Biennial Report

of the

Attorney General

of the

State of Colorado

Biennial Report

of the

Attorney General

of the

COMPLIMENTS OF

BENJAMIN GRIFFITH
Attorney General

Years 1911 and 1912

BENJAMIN GRIFFITH
Attorney General

DENVER, COLORADO
THE SMITH-BROOKS PRINTING CO., STATE PRINTERS
1912

ATTORNEYS GENERAL OF COLORADO

FROM THE ORGANIZATION OF THE STATE

A. J. Sampson 1877-1878
Charles W. Wright 1879-1880
Charles H. Toll 1881-1882
David F. Urmy 1883-1884
Theodore H. Thomas 1885-1886
Alvin Marsh 1887-1888
Samuel W. Jones 1889-1890
Joseph H. Maupin 1891-1892
Eugene Engley 1893-1894
Byron L. Carr 1895-1898
D. M. Campbell 1899-1900
Charles C. Post 1901-1902
Nathan C. Miller 1903-1906
William H. Dickson 1907-1908
John T. Barnett 1909-1910
Benjamin Griffith 1911-1912

ATTORNEY GENERAL'S OFFICE

Benjamin Griffith.....Attorney General

Archibald A. Le[illegible].....Deputy Attorney General

Charles O'Connor.....First Assistant Attorney General

Philip W. Mothersill.....Second Assistant Attorney General

*Theodore M. Stuart.....
.....Third Assistant Attorney General and Law Clerk

George D. Talbot.....Special Counsel

Margaret E. Fallon.....Stenographer

Frances Henderson.....Stenographer

†Marie L. Howell.....Stenographer

INHERITANCE TAX APPRAISERS

E. R. Harper.....District No. 1

Oliver E. Collins.....District No. 2

Karl A. Bickel.....District No. 3

*Mr. Frederick D. Anderson occupied this position during Mr. Stuart's absence from the office temporarily in the fall of 1911; and Mr. Ernest B. Upton occupied the same position from December 1, 1912, to January 14, 1913.

†Miss Bessie Thompson occupied this position from December 15, 1912, to January 14, 1913.

Biennial Report

of the

Attorney General

of the

State of Colorado

To His Excellency,
John F. Shafroth,
Governor of Colorado.

Sir: In accordance with the laws of the State of Colorado, I have the honor to submit the following report of the office of Attorney General during the term of my incumbency of such office.

This report being limited to 300 pages, manifestly it is only practicable to touch upon the more important matters considered by me, and I shall content myself accordingly.

The first part of this report will deal with certain of the more important cases and matters affecting the public interests which have been handled during my term of office; then will follow a list of civil and criminal cases in which I have appeared in the various courts, together with a brief statement of their status and disposition. Finally I shall set forth and make reference to certain opinions. It has been the precedent of the various attorneys general heretofore to conclude their reports by setting forth *in extenso* certain opinions in writing given by the office. The opinions written during my term of office cover over two thousand typewritten pages, and it will be impossible in this limited volume to set out at length even the more important. I have therefore concluded to depart from the precedent heretofore established, and to select only the more important of these opinions, set out some of them in full as space will allow, and set out syllabi as to others, and in the

syllabus of each opinion the book and page where the same may be found in full are referred to.

RATES AND SERVICE OF COMMON CARRIERS AND THE STATE RAILROAD COMMISSION

Upon being inducted into office, I found that the State Railroad Commission of Colorado was very much embarrassed by decisions of trial courts with reference to the validity of the law under which it was organized, and among the cases pending in the Supreme Court was one in which a writ of error had been sued out by the Attorney General directed to the District Court of the City and County of Denver, entitled The Consumers' League of Colorado vs. The Colorado & Southern Railway Company et al.

In this case the Railroad Commission had established a maximum rate for coal from northern Colorado to Denver, being a much lower rate than had theretofore obtained under the rules of the different railroad companies. This order of the Commission had been attacked in the District Court of Denver County, and the court had found that the act of 1907, under which the order was made, was unconstitutional and therefore void. As already stated, a writ of error had been sued out by the Attorney General with reference to this case.

