the purpose of paying the interest on the Cripple Creek and Leadville insurrection bonds.

Number 12, for the Spanish-American war, was levied in accordance with a statute, for the purpose of meeting the expenses incurred in the mobilization of Colorado troops.

Session Laws of 1899, page 325.

The last two levies, being for extraordinary and not ordinary expenses, do not, as held by the Supreme Court, fall within the four-mill limit of the Constitution, and will hereafter, in this opinion, be disregarded.

In re Board of Equalization, 24 Colo., 446.

The Supreme Court of this state, prior to the passage of said act of 1897, has held that the expenses of the three departments of the state, as well as the principal and interest of the bonded indebtedness of the state, are preferred, under the Constitution, and must be first paid. That court has also held that the State Board of Equalization, in fixing the levy for state purposes, must observe the legislative mandate for the levying of fractional mill levies for the state institutions, stock inspection and Capitol Building funds, so far as the same may not be repugnant to the constitutional provision concerning excess appropriations. That court has also upheld the right of the State Board of Equalization to determine the amount of revenue necessary for the purpose of meeting the expenses of the three departments, and the principal and interest of the public debt, and the power of the board, under the statute, to fix the amount of the mill levy for general revenue, not exceeding, however, four mills on the dollar, and has said that if the several mill levies provided for by statute, when deducted from four mills, do not leave a sufficient levy for general revenue, the State Board of Equalization may exclude from the annual levy and decline to order to be levied any or all of the fractional mill levies provided for by statute, beginning with the last statutory levy in point of time and striking off the levies in the inverse order of their passage by the legislature, until there remains a sufficient part of the four mills to provide the necessary general revenue for the state.

People vs. Board of Equalization, 20 Colo., 220, 231.

In Re Board of Equalization, 24 Colo., 446, 453.

The several statutes above referred to, providing for mill levies for the support of the state institutions, and for the other purposes mentioned, create what may be called "Continuing Levies." Either by the same sections of the statutes providing for the said several mill levies, or by other sections of the statutes, the proceeds arising from said mill levies are *appropriated* for the purposes for which the mill levies were created. These appropriations, therefore, constitute what may be termed "Continuing Appropriations." The distinction between the levy and the appropriation has been recognized by our Supreme Court.

People vs. Board of Equalization, 20 Colo., 220, 232.

Continuing appropriations do not differ from the specific appropriations made by the General Assembly at its biennial sessions, except that the General Assembly, by the use of apt words in making the continuing appropriations, relieves itself from the necessity of re-enacting the statutes and making specific appropriations for specific purposes at each biennial session. All appropriations, either specific and biennial, or continuing, are embraced within the provisions of the said act of 1897, providing for the classification of appropriations "in case the available revenues of the state for any fiscal year are insufficient to meet all the appropriations made by the General Assembly for such year."

From what has been said above, it necessarily results that if the revenues of this state for a particular fiscal year are sufficient to meet all appropriations in full, falling within the first four classes mentioned in said act of 1897, but are insufficient to meet in full all appropriations falling within the fifth class, whatever moneys are available for the payment of fifth class appropriations, must be pro-rated among the several persons, officers or objects entitled thereto, and the capitol building fund, derived from the said

half-mill levy for the purpose of completing and furnishing the capitol building, must pro rate with all other fifth class appropriations.

If there be sufficient revenues with which to pay all appropriations in full embraced within the first three classes, but not a sufficient amount with which to pay the fourth class appropriations, without drawing upon the fifth class mill levy, then the moneys derived from the capitol building half-mill levy, or so much thereof as may be necessary, must be used for the purpose of paying the fourth class appropriations, and if, after using all of the proceeds derived from the capitol building levy, there shall then be a deficiency in the fourth class, the appropriations in that class, including that of the stock inspection fund, derived from the one-fifteenth mill levy, must be pro-rated.

If there be sufficient revenue in any fiscal year to meet in full the first and second class appropriations, but not sufficient to meet all appropriations falling within the third class, without drawing upon the fourth and fifth class mill levies, then the capitol building levy in the fifth class and the stock inspection mill levy in the fourth class, must be applied, so far as necessary, to the payment of appropriations in the third class. If, however, the funds derived from the stock inspection levy, would be sufficient to meet the deficiency in the third class, then the fourth class would become entitled to the capitol building levy, or so much thereof as may be necessary, to meet in full all of the fourth class appropriations, and if insufficient to meet in full all fourth class appropriations, must be pro-rated.

If, after the payment of all first class appropriations in full, it should be found that in any fiscal year the revenues are insufficient to meet appropriations falling within the second class, the mill levies for the Mute and Blind, University, Agricultural College, School of Mines and Normal School, falling within the third class, as well as the stock inspection

mill levy in the fourth class and capitol building mill levy in the fifth class, must be drawn upon, so far as necessary, for the purpose of meeting the deficiency in the second class. If, after drawing upon the proceeds of said mill levies in the third, fourth and fifth classes, sufficient funds should be derived with which to meet all second class appropriations, whatever sum remains of the proceeds of said third, fourth and fifth class mill levies would then be applicable to the payment of third class appropriations, and, if necessary, should be pro-rated among the said third class institutions.

If, after the payment in full of all first and second class appropriations, it should be found that there was a shortage in the third class appropriations, the said five mill levies falling within the third class, must be pro-rated with other specific third class appropriations made for the support of the educational or charitable institutions.

It needs no argument to show that if the revenues of the state should be insufficient to meet in full the first class appropriations, all mill levies falling in either the second, third, fourth or fifth classes must be used to whatever extent may be necessary for the payment of first class appropriations. This is true by reason of the constitutional guarantee which prefers all first class appropriations.

It will be observed that the said act of 1897 provides for pro-rating, in case of a deficiency, only in the fourth and fifth classes.

Session Laws of 1897, page 21.

It will be further observed that at the next session of the legislature, the General Assembly amended said act so as to provide for pro-rating in the third class in the case of a deficiency of the revenues.

Session Laws of 1899, page 21.

This is clearly a legislative construction that it was not the intention of the framers of the act of 1897

to provide for pro-rating in the first and second classes. It remains, therefore, to determine the order of payment of appropriations in the event that there shall be a deficiency of revenue with which to meet second class appropriations.

"It may be competent for the legislature to provide that, in case of a deficiency, the public funds shall be pro-rated between claimants of the same grade, but certainly, in the absence of such legislation, the courts can not require this to be done when the priority in time can be ascertained; consequently, in case of several appropriations of the same grade made by separate bills bearing the same date, and there are funds to pay part, but not sufficient for all, priority should be given as of the time of day of the taking effect of the several acts."

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 101.

I conclude, therefore, that in the event of a deficiency in the second class appropriations, all appropriations falling within that class, so far as payment thereof can be made, must be made in the order of the taking effect of the several appropriation acts. The Auditor of State should, therefore, classify all appropriations according to the date, and if necessary, the hour of the day upon which the said appropriations took effect, and pay the same in the order of said classification.

It will be observed that the Insane Asylum mill levy falls within the second class. This appropriation, therefore, has a priority dating from the passage of the act creating said mill levy in 1879, and becomes the first appropriation which should be paid in the second class. All other appropriations falling within that class being specific biennial appropriations and all having been passed by the Twelfth General Assembly, take effect as of the year 1899.

With a valuation of two hundred million dollars, a half-mill levy for capitol building purposes will produce $100,000 for each year. For several years past the valuation of this state has fallen below two

hundred million dollars, and this fact, together with an allowance of five per cent. for uncollected taxes, reduces the annual receipts for the capitol building fund to something like $90,000 for each year. As stated above, for the past three years, out of this fund has been paid $22,500 for interest on capitol building bonds. The last General Assembly appropriated for the maintenance and support of the capitol building, for the biennial period of 1899 and 1900, $69,300, or $34,650 per year.

Session Laws of 1899, page 53.

From the above figures it will appear that but a comparatively small sum is left in said capitol building fund with which to pay for construction work for the completion of the building, and with which to pay the capitol building warrants now outstanding to the amount of $544,595.39 and the interest thereon, which is accruing at the rate of six per cent. per annum, amounting, upon the present outstanding warrants, to the sum of $32,675.72 per annum. Interest upon the capitol building warrants is not payable annually, but only at the time of calling and paying the warrants. Prior to the fiscal year 1897, capitol building warrants were issued for certain fiscal years in excess of the income of the capitol building fund. In this manner capitol building warrants came to be outstanding which were void and might be technically called excess warrants. I am credibly informed that since the beginning of the fiscal year 1897, warrants have not been drawn upon the capitol building fund for any year in excess of the sum produced by the half-mill levy. Capitol building warrants, therefore, for the past three years, are valid warrants and cannot in any sense be called excess warrants. I am credibly informed that the revenues derived from the capitol building mill levy for the fiscal years 1897, 1898 and 1899, have been used, and are now being used, for the payment of capitol building warrants issued prior to the beginning of

the said fiscal year 1897 (the date of the last capitol building warrant which was called for payment by the State Treasurer, March 10, 1900, was June 7, 1895), and consequently have been used, and are now being used for the payment of warrants, a part of which are valid and a part of which are excess and void warrants. The time may therefore come when the capitol building warrants of said years 1897, 1898 and 1899, as well as future years, if the present practice be continued, cannot be paid, not because they are not valid warrants drawn within the limits of the revenue of the fiscal years for which they were drawn, but because the moneys applicable for the payment thereof have been diverted to the payment of warrants of prior years, a part of which were excess warrants. I am also credibly informed that the attention of the executive officers of this state has been heretofore called to this situation by my predecessor in office.

I have already said that interest upon capitol building warrants is not payable annually, but only at the time of calling and paying the warrants themselves, and that the capitol building warrants which are now being called and paid, were issued in June, 1895. The interest, therefore, upon said warrants is not being paid for nearly five years after the date of their issuance. The fact that excess capitol building warrants have been issued, together with the method of payment thereof indicated above, having postponed the payment of the principal and interest thereon for a period of several years after their issuance, rendered such warrants an undesirable investment for purchasers of warrants, and their value in the market fell much below par. Not only were the contractors engaged in the construction work upon the capitol building compelled to discount their warrants, but the janitors and other employes were also compelled to discount their warrants for their monthly salaries, accepting in some instances, as I have been informed, as low as eighty-five cents on the dollar. The Eleventh

and Twelfth General Assemblies not only provided by law for the issuance of certificates of indebtedness where there were no funds with which to pay the expenses of the maintenance of the capitol building, but also provided that *certificates of indebtedness* issued in payment of maintenance expenses should bear interest at the rate of six per cent. per annum, *payable semi-annually.*

Session Laws of 1897, page 28.
Session Laws of 1899, page 53.
Session Laws of 1899, page 57.

No certificates of indebtedness have been issued under said act, but the Auditor of State has drawn *warrants* against said appropriations upon vouchers issued by the Board of Capitol Commissioners, and the State Treasurer has stamped the same payable out of the capitol building fund, with interest thereon from the date of presentation to the date of payment, at the rate of six per cent. per annum, *payable semi-annually,* and the interest thereon has heretofore been, and now is being, paid *semi-annually* out of the capitol building fund, without drawing warrants therefor.

Since the year 1897 the State Treasurer has been purchasing capitol building maintenance warrants as an investment for the public school fund. This practice of paying *semi-annual* interest (and purchasing said warrants as an investment for the school fund), has had the desired effect of bringing said maintenance warrants to par, but as said practice is illegal it should be at once discontinued.

The Constitution of this state contains the following provision:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof."

Section 33, Article V, Constitution.

In construing the above section our Supreme Court has made use of the following language:

"Under this provision, when money has been actually paid into the state treasury, a statute providing for its payment other than by appropriation and warrant, is void. No argument is needed to demonstrate this. The language employed admits of no other construction."

The Institute vs. Henderson, 18 Colo., 98, 101.

In re Bounties, 18 Colo., 273.

Goodykoontz vs. Acker, 19 Colo., 360, 363.

Parks vs. Soldiers' and Sailors' Home, 22 Colo., 86, 91.

Carlile vs. Hurd, 3 Colo. App., 11, 14.

It has been the uniform practice of the present State Treasurer, as well as that of his predecessors, to pay the semi-annual interest upon the bonded indebtedness of the state without the drawing of warrants therefor. This practice, being in contravention of the above section of the Constitution, should also be discontinued.

I have no doubt that the legislature may lawfully provide for the payment of semi-annual interest upon state warrants where there is money already in the treasury belonging to any fund which is available for the payment of such interest, or where the payment thereof can be provided for by law, out of proper funds, without exceeding the constitutional limit, but in cases like the capitol building warrants mentioned above, considering the present state of our finances, outlined above, I am of the opinion that the payment of semi-annual interest upon said capitol building maintenance warrants is clearly illegal. Under the present condition of our state finances, if warrants are drawn upon the capitol building fund in anticipation of the revenues to be derived therefrom, the interest thereon, when paid, must be paid out of the revenues

of the year for which the warrants were drawn. Assuming that the half-mill levy for the capitol building fund will produce $90,000 and no more each year, then the statute appropriating the proceeds of said mill levy for capitol building purposes appropriates $96,000 for each year, and no more. If warrants are not drawn against this fund until the money is actually in the treasury, it is clear that warrants cannot be drawn exceeding in amount $90,000 for any one year. If, however, the proceeds of the mill levy are anticipated and warrants are drawn against the proceeds of said capitol building fund for any fiscal year, the amount thereof, including the interest which will accrue upon said warrants from the date of issuance to the date of payment, must not exceed $90,000. Under our financial system the moneys with which to pay the expenses of any fiscal year are not received into the treasury until the following year, and warrants drawn upon the revenues of a particular year are not called and paid until from twelve to eighteen months after the issuance thereof. Under this situation it is manifest that there will be no moneys available for the payment of the first or second installments of the semi-annual interest upon said maintenance warrants derived from the revenues of the fiscal year for which said warrants were issued, and that when there is money in the treasury with which to pay said interest, the money is then applicable to the payment of both the principal and interest of said warrants. Under the present practice of paying semi-annual interest on said maintenance warrants, the interest thereon is paid for the first and second semi-annual installments out of revenues derived from the levy of taxes for some preceding year or years, and after the warrants have been outstanding for a considerable time, the semi-annual interest thereon must be paid, if at all, out of the revenues of fiscal years subsequent to the year in which said warrants were drawn. It is manifest from the above that where warrants are drawn upon the capitol building

fund, as has been done for many years past, to the full amount of the half-mill levy, the payment of semi-annual interest thereon out of the revenues of other years is simply a device by which the expenses of a particular fiscal year are made to exceed the revenue of that fiscal year.

During the last three fiscal years approximately $100,000 worth of maintenance warrants have been issued and stamped as bearing interest at six per cent., payable semi-annually. The semi-annual interest, therefore, upon said warrants now amounts to $6,000 per annum. It needs no argument to demonstrate conclusively that if this practice be continued for a few years longer, under the present situation, the capitol building fund will be embarrassed in an attempt to meet the semi-annual interest on said warrants.

The several state institutions mentioned above as having mill levies have been kept upon a cash basis and have not been permitted to draw warrants against the proceeds of their mill levies until the moneys were actually in the treasury. The warrants, therefore, are cash warrants payable at the time they are drawn. I am not advised as to why the capitol building has been treated differently from the state institutions supported by mill levies, and why the capitol building has been permitted to anticipate its mill levy for years to come.

From what has been said above it must be clear that the investment of the public school fund by the State Treasurer in capitol building maintenance warrants is not a safe investment for the public school fund.

Attention is called to the status of the capitol building levy at this time for the purpose of observing that it may be argued with some show of reason that the expenses incurred for capitol building maintenance properly falls within the first class. Without expressing any opinion upon this question at this time, it is sufficient, for the purpose of this opinion, to say that so far as the expense of construction work is con-

cerned, the appropriation of the proceeds of the half-mill levy for such purpose clearly falls within the fifth class of appropriations.

I am credibly informed that since the passage of the said act of 1897, regulating the order of payment of appropriations, the Auditors of State have construed the same as including within the second class only appropriations for maintenance and support of the penal and reformatory institutions, and not appropriations for buildings.

Replying to your first specific inquiry, I must advise you that the appropriation of $25,000 (Session Laws of 1899, page 97) for the purpose of purchasing lands and erecting buildings for the Girls' Industrial School, falls within the second class of appropriations, as designated by the said act of 1897, providing the order of payment of appropriations in case the available revenues of the state are insufficient to meet all appropriations made by the General Assembly.

The following list furnished me by the Auditor of State contains seven specific appropriations for maintenance, etc., of the several penal and reformatory institutions, and embraces only such appropriations as have been heretofore construed by the Auditor of State as falling within the second class. The list contains the number of each bill, volume and page of the Session Laws where published, and the date and hour of the executive approval thereof.

(1) S. B. 75, (Laws of 1899, p. 108) March 6, 1899, 10:25 A. M. Penitentiary, Maintenance.....$ 25,000

(3) S. B. 143, (Laws of 1899, p. 100) April 13, 1899, 11:20 A. M. Insane Asylum, Maintenance..... 50,000

(5) S. B. 77, (Laws of 1899, p. 196) April 13, 1899, 11:21 A. M. Penitentiary, Maintenance..... 145,000

(6) H. B. 135, (Laws of 1899, p. 91) April 13, 1899, 11:23 A. M. Dependent Childrens' Home, Maintenance ..... 30,000

(8) H. B. 72, (Laws of 1899, p. 95) April 13, 1899, 11:30 A. M. Boys Industrial School, Maintenance... 60,000

(11) S. B. 105, (Laws of 1899, p. 110) April 13, 1899, 11:40 A. M. Reformatory, Maintenance..... 70,000

(12) S. B. 296, (Laws of 1899, p. 97) April 18, 1899, 3:40 P. M. Girls Industrial School, Maintenance, Rents, etc..... 5,000

The Honorable Auditor of State, at my request, has furnished me with a copy of the estimated receipts and disbursements of the state for the fiscal years 1899 and 1900. From this estimate it appears that there will be no moneys with which to pay any of the appropriations falling within the third, fourth or fifth classes, and that there will probably be a shortage of about $57,000 in the second class. Two propositions should be particularly noted by you at this time. First, that in this estimate the Auditor has taken into consideration only the above mentioned seven appropriations as falling within the second class; and, second, he has assumed that the above mentioned five-mill levies for the support of educational and charitable institutions, as well as the above mentioned mill levies falling within the fourth and fifth classes should not be taken into consideration in classifying the appropriations for payment under the said act of 1897.

It is proper for me at this time to advise you that, in my judgment (in addition to the said appropriation of $25,000 for the Girls' Industrial School), the following specific biennial appropriations made by the Twelfth General Assembly, principally for the purchase of lands, the erection of buildings and the making of permanent improvements for the several state institutions, likewise fall within the second class.