I proceeded to file the abstract of record in the case and briefs on behalf of the Consumers' League, upholding the validity of the act of 1907 with reference to the Railroad Commission and its powers. The railroad companies, in their briefs filed in the court, raised the question, not only of the validity of the Commission, but of its power to fix maximum rates; to which latter contention a brief was filed by this office. I then secured the advancement of this case on the docket of the Supreme Court, and in an exhaustive opinion, handed down by a unanimous court, it was held: first, that the Railroad Act of 1907 was constitutional; and, secondly, that the Railroad Commission had the power under that act to fix maximum freight rates, and to see that all rates should be reasonable and just, and that there should be no undue preference or discrimination with reference to rates.

While it is true that the legislature of 1910 enacted a new Railroad Act, which now takes the place of the act of 1907, yet the act of 1910 is in most respects identical with the act of 1907, and the significance of the decision of our Supreme Court, in my opinion, is that the same rule of law with reference to the right of the Commission to fix freight rates applies to the language used in the act of 1910, as in the case of the act of 1907. This case is reported under the name of The Consumers' League of Colorado vs. The Colorado and Southern Railway Company et al., 125 Pacific, 577.

In the month of November, 1911, the Railroad Commission, acting under the law of 1910, promulgated an order which brought up an entirely new question of law under the Railroad Act. The Colorado and Southern Railway Company and its predecessors in interest had for thirty years operated a narrow-gauge line from Denver to Leadville by way of Como and Breckenridge. About the year 1910 the company determined to abandon the line from Como to Breckenridge, thus preventing through service over this line from Denver to Leadville and compelling the people of Breckenridge and Summit County, in order to get to Denver, to go around by way of Leadville, thence by the Denver and Rio Grande through Pueblo, or by the Colorado Midland through Colorado Springs to Denver. This change compelled them to pay a very large increase in the passenger rates to and from Denver, and the freight service became very unsatisfactory on account of the great delay in receiving their goods.

The Railroad Commission made an order requiring the Colorado and Southern to operate this abandoned line of road and to establish again through service over the narrow-gauge from Denver to Leadville. This question had nothing to do with rates, but raised the entirely new point as to whether the Railroad Commission under the act of 1910 could order an adequate railroad service for the people of the state from railroads operating therein.

The railroad company refused to obey the order of the Commision, whereupon this office, representing the Railroad Commission, and Mr. Barney L. Whatley, of Breckenridge, representing the Breckenridge Chamber of Commerce (and I desire here to express my appreciation for the exhaustive and able assistance rendered by Mr. Whatley in this case) proceeded to bring an action in the District Court of Summit County to compel the railroad company to obey the order.

The case was argued on the demurrer of the railroad company, before Judge Cavender, and, upon the demurrer being overruled and the railroad company compelled to answer, a change of venue or a new judge to try the case was requested by the railroad company, which request was granted, and Judge Rizer, of Pueblo County, was called in. After a new trial before Judge Rizer, the railroad company being permitted to offer additional and further evidence, the case was argued and the issues found against the railroad company, and the company ordered to resume the abandoned line and establish through service from Denver to Leadville by way of Como and Breckenridge.

Thereupon the case was taken by the railroad company to the Supreme Court, and in November, 1912, the Supreme Court sustained every contention of this office and ordered the resumption of service. The railroad company filed a petition for re-

hearing, which was denied on January 6, 1913. This case is not yet reported.

It gives me great pleasure to inform your Excellency that, by reason of the two decisions of the Supreme Court last above referred to, we have been able, after five years of continued and vexatious litigation, to establish, first, that our Railroad Commission is a valid organization and has rate-making powers; and, secondly, that it has power to compel a railroad company to furnish an adequate railway service to the people of the state.

While there is great room for improvement in needed amendments to our present Railroad Act, yet the vital matters which the people have been contending for have been decided and set at rest finally by our Supreme Court, and I trust we may be able to secure the advantage of proper railroad regulation from this time on.

I desire, however, to call your attention to one very great defect in our present Railroad Act, which should be amended forthwith, namely: Upon the order of the Commission being promulgated, generally speaking, that order does not become effective until the courts see fit to order it into effect. If an appeal is taken to the District Court, that appeal in itself stays the operation of the order. If, on the other hand, as in the Breckenridge case, the railroad company refuses to obey the order, the Railroad Commission or other interested party is compelled to go into court and secure compliance therewith. The law should be changed so that, unless the railroad company as the moving party should secure a stay of execution in the court, the order becomes effective in a certain number of days—say, thirty days.