(2) H. B. 133, (Laws of 1899, p. 101) April 8, 1899, 11:45 A. M. Dependent Childrens' Home, Lands, Buildings, etc.....$ 30,000

| | | |
|---|---|---|
| (4) | S. B. 143, (Laws of 1899, p. 100) April 13, 1899, 11:20 A. M. Insane Asylum, Repairs, Buildings, etc.. | 44,000 |
| (7) | S. B. 76, (Laws of 1899, p. 109) April 13, 1899, 11:25 A. M. Penitentiary Repairs, etc..... | 4,000 |
| (9) | H. B. 72, (Laws of 1899, p. 95) April 13, 1899, 11:30 A. M. Boys Industrial School, Heating Plant, etc. ..... | 10,000 |
| (10) | S. B. 194, (Laws of 1899, p. 111) April 13, 1899, 11:32 A. M. Reformatory, Heating Plant, etc.... | 8,500 |
| | To which should also be added the above mentioned appropriation of $25,000, as follows: | |
| (13) | S. B. 296, (Laws of 1899, p. 97) April 18, 1899, 3:40 P. M. Girls Industrial School, Buildings, Lands, etc..... | 25,000 |
| | Total ..... | $126,500 |

The figures in parentheses prefixed to the above schedules indicate the order in which said appropriations received the executive approval and take effect. All of said acts containing emergency clauses.

From the above it will appear that according to the best estimate which the Auditor of State is able to make at the present time, and including the said $126,500, there will be a deficiency in the revenues falling within the second class of appropriations amounting to more than $183,000 for the fiscal years 1899 and 1900. It will thus be seen that if all of said penal and reformatory institutions demand and receive their appropriations in full, the payment thereof will absorb an amount substantially equal to one-half of the aggregate mill levies of the said educational and charitable institutions falling within the third class for the said fiscal years 1899 and 1900. Each of said educational and charitable institutions have a one-fifth mill levy, which will produce for all of said

five institutions for each fiscal year about $180,000, and possibly a little more.

If a part or all of the mill levies for the educational and charitable institutions falling within the third class shall be absorbed for the purpose of meeting the appropriations within the second class, the educational and charitable institutions will then become entitled to the proceeds derived from the stock inspection mill levy in the fourth class, and the Capitol Building mill levy in the fifth class.

At the present valuation, the stock inspection fund derives an income of about $12,000 per annum from its levy of one-fifteenth of a mill, and the Capitol Building fund derives an income of about $90,000 from its levy of one-half mill.

In considering the proposition that the third-class institutions may become entitled to absorb the proceeds of the Capitol Building mill levy, it must not be forgotten that the interest upon the Capitol bonds, amounting to $22,500 per annum, is at present being paid out of that fund, and as this is an appropriation properly belonging to the first class, the interest on the Capitol Building bonds must continue hereafter to be paid out of said Capitol Building fund, or else it must be paid from the general revenue and classed as a first-class appropriation. This latter method, which is perhaps the correct one, would have the effect of increasing the deficiency in the second class by an additional amount equal to the annual interest upon said Capitol Building bonds. The practical effect would be that $22,500 additional would by this method be taken from the mill levies of the educational and charitable institutions, and those institutions would be enabled to recoup by taking from the Capitol Building fund its entire $90,000, less the amount necessary for the maintenance of the Capitol Building, which, as I have above explained, might also be properly considered as an expense falling within the first class.

An examination of the above two schedules will show that the appropriation of $25,000 for the Girls' Industrial School is at the bottom of the list, and that the appropriation of $5,000 for maintenance, rents, etc., for said institution is embraced within the same bill and takes the same rank as the larger appropriation for buildings, land, etc. It follows from this that said institution, if deprived of the $25,000 appropriation, must also be deprived of its $5,000 appropriation, and if, in order to pay all second-class appropriations, including the $5,000 appropriation for the maintenance of the Girls' Industrial School, which stands at the bottom of the list, it becomes necessary, as it unquestionably will, to absorb at least one-half of the mill levies for the educational and charitable institutions for the years 1899 and 1900, then the Girls' Industrial School will be entitled to its appropriation of $25,000.

Your second inquiry is as follows: "First—Is this appropriation available only out of the revenues of 1899 and 1900, or is it a continuing appropriation?"

In answer to this question, it must be observed, first, that the money from which the appropriation was to be paid was not in the treasury at the time of the passage of the appropriation act. This is a matter concerning which every executive officer must possess absolute knowledge, for under our financial system it is impossible that there should be moneys in the treasury at the beginning of any particular biennial period applicable for the payment of the expenses of that biennial period. Particularly is this true when the state has been unable in years past to meet all of its appropriations. Second—The appropriation does not specify the revenue of the particular fiscal year out of which the same is payable. For this reason the Supreme Court has said that there is much force and reason in the argument that such an appropriation should be declared void.

Goodykoontz vs. People, 20 Colo., 374, 376.

It has also been held by the Supreme Court in the same case that where an appropriation is not void,

"If the legislature fails to specify definitely the revenue of the fiscal year out of which an appropriation is to be paid, where the money is not already in the Treasury, the Auditor must determine such question for himself, or else refuse to issue his warrant therefor. The Auditor is not authorized to exercise an arbitrary or irreversible judgment in such matters, but he may determine the question for himself, *provided* he can from the language and purposes of the act ascertain with a reasonable certainty the fund or revenue out of which it was intended the appropriation should be paid. He must necessarily observe the greatest caution in determining such question; otherwise he may become responsible for issuing warrants in excess of the revenue."

Goodykoontz vs. People, *supra*.

If the Auditor should determine that the appropriation is payable wholly out of the revenues of the fiscal year 1899, or wholly out of the revenues of the fiscal year 1900, or that the same is payable one-half out of each of said fiscal years, I think it is safe to assume that the courts would hold that such construction was fairly warranted by the language of the act and would not reverse his judgment.

People vs. Goodykoontz, *supra*.

The appropriation is not a "continuing appropriation" in the sense in which that term is commonly understood and used in our financial system.

In re Continuing Appropriations, 18 Colo., 192.

That term is used in our financial system for the purpose of designating an appropriation which is payable, not only for one fiscal year or a particular biennial period, but is payable in the amount designated for each year, so long as the act remains in force. It needs no argument to show that it was not the legisla-

tive intention to provide $25,000 for the purchase of a site and the erection of buildings for this institution every succeeding biennial period until the act should be repealed.

I assume that it was your desire to ascertain by this interrogatory whether or not the appropriation, if not paid during the biennial period of 1899 and 1900, would lapse at the end of the last mentioned year, or whether it might be available as an appropriation payable in some future year. In my judgment, it is not advisable for me to express an opinion upon this question at this time, for the following, among other reasons: The Auditor of State may determine that the appropriation is payable out of the revenues of the present biennial period and may ascertain that he is able to pay the same during said period. If so, the question suggested cannot arise. Again, the next legislature may repeal the said appropriation act or pass other appropriation acts covering the same purpose. A different order of classification in the order of payment of appropriations may be authorized by the next legislature; and, finally, I am not able to ascertain at this time whether or not, even if said act should be held not to lapse with the present biennial period, there will be revenues sufficient to meet this appropriation in the classification within which this appropriation may then fall.

The general principle governing the payment of appropriations falling within the second class (which do not pro-rate), being the same as the rule for determining the priority of appropriations under the decision of the Supreme Court of this state prior to the passage of the act of 1897, classifying appropriations, is that the same must be paid in the order of their priority. Therefore such appropriations as do not lapse with the present biennial period will be payable in their proper class before specific appropriations falling within the same class made by any subsequent General Assembly.

Your third interrogatory is as follows:

"Third: Can the State Auditor issue certificates of indebtedness against the same in whole or in part in payment of vouchers approved by the Board of Control, as provided in section 2 [3] and if in part only, to what extent can the same be issued."

In answering this question I say most emphatically that the Auditor cannot lawfully issue the certificates of indebtedness as provided in section 3 of the act. If it shall appear to the Auditor that there will be sufficient revenues for the years 1899 and 1900 with which to pay this appropriation, then he may anticipate the revenues, draw the warrants thereon payable out of the revenues of one or both of said years, and the treasurer can countersign and stamp said warrants as bearing interest until payment, in the same manner in which all other general revenue warrants are now drawn and stamped to bear interest; but if it shall appear that the appropriation in the class in which it falls, and in its proper order of payment, as the last one on the list of appropriations within the second class, is in excess of the revenues for said fiscal years, then it is absolutely void as an appropriation, and the issuance of certificates of indebtedness would be in defiance of the Constitution and the decisions of the Supreme Court of this state, and absolutely void. I have already in this opinion called your attention to the constitutional provisions and the decisions of the courts thereunder, which hold that the annual state tax must meet the annual state expenditures, and that any attempt of either the legislative or the executive officers to authorize expenditures for the ordinary expenses of the state government, in excess of the total tax then provided by law and applicable for such appropriations and expenditures, is absolutely void and creates no indebtedness against the state and entails no obligation, legal or moral, upon the people or any future General Assembly. This

question was more particularly the subject of my official opinion heretofore rendered to your Excellency on the 5th day of July, A. D. 1899.

In several instances of late the legislature has directed the issuance of certificates of indebtedness in cases where there were no revenues available for the payment of appropriations. Such a direction cannot be considered in any other light than an attempt to evade the constitutional inhibition against creating indebtedness in excess of the revenues of the state.

In addition to the above act, I now have in mind two acts of the Twelfth General Assembly, specifically providing for the issuance of certificates of indebtedness in cases where there were no available revenues for the payment of appropriations, and the issuance of which would therefore be in excess of the revenues of the state.

In the first of said acts the legislature attempted to pledge the faith and credit of this state for the payment of the interest and principal of such indebtedness. I am unwilling to believe that a charge can ever be justly laid at the door of any of the executive officers of this state, that they are without regard for their official oaths, entertain no comprehension of their obligation to obey the constitutional mandate, or that they will in any way allow themselves to be made parties to the legislative direction to violate the plain terms of the Constitution of the state and create an indebtedness in excess of the revenues.

The constitutional provisions in this state were wisely intended to prevent the state from being plunged into debt.

The fourth question is: "Fourth: Under the statute can the Board of Control contract to purchase land for a permanent home, paying rental therefor until an appropriation can be obtained with which to purchase same?"

I have already shown you that the appropriation which we are now discussing, and the $5,000 appropriation for rents, improvements, repairs, etc., stand upon the same footing. It is manifest, therefore, that

the Girls' Industrial School will either be entitled to all of both appropriations, or will not be entitled to receive any part of said appropriations for the present biennial period. For these reasons, coupled with the further fact that both appropriations will probably be held by the Auditor to be payable, during the present biennial period, after first absorbing the mill levies for other institutions, it does not seem to me to be necessary to discuss the question as to the power of the board to contract for a home for a school, or to pay rent therefor, further than to suggest that the power of the board in this behalf should be construed in connection with the act establishing the home and granting general powers to the board.

Session Laws of 1897, page 68.
1 M. A. S., Chapter 66.
Session Laws of 1887, page 279.

Before leaving this subject, your attention is respectfully called to section 1 of said act of 1899, which attempts to authorize the State Board of Land Commissioners to lease to the Board of Control of the State Industrial School for Girls, for a period not to exceed fifty years, not to exceed forty acres of school land, located outside and near the city of Denver, and under irrigation, at a rental value not to exceed one dollar per acre per annum.

The public lands of this state were granted to the state by acts of congress. These acts, together with the Constitution of this state, make the state of Colorado a trustee, and impose upon the state the duty of handling said lands, and disposing of the proceeds to be derived from the sale and rental thereof as a trustee for trust purposes.

Enabling Act, 18 U. S. Stats. At Large, 474.
U. S. Stats. At Large, 1883-1884, Chapter 20, page 10.
Sections 3, 5 and 10, Article IX, Constitution.

The sale of public lands, and particularly school lands, by the State Land Board for a nominal sum, or the execution of long term leases thereon for a nominal consideration, is inhibited by the terms of the congressional grants and the Constitution of this state, which provides for the sale or other disposal of state lands in such manner as shall secure the maximum possible amount therefor.

For the reasons stated herein, and particularly in answer to the fourth interrogatory, I assume that it is not necessary, and that your Excellency would not care to have a further expression of opinion from me upon the last inquiry contained in your official communication.

The importance of the question presented by the interrogatories contained in your official communication, and the far-reaching effect which my conclusions thereon may possibly have upon the disposition of the revenues of the present biennial period, is my justification for the great length at which I have discussed these important questions, many of which have not been settled by judicial determination, and which are questions of first impression in this state. I have not discussed these questions simply because of their importance, but because they are so intimately connected with our financial system, that their proper determination is necessary to enable the Auditor of State to properly classify the appropriations and to determine with some degree of accuracy what warrants may or may not be lawfully drawn during the present biennial period. The proper classification of certain other appropriations which I shall presently mention, is necessary to enable the Auditor to accurately determine in what class the shortage arising from the deficiency in the revenues will actually fall, as well as the amount of the shortage.

Under the said act of 1897, "appropriations for any other officer or officers, bureaus and boards, * * *" are placed in the fourth class. This certainly embraces appropriations for the State Board

of Horticulture, State Board of Charities and Corrections, State Board of Pardons, State Board of Health, Stock Inspection Fund, State Historical and Natural History Society, State Board of Arbitration, State Board of Medical Examiners, and perhaps appropriations for other officers, bureaus and boards which do not now occur to me.

Assuming as I have, that the said act of 1897 is valid in all respects, and that it is the duty of the executive officers to observe strictly its provisions while the same remains upon the statute books, the conclusion is inevitable that the appropriations for the above mentioned officers, bureaus and boards must be classed in the fourth class.

I am aware that this situation is unfortunate, so far as said officers, bureaus and boards are concerned, and that some very grave questions may arise under said statute, among which may be mentioned the following: First: What appropriations are properly classed in the fourth class; second, what constitutes an *executive* officer, board or bureau; third, do any of said above mentioned officers, boards or bureaus belong to the executive department, and if so, should they be classed in the first rather than in the fourth class; and, fourth, if certain officers, bureaus and boards are a part of and belong to the executive department of the state, can the legislature by statute lawfully postpone the payment of their appropriations until after the payment of the first, second and third classes enumerated in said statute, and class the same in the fourth class? These questions are further complicated by the fact that several of the appropriations for the above officers, bureaus and boards were incorporated into the general appropriation bill, which, under the Constitution of this state,

"Shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools."

Section 32, Article V, Constitution.

It has been held by our Supreme Court that for some purposes the public revenue may be anticipated and drawn upon, when the taxes have been actually levied according to law. As a matter of fact, in drawing general revenue warrants, the Auditor of State always anticipates the revenue. While the Auditor may, in his discretion, anticipate the revenue, and aldays does do so, yet it has never been held that he is compelled to anticipate the revenue, and it has been distinctly held that the levy itself may not be anticipated and drawn upon, and that the Auditor of State is not compelled to draw warrants in anticipation of the revenue prior to the September meeting of the State Board of Equalization, at which time the annual tax levy for state purposes is fixed.

Goodykoontz vs. People, 20 Colo., 374.

The Honorable Auditor of State has rendered me every assistance in his power, in the matter of furnishing me facts, figures and estimates. I have every reason to believe that all figures given by me herein are accurate, and that all estimates are as nearly accurate as it is possible to obtain at the present time. Accurate estimates can never be made earlier than the date on which the State Board of Equalization at its September meeting in each year fixes the levy for state purposes. I can only add that the questions of fact involved which are consequent upon the amount of revenue received and the amount of appropriations falling within the several classes, as herein indicated, can only be properly answered by the Auditor of State from the records of his office. I have attempted herein to announce the principles of law which should govern the Auditor of State in determining the questions of fact involved.

The situation is greatly complicated at the present time, by reason of the fact that sixteen months of the present biennial period have already passed, and the revenues of the fiscal year 1899 have already been practically exhausted by the drawing of warrants for that year.

In conclusion, I beg to say to your Excellency, that your official communication and the inquiries therein contained, have received my most thoughtful consideration, to the exclusion of all other official business for several days past, and the amount of time and labor involved in the preparation of this opinion has rendered impossible an earlier reply.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To HON. CHARLES S. THOMAS,
Governor, Capitol Building,
Denver, Colorado.

---

IN RE

## NATIONAL GUARD.

---

Term of enlistment. Re-enlistment within thirty days after discharge should be for term of one year. All other enlistments should be for a term of three years.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, March 31, 1900.

HON. J. C. OVERMYER,
Adjutant General of Colorado,
Denver, Colorado:

Dear Sir—I have your communication of the 23rd instant, in reference to terms of enlistment in the National Guard of Colorado.

Section 30 of Article III, of the act of 1897, relative to the National Guard, provides that every enlisted man shall be held to service for a term of three years unless he be properly discharged. Section 32, of the same article, provides that all re-enlistments shall be for a term of one year.

The act referred to authorizes the Military Board to adopt a Code of Regulations, and further provides that such Code, when adopted, shall be a part of the law. A Code has been adopted, and section 36 thereof provides that, in order to obtain continuous service, re-enlistment must be made within thirty days from the date of discharge.

In my opinion, a re-enlistment made within thirty days after the date of discharge would properly be termed a re-enlistment, whether the discharge was based upon the expiration of the term of service, or upon some other legal ground. And such enlistments should in all cases be for a term of one year.

All other enlistments, whether the party enlisting was ever before in the service or not, should be for a term of three years.

Very truly yours,

D. M. CAMPBELL,
Attorney General.
By DAN B. CAREY,
Assistant.

IN RE

## AUTREFOIS ATTAINT.

---

A convict who commits an offense while under sentence for another offense, may be indicted and tried therefor in the same manner as if he were not under sentence.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, April 11, 1900.

HON. CHARLES S. THOMAS,
Governor of the State of Colorado,
Denver, Colorado.

Dear Sir—I am in receipt of your favor of April 7th, in which you state that you are informed that indictments have been, or will be, at once returned against Wallace and Woode, two convicts now in the penitentiary at Canon City, for the murder of Night Captain Rooney; also, that you are informed that a paroled convict has recently been taken in the commission of an offense at Florence and is now in the city jail at Canon City awaiting the action of the county authorities. You ask my official opinion upon the question contained in the following paragraph which I quote from your letter:

"Will you kindly give me your opinion at once upon the question whether a convict who, during the service of his term, commits a crime can be indicted, tried and punished prior to the expiration of his sentence, and whether in such event the Warden of the State Penitentiary is justified in refusing to deliver the custody of the prisoner to the county authorities."

You also state that the warden fears that if the said Wallace and Woode are delivered to the sheriff,

said sheriff may be unable to protect them from lynching.