Under the present law, we are continually met by every device known to lawyers to stay proceedings in court, and we are compelled to be the moving party in order to have the order made effective. This may well result, in many cases, in the order being of little practical benefit, since, under the law, the order is good for only two years from the date of its promulgation. If, on the other hand, the railroad company would have to secure a stay within a certain number of days, or else comply with the order, it would be compelled to hasten proceedings and bring the matter to an early conclusion, which certainly is the spirit and intent of the law, since, as already stated, the order is only effective for two years.

I am of the opinion, also, that the order of the Commission should be effective for two years from the time it is actually put into operation, and not from the time of its promulgation by the Commission. These amendments to the present law are necessary to make the law of the most practicable benefit to the people of the state.

TRUSTS AND COMBINATIONS

One of the most important questions, in its bearing upon the interests and welfare of the people of the state, with which this department has been concerned, is that having to do with combinations, or so-called "trusts." Many complaints of the existence of such trusts or combinations in various lines of business have been received at this office, and much time and labor have been expended in an effort to ascertain the real conditions, and remedy them if possible.

Work along these lines by any executive officer of the state would have been of uncertain value previous to the decision of the Court of Appeals in the case of *The Denver Jobbers' Association et al. vs. The People,* decided in March last, reported 21 Colo. App., 326, for lack of any definition of the powers of the state in the restraint or control of such trusts and combinations. Although thirty-four states of the Union have, and have had for years, laws dealing with such conditions, Colorado has been entirely without legislation thereupon.

Proceedings had been started in November, 1907, under the authority of the common law, to restrain the continuance and operation of such a combination, maintained by the wholesale and retail grocers of the state. Various demurrers and motions had been filed by the defendants, challenging the jurisdiction of the court to grant the relief prayed for and denying the authority of the Attorney General to bring such a proceeding. These demurrers and motions being overruled by the District Court, the defendants in that case had stood upon them and appealed to the Supreme Court, which appeal was still pending upon my assumption of the office of Attorney General.

A careful investigation of the law led to the conclusion that the theory upon which the case was instituted was correct. The questions involved were briefed minutely by this office, and were argued at great length to the newly created Court of Appeals, in November, 1911, with the result that the Court of Appeals upheld the contentions made on behalf of the people in every particular.

After the decision of the Court of Appeals, in the case of *The Denver Jobbers' Association et al. vs. The People,* I made a somewhat extended inquiry to ascertain if the conditions complained of in that complaint still existed, but was able to procure no tangible evidence that such was the fact. In the course of this investigation, however, and in other ways, repeated complaints came to my notice of the existence of such a combination or trust among the wholesale and retail lumber dealers of the state. Further investigation led to the conclusion that these complaints were well founded, and in July proceedings were begun against some twenty-nine lumber companies of Denver and northern Colorado, in the District Court at Greeley, for the dissolution of such combination, Hon. George A. Carlson, district attorney of the Eighth Judicial District, appearing with this

office for the people. Various motions and demurrers were interposed by the defendants, all of which have now been disposed of in favor of the state. The case was set for trial for December 9, at which time it would have been reached and tried, save for the fact that both myself and my deputy, who are the representatives of this department appearing in that case, were engaged at that time in the trial of the penitentiary cases at Canon City, and it was, therefore, necessary to procure a continuance, which was granted; the court, however, refusing to set the case down for trial at any definite date. I trust, however, that it may be possible to try this case before the expiration of my term.

By the decision of the Court of Appeals in the case of The Denver Jobbers' Association et al. vs. The People, a civil remedy of the utmost value is afforded the people of the state against the illegal and monopolistic control of any commodity. The Attorney General, acting at the request of the Governor or the General Assembly, under section 6186, Revised Statutes of 1908, or acting purely by virtue of his common-law powers, without such request or direction, may enjoin the formation or continuance of illegal and monopolistic combinations. Similar remedies are also available to the people through action by the district attorneys of the various districts, as to any such combinations purely local. For a violation of such injunction, the defendants, of course, would be punishable for contempt of court. This decision affords a substantial remedy, and future legislation should be directed towards amplifying the same and giving greater inquisitorial powers to investigating officers, such as obtain in many states. Under no circumstances should this remedy afforded us by the Court of Appeals be wiped out by statute, and a new and untried remedy substituted. Such action would only unsettle a satisfactory basis which we now have to work upon, and afford an opportunity for further protracted litigation. I would recommend, however, an act making it a crime to conspire to form a monopoly, artificially control prices, or eliminate competition unfairly, etc.