In reply to your inquiry I have the honor to state as follows:

Under the old common law the plea of *autrefois attaint* might be interposed where a convict was indicted for a crime committed while under sentence for another crime. This doctrine, however, has not now, and probably never has had, any place in American jurisprudence.

Walker's American Law (6th Ed.), 722.
1 Bishop's New Criminal Law, Par. 1070.
Singleton vs. State, 71 Miss., 782, 787-789.
People vs. Flynn, 7 Utah, 378, 380-384.
Coleman vs. State, 35 Texas Crim. Rep., 404, 405.
Thomas vs. People, 67 N. Y., 218, 225.

It therefore appears quite clear to me, under the authorities, that a convict who, while undergoing sentence, commits an offense, whether within or without the prison, may properly be tried in exactly the same manner as he would be if he were not under sentence.

Very truly yours,

DAVID M. CAMPBELL,
Attorney General.

By DAN B. CAREY,
Assistant.

IN RE

## FOREIGN FIRE INSURANCE COMPANIES.

---

Foreign Fire Insurance Companies are required, by the Act of 1899, to have all insurance policies upon property situated in this State, countersigned by the resident agent, and any company violating said Act shall have its license revoked, which revocation shall continue for at least one year.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, May 19, 1900.

Sir—I beg to acknowledge the receipt of your official communication, under date of April 25, 1900, from which I quote as follows:

"Some while since this department decided not to renew the license of the German Fire Insurance Company of Peoria, Illinois, because of a violation of the resident agency and re-insurance law. Of this action by the department the company and its agents heretofore licensed to do business in this state were duly advised and cautioned against the transaction of further business. This company through its general agent has given notice to the department that it will apply for readmission, and other things being equal, its papers being in proper form, the question has presented itself to my mind whether or not the company have not been sufficiently punished and the dignity of the law sufficiently upheld by their suspension of business for the time that has transpired since the decision referred to above was rendered by this department. Against the possibility of the department taking such action I am in receipt to-day of a protest, copy enclosed, signed by a number of citizens of this state. wherein is raised the question in the third paragraph thereof as to the ability of the department to renew this license for the period of at least one year, and citation is made to the law of 1899, Section 5, pages 50 and 51, of the insurance laws of the state as issued by the department. Does a decision by this de-

partment, not to renew a certificate of authority upon its expiration, stand in the same relation to this section as a revocation of a certificate of authority to transact business in the state after the same has been issued? * * *"

The protest to which you refer, a copy of which accompanied your official communication, is signed by more than twenty individuals and firms engaged in the insurance business in this county and state.

Section 1 of an act entitled an act

"In relation to Reinsurance and the Transaction of Business by Fire Insurance Companies, Societies, Associations or Partnerships, otherwise than through Resident Agents,"

Approved April 10, 1889 (Session Laws of 1889, page 317), provides, among other things, that no foreign insurance company authorized to do business within this state, shall write any policy of insurance

"Upon property situated or located in this State except after the said risk has been approved, in writing, by an agent who is a resident of this State, regularly commissioned and licensed to transact insurance business herein, *who shall countersign all policies so issued* * * *"

Section 5 of said act provides that,

"Any fire insurance company, society, association or partnership wilfully violating or *failing to observe and comply with* any of the provisions of this Act, applicable thereto, shall have its authority to transact business in the state revoked by the Superintendent of Insurance, and such revocation shall continue for at least one year from the date thereof, * * *"

I quote further from the insurance laws of this state, as follows:

"No company shall transact in this state any insurance business unless it shall procure from the superintendent of insurance a certificate stating that the requirements of the laws of this state have been complied with and authorizing it to do

business. Said certificate shall expire on the last day of February in each year, and must be renewed annually. * * *"

Session Laws of 1889, page 98, Section 4.
1 Mills' Ann. Stats., Section 2217.

"Every insurance company doing business in this state shall, on or before the first day of March in each year, render to the superintendent of insurance a report, signed and sworn to by its chief officer, of its condition on the preceding thirty-first day of December, which shall include a detailed statement of assets and liabilities, the amount and character of its business transacted, and moneys received and expended during the year, and such other information as the superintendent of insurance may deem necessary. A synopsis of such statement, together with the superintendent of insurance's certificate of authority to transact business in this state, shall be published in some newspaper of general circulation, published at the capital, for at least four insertions. * * *"

Session Laws of 1889, page 200, Section 6.
1 Mills' Ann. Stats., Section 2219.

The facts in this case, as well as the particular action taken by your department, appear from certain official letters written by your department to the secretary of the German Fire Insurance Company of Peoria, Ill., on February 27, March 3 and 27, 1900, respectively, copies of which letters have been furnished to me at my request, and from which I quote as follows:

"* * * I mail you a copy of this law. It has come to my knowledge that your company has been violating Section 1 and seems to have subjected itself to the penalty provided in Section 5. This, in the case of policies issued to and in behalf of Mr. David Rubidge of this city. Mr. Rubidge tells me himself that a parcel of policies which he has in his possession issued by your Company and which are without the approval in writing or countersignature of any resident agent whatsoever, were issued at the home office.

"I write this letter to give you an opportunity to show cause whether this department should not refuse to issue you

an authority to transact business in this State for the year 1900. * * *"

"* * * In view of the foregoing and especially of the character of the letter just received from you, I feel impelled to advise you that this department gives your Company until the 15th of March, 1900, within which time you must show cause to the department by correspondence or through some representative or attorney, as may be elected by its officers, why a certificate of authority to do business in this State during the year 1900 should not be refused by it."

"* * * I have been giving the matter of issuing a license to your company for the year 1900 a very careful consideration. I have had several interviews with Mr. Horace Phelps of the firm of Benedict & Phelps, Attorneys for your Company in this city. We have gone over the ground thoroughly and your side of the case has been most ably presented by him. For the reasons set out at length in my letter to Mr. Phelps, under date of today, I can not see my way clear to authorize your Company to transact business in this State during the year 1900. I enclose a copy of the letter to Mr. Phelps.

"I hope I need not say to you that it is with great regret that I take the action which seems to be imposed upon me by the law and the proper execution thereof. In the adjustment of matters of this kind the interests of a single company can not be alone considered, but the effect of any decision upon all companies doing business in the State, their relations to the department and to the general public must be kept in mind.

"In view of the foregoing, I must advise you that the German Fire Insurance Company of Peoria, Illinois, is no longer authorized to transact the business of insurance in this state. You will, of course, protect all business heretofore transacted, but cease the procurement of new business from and after the receipt of this letter. I advise Mr. Rubidge, even date hereof, of this determination. * * *"

Under the insurance laws of this state, the annual licenses of insurance companies to do business within this state expire on the last day of February in each year. The annual reports of the insurance companies doing business within this state must be filed with the insurance department on or before the first day of March in each year, and a synopsis of each annual report, together with the superintendent's cer-

tificate of authority to transact business in the state, must be published in some newspaper of general circulation published at the capital.

From the above quoted sections of the insurance laws, it appears that the annual reports are not due until the day following the date on which the annual licenses expire. It is manifestly impossible for the insurance department to examine the annual reports of each insurance company doing business within this state, prepare a synopsis thereof, and issue the annual licenses before the close of business on March 1. It would be an inexcusable hardship upon insurance companies to require them to cease doing business in this state until such time as their reports could be examined and their written licenses issued. It has, therefore, been the uniform practice of the department for many years past, and perhaps from the date of the organization of the department, or at least from the passage of the above quoted statutes, to permit insurance companies to continue their business after the expiration of their licenses, until such time as the insurance department is able to furnish them their written certificates or licenses.

I have been informed by you that the matter of the violation of the insurance laws by the said company was not brought to the attention of your department until on or about the 27th day of February, 1900, or the day preceding that on which the license of the company expired. Had you revoked the license on that date, there could be no question but what such revocation must, under the law, have continued for at least one year from the date thereof. Such a revocation, however, without giving the company an opportunity to be heard in its defense, would have given the company just cause for complaint and for feeling aggrieved. In giving the company an opportunity to be heard, its license for the year 1899 expired, and it is now contending that your refusal to *renew* its license for the year 1900, was not equivalent to a *revocation* which must continue for at least one year.

The language of section 5 of said act of 1899, that an insurance company violating or failing to observe and comply with the provisions of the act,

> "Shall have its authority to transact business in the State revoked by the Superintendent of Insurance, and such revocation shall continue for at least one year from the date thereof,"

is mandatory, and leaves the insurance department without discretion in the case of a violation of said act. Having ascertain that the law has been violated, it is the duty of the department to act under the statute, and it will scarcely be contended by any person that the law would, in any event, require the Superintendent of Insurance to issue a license and immediately thereafter revoke the same. In my judgment, the law will not bear a construction which will permit an insurance company, if it should so desire, to violate the law with impunity on the day of the expiration of its license, and then insist upon a renewal thereof upon the following day. Neither can I believe that it is the spirit or intent of the law to require the Superntendent of Insurance to issue to an insurance company known by him to have violated the act of 1899 immediately before the close of the last insurance year "a certificate stating that the requirements of the laws of this state have been complied with and authorizing it to do business."

In a case entitled *Ohio ex rel. vs. Life Insurance Company,* 58 Ohio State Reports, page 1, it is said:

> "This section of the statute expressly authorizes the Superintendent of Insurance in case 'such company refuses to pay said tax, after demand therefor has been made' * * * to 'revoke the license of such company to do business in this state.' If, upon this ground, he may revoke a license previously issued it would seem to, unquestionably, follow that he may also, upon such ground, refuse to issue or renew such license to the defaulting company."

After a careful examination of this act, I am of the opinion that the action of the insurance department, under date of March 27, 1900, advising the company, through its secretary, "that the German Fire Insurance Company of Peoria, Illinois, is no longer authorized to transact the business of insurance in this state," and must "cease the procurement of new business from and after the receipt of this letter," was justified under the law, and that said company is not entitled, under the law, to a renewal of its license to do business for a period of one year thereafter.

In conclusion, I beg to say that an early response to your request for my official advice was deferred, in order that I might avail myself of the very able briefs of counsel which were submitted by C. W. Franklin, Esq., and Benedict & Phelps, on behalf of the protestants and the German Fire Insurance Company of Peoria, Illinois, respectively.

Very respectfully,

DAVID M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. H. H. Eddy,
Deputy Superintendent of Insurance,
Denver, Colorado.

IN RE

## DISTRICT JUDGES.

---

The Territorial Act, (Laws of 1870, page 66; 1 Mills' Ann. Stats., Sections 1031-1033), providing for the forfeiture by a District Judge, of one quarter's salary for his failure to decide all questions within ninety days after the adjournment of court, is unconstitutional and void.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, August 7, 1900.

Sir—I have the honor to acknowledge the receipt of your official communication of the 3d instant, transmitting a written communication recently received by you from one of the Denver daily evening newspapers, the material portion of which communication is as follows:

"You are hereby notified that the Hon. Peter L. Palmer, one of the judges of the Second Judicial District, has failed to comply with the requirements of Section 1031 Mills Statutes, in that he has not determined all matters submitted to his court within ninety days after the adjournment thereof, and that by reason of such failure, is not entitled to receive any salary for the quarter in which said failure has occurred.

"You are therefore hereby warned not to audit or allow the account of said Peter L. Palmer for the quarter commencing July 1st 1900, and that should you audit or allow said account you and your official bondsmen will be held liable for the amount so audited or allowed.

"Dated at Denver, Colorado, this twenty-eighth day of July 1900."

I note your inquiry in the following language:

"Will you kindly advise me whether or not the section quoted in said protest, to-wit, 1031, Mills' Statutes, is good and

sufficient grounds for me to withhold the issuing of said warrant?"

The question of fact as to whether or not the honorable district judge "has failed to comply with the requirements of section 1031, Mills' Statutes, in that he has not determined all matters submitted to his court within ninety days after the adjournment thereof," and has thus brought himself within the terms of said statute, if such a question may lawfully be determined by an executive officer, a matter upon which I express no opinion, is a question to be determined by the Auditor of State and not by this office. In this opinion, therefore, I shall assume that you desire my official opinion as to your duty, in the event that you shall hereafter determine the said question of fact in accordance with the statement contained in the said protest.

In the view which I take of the question submitted, it is unnecessary for me to determine the exact period of time covered by the words: "for the quarter in which such failure shall occur." It is also unnecessary for me to determine the effect of the statute in a case where the commencement of a succeeding term of court, as fixed by law, is more than ninety days from and after the date of the adjournment of the court for the last preceding term.

The section of Mills' Annotated Statutes above referred to is section 1 of an act, containing three sections, which was passed by the territorial legislature in 1870. The said act is entitled "An act relating to the judges of the Supreme Court of Colorado territory," approved February 11, 1870, and is reprinted in chapter 35 (division II, entitled "District Courts") of Mills' Annotated Statutes, as sections numbered 1031, 1032 and 1033 thereof.

While the title of the act refers to the judges of the Supreme Court, the body of the act deals with District Courts. The first section of said act provides that:

"Every motion, demurrer, issue, or other matter, arising in any cause pending, or to be tried in any district court of this territory, and which shall be submitted to any such court for judgment or decision, shall be determined within ninety days after the adjournment of court; * * *"

This section contains a proviso to the effect that the section shall not be so construed as to prohibit a decision after the expiration of the time limited, "but only as working a forfeiture as hereinafter provided."

Section 2 of said act provides that if any judge of any District Court to whom any matters shall be submitted for judgment or decision shall fail or neglect to decide or give judgment upon the same within the time limited by section 1 of this act, "he shall not receive from the territorial treasury any salary for the quarter in which such failure shall occur."

Section 3 of said act provides that the auditor of the territory, before auditing the account of any judge for salary,

"Shall require such judge to certify that all motions, demurrers, issues, and other matters arising in any cause, which have been submitted to him for judgment or decision thereon, have been determined as required in the first section of this act."

Legislation of this character is a matter entirely within the province of a territorial legislature, or of a state legislature, where no constitutional restriction exists.

Carlile vs. Henderson, 17 Colo., 532, 534.

The Constitution of this state, adopted in the year 1876, contained the following among other provisions:

"Judges of the Supreme and District Courts shall each receive such salary as may be provided by law; * * *"

Section 18, Article VI, Constitution.

"Except as otherwise provided in this Constitution, no law shall extend the term or any public officer, or increase or diminish his salary, or emoluments after his election or appointment; * * *"

Section 30, Article V, Constitution.

The above section of the Constitution was amended in 1882 by adding thereto the following, among other provisions:

"Judges of the district courts shall each receive an annual salary of four thousand dollars."

Another provision of the Constitution provides that certain executive officers of the state, named in the Constitution,

"Shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms."

Section 19, Article IV, Constitution.

The Supreme Court of this state, in construing the last two above cited constitutional provisions, made use of the following language:

"Section 30 of Article V is clear, explicit and decisive. * * *

"By section 19 executive officers can not have their salaries increased or diminished during their official terms. By section 30 no public officer can by law have his term extended or his salary or emoluments increased or diminished after his election or appointment."

Carlile vs. Henderson, 17 Colo., 532, 535-536.

The conclusion, therefore, is irresistible, that any law which operates to diminish the salary or emoluments of any public officer of this state, after his election or appointment, is in conflict with the above cited provisions of the Constitution of this state, and

is therefore void. Upon this proposition there can be no two opinions. The one remaining question for consideration, and the only question upon which a difference of opinion may exist, is the question as to whether or not the said act of 1870, providing, as it does, for "working a forfeiture" of the salary of a district judge for one quarter of a year for "failure or neglect" to decide a question within a given time, has the effect of "diminishing" his salary within the meaning of the constitutional inhibition.

So far as I am at present advised, this particular question has never been determined by the courts of this state, and I believe that this is the first attempt that has ever been made, in this state, to enforce the provisions of said territorial act. We are, however, not without authority in the opinions of courts of final resort in other states.

A statute of Tennessee provided that, if for any cause a judge of any court of record failed to attend, the bar should elect one of its members as a special judge, who should preside in the place of the regular judge. The act further provided that the special judge should be paid at the same rate as the regular judge for the time he served, and that the amount thus paid should be deducted from the salary of the regular judge.

The Constitution of the state of Tennessee provides that the compensation of its judges "shall not be increased or diminished during the term for which they were elected."

The above statute was held invalid by the Supreme Court.

Burch vs. Baxter, 12 Heisk. (Tenn.), 601.

Twelve years later the Supreme Court of the same state was called upon to pass upon the validity of a later statute of that state, which provided that a special judge should receive no compensation from the state unless the regular judge should expressly

authorize the same to be paid out of his own salary. In upholding this later statute, the Supreme Court took occasion to quote with approval its former decision in *Burch vs. Baxter, supra,* and said:

"And this act was properly held to be unconstitutional because it diminished the salary of the regular judge during his continuance in office."

The Constitution of the state of Kentucky provides that the judges of the Circuit Court shall receive a compensation "which shall not be diminished during the time for which they were elected." The Constitution of that state further provides that

"It shall be the duty of the General Assembly to regulate by law in what cases, and what deductions from the salaries of public officers, shall be made for neglect of duty in their official capacity."

A statute of that state provided that if the circuit judge be absent, or if present and "he cannot properly hold court," a judge *pro tem.* shall be elected by the bar, and his salary shall be deducted from the salary of the circuit judge.

The Supreme Court, in construing the above statute, held that no deduction could rightfully be made from the salary of the circuit judge, except for *neglect,* and that a statute authorizing a deduction for any other reason than the one specified in the Constitution is unconstitutional and void.

Auditor vs. Adams, 13 B. Mon. (Ky.), 150.

The above decision has been twice since reaffirmed by the same court.

Garrard vs. Nuttall, 2 Met. (Ky.), 106.
Auditor vs. Cochran, 9 Bush (Ky.), 7.

The Constitution of the state of Arkansas provides that the judges of the Supreme and Circuit Courts shall receive a compensation "which shall not

be diminished during the time for which they were elected."

A statute of that state provided that if any judge of the Circuit Court

"Shall fail to hold his court in any of his counties, at such time as is required by law, such judge shall forfeit and pay to the State, the sum of one hundred and fifty dollars."

The Supreme Court of that state, in construing the above statute, made use of the following language:

"All experience proves, that power over a man's subsistence amounts but too frequently to a power over his will. If the judges fail to do their duty, they are liable to removal by address or impeachment. The constitution forbids their salary being taken from them, or reduced in its amount. The Legislature can not effect, indirectly, what it is forbid to do, directly. It is certainly a clear proposition, that the Legislature can not declare that the salary of the judges, upon a failure to discharge their duties, shall be forfeited to the State. To allow them to do that, necessarily makes them the judges of what should constitute a forfeiture; and that would indirectly place in their hands the power to lessen, or entirely take away, their salary, during the term for which they are elected, which is clearly and pointedly inhibited by the constitution. The salaries of the judges of the Supreme and Circuit Courts stand upon the same ground, and the Legislature can no more touch the salary of the one than of the other. They are both fixed, so far as their diminution is concerned, by the constitution, and are inviolate, and excepted out of the powers of the Legislature. * * * We can regard this law in no other light than as an act of forfeiture in favor of the State, for the non-performance of a judicial duty, and, for that failure, it decrees a certain amount of the judge's compensation forfeited to the State.

"If this does not expressly diminish the salary of the judge, during the time he is in office, by indirect, yet effectual means, then we are sure language can not give the power. To our minds, the act is a direct and dangerous attack upon the independence of the judiciary, and upon the freedom and happiness of the people, and in contravention of their supreme will, as expressed in the constitution."

*Ex Parte* Tully, 4 Ark., 220, 224-225.

In my opinion, our constitutional inhibition not only applies to direct legislation, the avowed purpose and object of which is to diminish the salaries of public officers after their election or appointment, but also to any indirect legislation which has the effect of diminishing their salaries after their election or appointment, and I am further of the opinion that the constitutional restriction applies not only to legislation enacted after their election or appointment, but to legislation enacted before their election or appointment, where, by the provisions of the statute itself, it does not become operative as to a particular officer until the happening of some event, after his election or appointment, and which may or may not happen.

The Constitution of this state, at the time of its adoption, created the office of district judge and fixed the tenure thereof, but left the compensation to be regulated by statute. By the above cited amendment to the Constitution of this state, adopted in 1882, the salaries of district judges are fixed at four thousand dollars per annum. I am of the opinion that, even in the absence of a constitutional provision forbidding the diminution of the salaries of district judges after their election or appointment, it would be beyond the legislative power to in any way reduce or diminish the salaries of district judges as fixed by the Constitution, unless there existed a constitutional provision expressly authorizing such diminution.

"The authorities all recognize and establish the doctrine, that a constitutional office is beyond the reach or control of legislative authority, except in the manner and to the extent expressed in the constitution; and that where a salary or compensation is provided by the constitution, it is an incident to the very office itself, and can not be detached from it. The right to the salary follows the office, as shadow follows the substance."

Blair vs. Marye, 80 Va., 485, 492.

My conclusion, therefore, is that the said territorial act of 1870 is in conflict with the Constitution of the state of Colorado, and is inoperative and void.

Respectfully submitted,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. George W. Temple,
Auditor of State,
Denver, Colorado.

---

IN RE

## FOREIGN INSURANCE COMPANIES.

---

Amount of deposit required by statute to be made by Foreign Insurance Companies doing business in Colorado.

What constitutes an impairment of the capital of Foreign Insurance Companies.

---

State of Colorado,
Attorney General's Office.
Denver, Colorado, August 9, 1900.

Sir—I have the honor to submit the following reply to your official request for advice to your department, upon three questions, which are as follows:

"1. Under our statutes, what is the amount of the deposit which must be made with the State Treasurer of this State, or with the duly authorized officer of some other State of the United States, by foreign insurance companies doing business in this State, in exclusive trust for the benefit and security of all of the Company's policy holders and creditors, and which our statutes

declare "shall be deemed for all purposes of the insurance laws, the capital of the company making it?"

"2. Under what circumstances may the capital of foreign insurance companies doing business in this State be said to have become impaired?"

"3. If it shall appear that the capital, that is, the deposit, of a foreign insurance company has become impaired or reduced in value, will this fact authorize this Department to revoke the license of such Company to do business in this State, upon the ground that its affairs are in an unsound condition?"

I will reply to the three questions in their order.

1. Domestic joint stock fire or life insurance companies are not permitted to do business in this state, unless they are possessed of an actual paid up cash capital as follows: Fire insurance companies, of not less than two hundred thousand dollars, and life insurance companies, of not less than one hundred thousand dollars.

3 Mills' Ann. Stats., section 2220.

The same section of our statutes contains the following provision:

"No joint stock insurance company organized for any purpose other than fire or life insurance shall be permitted to do any business in this state unless possessed of an actual paid up cash capital of not less than one hundred thousand dollars."

The same section of our statutes also provides that no foreign fire or life insurance company incorporated or associated under the laws of any government or state other than the United States, shall be permitted to do business in this state, until it has deposited with the State Treasurer of this state, or with the duly authorized officer of some other state of the United States, a sum not less than the capital required of domestic insurance companies.

You will observe that the statute does not provide for a deposit by foreign joint stock insurance companies doing business in this state, where they are organized for any purpose other than that of do-

ing a fire or life insurance business. This omission may have been, and probably was, an oversight on the part of the legislature in framing our statutes upon the subject of deposits required of foreign insurance companies.

2. The foreign insurance companies with which we are now dealing, are companies incorporated in foreign countries, and not under the laws of any state within the United States other than the state of Colorado. Such companies, in doing business in the United States, do business through what is commonly called "An American Branch," and the deposit required by our statutes, which is also declared to be the capital of the company making the deposit, may be designated, for convenience, as the capital of the "American Branch."

This statutory deposit, or capital, which is deposited in trust for the benefit and security of all of its policy holders and creditors, is not subject to withdrawal by the company. It may, however, be impaired either where the bonds or other securities deposited shrink in value until their market value is less than the minimum deposit required by our statute, or where the company, being unable to meet its obligations to its policy holders or creditors, is compelled to allow the deposit to be drawn upon to meet its obligations to an extent which reduces the remaining deposit to less than the minimum deposit required by our statutes.

Strictly speaking, its deposits or capital is impaired the moment it is reduced in amount either by the shrinkage in value of its securities or in any other manner, but in my judgment your department is not called upon to take official action unless the impairment is sufficient in amount to either leave the affairs of the company in an unsound condition or to reduce its deposit or capital below the minimum fixed by our statutes.

3. The statutes of this state provide 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, * * *"

1 Mills' Ann. Stats., section 2211.

The question, therefore, of the soundness or unsoundness of an insurance company doing business in this state, is, in all cases, a question of fact to be determined by the insurance department. The mere fact that the statutory deposit or capital is impaired does not show conclusively that the affairs of the company are in an unsound condition. This is one element which may be taken into consideration by the department in determining the soundness or unsoundness of the company. The deposit or capital, by the shrinking in value of its securities, may be impaired and yet its assets may exceed its liabilities to a very large amount and the company be entirely solvent.

In my judgment, the mere fact that its deposit is impaired, where it does not appear to your department that its affairs are in an unsound condition, does not call for official action from your department, unless the deposit should become so far impaired as to reduce the same to an amount less than the minimum deposit required by our statutes, in which event, it would no doubt become the duty of your department to require an additional deposit to be made, sufficient in amount to maintain at least the minimum deposit required by our statute.

Very respectfully yours,

D. M. CAMPBELL,
Attorney General.
By CALVIN E. REED,
Assistant.

To Hon. H. H. Eddy,
Deputy Superintendent of Insurance,
Denver, Colorado.

# INDEX.

# INDEX.

## A


Page.

Adjutant General, Opinions to—

Concerning armory for National Guard....199, 207

Claim of L. P. McGwire.... 209

Term of enlistment of members of National Guard.... 256

Agricultural land funds.... 71

Agriculture—

See State Board of Agriculture.

Appropriations—

For payment of salaries.... 200

For state wagon road.... 107

In excess of revenues, void....154, 224

Order of payment....144, 163-166, 216, 221

Armory for National Guard....199, 207

Attorney General—

Biennial Report, letter of transmittal.... 3

Cases in court.... 5

Disbarment proceedings.... 6

Important court cases.... 7

Moneys received and disbursed.... 4

Office docket.... 5

Official opinions.... 9

State finances.... 11

Suit upon bond of State Treasurer.... 9

Auditor of State, Opinions to— Page.
Concerning officers and employes of General Assembly..... 19
Payment of salaries..... 200
Relief bills..... 144
Salary of District Judges..... 267
Scalp bounties..... 190
Autrefois attaint..... 258

## B

Board of Agriculture—
See State Board of Agriculture.
Board of Health—
See State Board of Health.
Board of Lunacy Commissioners—
Authorized to appoint Superintendent of Insane Asylum.... 146
Bonded indebtedness of the state..... 174
Bond of State Treasurer, suit upon..... 9
Bounties—
See Scalp Bounties.
Briscoe, Hon. Cole, Opinion to—
Concerning relief bill..... 96

## C

Capitol Building warrants..... 240
Casual deficiencies of the revenue.....171, 191
Certificates of Indebtedness—
When void..... 154
Certificates of Incorporation—
When Secretary of State forbidden to receive..... 179
Civil cases, juries in..... 27
Civil Code—
Verdicts of juries..... 27
Coal Mine Inspector—
See State Coal Mine Inspector.

Colorado Insane Asylum— Page.
Maintenance of Superintendent..... 85
Office of Superintendent abolished..... 146
Conrad, M. Ernest—
Relief bill for widow of, unconstitutional..... 54
Continuing appropriations.....233, 248
Contracts of insurance companies..... 183
Corporations—
Certificates of incorporation..... 179
Counties—
Classification of, in reference to county high schools..... 213
County Commissioner—
Vacancy in office of..... 38
County High Schools—
See Schools.
County mill levies..... 176

## D

Disbarment proceedings..... 6
District Judges—
Statute providing for forfeiture of salary of, void..... 267
Docket, office..... 5

## E

Excess appropriations void..... 170
Exposition—
See Paris Exposition.

## F

Finance Committee—
See Senate Finance Committee.
Fire Insurance Companies—
See Insurance Companies.
See Mutual Fire Insurance Companies.
Foreign Insurance Companies—
See Insurance Companies.

## G


General Assembly— Page.

When inhibited from passing relief bills ..... 54

May not appropriate Internal Improvement Fund for erecting buildings for state institutions..... 60

Members of, not eligible as Trustees of State Normal School ..... 44, 81

Officers and employes of..... 19

General Revenue Fund—

Not entitled to interest on deposits of state funds..... 88

Transfer to from Public School Fund..... 111

German Fire Insurance Company of Peoria, Illinois—

License revoked..... 266

Gifts—

Bill to tax is a revenue measure..... 52

Governor—

Authority of, to remove appointive officers..... 211

Authority of, to rent armory for National Guard.....199, 207

Without power to authorize expenditures in excess of revenues ..... 154

Governor, Opinions to—

Concerning authority to remove appointive officers..... 211

Convicts who commit crimes while undergoing sentence ..... 258

Indebtedness of state institutions..... 154

Interest on Public School Fund..... 197

Paris Exposition Commissioners..... 122

State Board of Agriculture..... 102

State Board of Medical Examiners..... 17

State revenues and payment of appropriations..... 216

State wagon road..... 107

Superintendent of Insane Asylum..... 85, 146

Trustees of the State Normal School..... 44, 81

Vacancy in office of county commissioner..... 38

## H

Health— Page.

See State Board of Health.

High Schools—

See Schools.

House Bill No. 95..... 190

House Bill No. 204..... 96

House Bill No. 266..... 123

House Committee on Appropriations and Expenditures, Opinion to—

Concerning relief bill..... 96

## I

Indebtedness of state institutions..... 154

Indebtedness in excess of state revenues, void..... 154

Inheritances—

Bill to tax is a revenue measure..... 52

Industrial School for Girls—

See State Industrial School for Girls.

Insane Asylum—

See Colorado Insane Asylum.

Insurance Companies—

Contracts with agents..... 183

Foreign, deposit required of..... 275

Foreign fire insurance policies must be countersigned by resident agent..... 260

Foreign, impairment of capital, what constitutes..... 275

Life insurance companies' capital, of what must consist.... 187

Special adviser's contract..... 183

Insurance Department—

Supervision over mutual fire insurance companies..... 141

When may require additional deposit by foreign insurance companies..... 275

When shall revoke license of foreign fire insurance companies..... 260

Interest— Page.
On deposits of state funds..... 88
On public land funds credited to income funds..... 71
Internal Improvement Fund—
Purposes for which may be used..... 60
Internal Improvement Income Fund—
Purposes for which may be used..... 60

## J

Judges—
See District Judges.
Judiciary Committee, Senate—
See Senate Judiciary Committee.
Juries in civil cases..... 27

## L

Land Commissioners—
See State Board of Land Commissioners.
Legacies—
Bill to tax is a revenue measure..... 52
Life Insurance Companies—
See Insurance Companies.
Lunacy Commissioners—
See Board of Lunacy Commissioners.

## M

McGwire, L. P.—
Claim of..... 209
Medical Examiners—
See State Board of Medical Examiners.
Militia—
See National Guard.
Mill levies.....156, 228
Mob—
Property destroyed by..... 96

Page.

Moneys received and disbursed by Attorney General..... 4

Mutual Fire Insurance Companies—

Subject to supervision of Insurance Department..... 141

## N

Name, corporate..... 179

National Guard—

Armory for.....199, 207

Members of, entitled to same compensation for injury as under United States Army Regulations..... 209

Pensions ..... 209

Term of enlistment of members of..... 256

Normal School—

See State Normal School.

## O

Officers and Employes of General Assembly—

Act of 1895, fixing number and compensation, void..... 19

Officers, Appointive—

Power of Governor to remove..... 211

Opinions, official..... 9, 15

## P

Paris Exposition—

Commissions to represent Colorado..... 122

Penitentiary Land Funds..... 71

Pensions—

When members of National Guard entitled to..... 209

Public Building Land Funds..... 71

Public Instruction—

See Superintendent of Public Instruction.

Public Land Income Fund— Page.
Not available for salaries and expenses of State Board of Land Commissioners..... 71
Public School Fund—
When transferred to General Fund..... 111
Public School Funds—
Interest thereon credited to Income Fund..... 75, 197
Public School Income Fund—
Not available for salary and expenses of Superintendent of Public Instruction..... 71
Of what it consists..... 75
Public Schools—
See Schools.

## R

Relief Bills—
Order of payment..... 144
When General Assembly inhibited from passing..... 54, 96
Revenues—
Appropriations in excess of, void.....154, 216
Bills to tax gifts, etc., must originate in House of Representatives ..... 52
Deficiency of.....154, 216
Road—
See State Wagon Road.

## S

Salaries—
Appropriations for payment of..... 200
Salary of District Judges—
Statute providing for forfeiture of, is void..... 267
Saline Land Permanent and Income Funds—
Appropriation of..... 71
Scalp Bounties—
Appropriation for the payment of..... 190
Not made by act providing for the branding and marking of live stock..... 192, 196

School Districts— Page.
Special meeting of electors, notice..... 138
School Funds—
See Public School Funds.
Schools—
County high schools..... 213
What counties may organize..... 213
Secretary of State, Opinion to—
Concerning corporate names..... 179
Secretary of State—
When forbidden to file certificates of incorporation..... 179
Seldomridge, Hon. H. H., Opinions to—
Concerning interest on deposits of state funds..... 88
Public Land Income Funds..... 71
Senate, Opinion to—
Concerning taxation of gifts, etc..... 52
Senate Bill No. 20..... 52
Senate Bill No. 31..... 60
Senate Bill No. 116..... 107
Senate Bill No. 123..... 148
Senate Bill No. 126..... 54
Senate Bill No. 142, unconstitutional..... 27
Senate Bill No. 152..... 60
Senate Finance Committee, Opinions to—
Concerning Internal Improvement Fund..... 60
Interest on deposits of state funds..... 88, 197
Public Land Income Funds..... 71
Toll road companies..... 84
Senate Judiciary Committee, Opinions to—
Concerning Internal Improvement Fund..... 60
Juries in civil cases..... 27
Relief bills..... 54
State—
Claims against..... 54, 96

State Board of Agriculture— Page.
Members, time of appointment ..... 102
State Board of Health—
Appropriation for ..... 105
Authority of ..... 134
Creation of ..... 105
Expense incurred by, when paid by county ..... 134
Members appointed by Governor ..... 105
Term of office ..... 105
State Board of Inspection Commissioners—
Authority of relating to Stock Inspectors ..... 118
State Board of Land Commissioners—
Salaries and expenses not payable out of Public Land Income Funds ..... 71
State Board of Medical Examiners—
Expenses of, how paid ..... 17
Fees received by ..... 17
State Coal Mine Inspector—
Power of Governor to remove ..... 211
State finances ..... 11
State finances, a review of ..... 216
State Funds—
Interest on deposits of ..... 88
State Industrial School for Girls—
Appropriation for ..... 216
State Institutions—
Appropriations for, order of payment ..... 216
Indebtedness of, when Governor may not authorize ..... 154
May not receive appropriations from Internal Improvement Fund for buildings ..... 60
State Life Insurance Company, The—
Contracts of ..... 186
State Militia—
See National Guard.

Page.

State Normal School—
Trustees of, civil officers ..... 44
Vacancy in Trustees of ..... 81

State Treasurer—
Duty of, in relation to interest on deposits of state funds.. 88, 197
Duty of, to transfer Public School Fund ..... 111
Opinion to, concerning Public School Fund ..... 111
Suit upon bond of ..... 9

State Wagon Road—
Mineral county ..... 107

Stock Inspectors—
Number, no deputies ..... 118

Superintendent of Insane Asylum ..... 85, 146

Superintendent of Insurance, Opinions to—
Concerning capital of life insurance companies ..... 187
Deposit required of foreign insurance companies ..... 275
Mutual fire insurance companies ..... 141
Revocation of license of foreign fire insurance companies ..... 260
Special adviser's contract ..... 183

Superintendent of Public Instruction, Opinions to—
Concerning county high schools ..... 213
Notice of special school district meeting ..... 138
Salary and expenses of, not payable out of Public School Income Fund ..... 71

## T

Taxation—
Bill to tax gifts, legacies and inheritances is a revenue measure ..... 52

Taylor, Hon. Ed. T., Opinions to—
Concerning Internal Improvement Fund ..... 60
Juries in civil cases ..... 27
Relief bills ..... 54

Toll Road Companies—
Collection of toll after expiration of charter ..... 84

Trustees of State Normal School, The— Page.
Civil officers under the state..... 44
Tyler, G. E., M. D., Opinions to—
Concerning authority of State Board of Health..... 134
State Board of Health..... 105

## U

University Land Funds..... 71

## V

Vacancy—
In office of county commissioner..... 38
Trustee of State Normal School..... 81
Verdicts of juries in civil cases..... 27

## W

Wagon Road—
See State Wagon Road.
Waldron, A. J., Opinion to—
Concerning Stock Inspectors..... 118
Wasson toll road..... 107
Whitney, Sumner—
Relief bill for widow of, unconstitutional..... 54
World's Fair—
See Paris Exposition.