INHERITANCE TAX DEPARTMENT

A department of the work of this office of very great importance is that relative to the administration of the inheritance tax laws. A far greater amount of tax has been assessed and collected during the past biennial period than ever before since the first enactment of the law. The details are as follows:

Number of domestic estates examined and taxed	[illegible]
Number of domestic estates examined and found not taxable	672
Number of foreign estates examined and taxed	88
Number of foreign estates examined and found not taxable	28
Total number of estates examined	1,28[illegible]

Amount of tax collected from domestic estates	$383,727.68	
Amount of tax assessed and outstanding on domestic estates	38,454.87	
Amount of tax assessed and collected on foreign estates	29,450.23	
Total inheritance tax assessed		$451,632.78
Total tax collected		$413,177.91

We have found, as did our predecessors in this department, that the present inheritance tax law is indefinite and imperfect in many particulars, and strongly urge that the incoming legislature make several amendments which will facilitate the administration, economize the expense, and remove many of the ambiguities. For instance, we strongly recommend that, instead of having three appraisal districts, with three separate appraisers, there should be one inheritance tax commissioner, with a deputy, having authority throughout the state, and with headquarters at the State Capitol. This will unify the work of appraising estates, and increase the efficiency of the department.

Under the present law, direct heirs pay a tax of 2 per cent on their beneficial interests in excess of $10,000 in value, and collateral heirs pay a tax of 3 per cent when their interest exceeds $500. This tax of 2 and 3 per cent remains, no matter how much the interest received. A graduated tax applies to the interest received by strangers, the amount of tax increasing according to the increase in value of the beneficial interest received. We believe this graduated tax should apply to direct and collateral heirs as well. Such is the character of the inheritance tax law in most of the states where such a tax is found.

Under the peculiar wording of the law as it now stands, life estates are taxable without the benefit of the exemptions which apply to absolute estates. This often works a real injustice, and the law should be amended at least so as to allow the benefit of the usual exemption to those receiving a life estate.

Contingent interests, the value of which cannot be determined during the usual time within which an inheritance tax is fixed, and which therefore are untaxable under our present law, should be taxed under provisions similar to those found in California and New York, which fix a tax upon such contingent interests according to the highest rate under any possible contingency, and which allow a rebate when the contingency is determined and it is found that the beneficiary pays a tax of a less rate than what was originally fixed.

The law should be amended to require the representative of every estate to file a certified inventory of the estate with the proper inheritance tax authorities, and also requiring such representative to present to the County Court a receipt showing full payment of inheritance tax, or a certificate from the inheritance

tax commissioner that there is no tax, before the County Court may enter an order closing the estate.

The present law provides that, unless the inheritance tax is paid within six months from the date of decease, interest must be paid at the rate of 6 per cent from date of decease. Inasmuch as the statutes grant a year for the administration of estates, and generally it cannot be determined until the expiration of such year what will be the amount of the property to be distributed, and the amount of the debts and the expenses of the estate, we believe the law should be amended so as not to impose any interest upon the tax until after the expiration of the year of administration.

Attorneys often raise the question as to the right of the state, under the present law, to tax the stocks, bonds, and other securities of domestic corporations belonging to the estates of non-resident decedents. There should be an amendment making the law so clear as to remove any question as to what property is included within the taxing power of the state.

A penalty should be provided for the transfer of stocks, bonds, and securities of domestic corporations belonging to the estates of non-resident decedents, and the opening and transfer of the contents of safe-deposit boxes within the state, without proper notice to the Inheritance Tax Department and the written consent of such department. Under the present law, the person or company making such transfer, without having given such notice or awaiting such consent, is only liable for the payment of such tax as may be found to be due upon such property; but this is not sufficient to insure the notice of the proposed transfer or the awaiting of consent of the Inheritance Tax Department in every case, and the law is often evaded.

A large number of estates are examined by the Inheritance Tax Department and found to be not taxable, and waivers are issued for the transfer of property, and certificates are given showing that, in the opinion of the Inheritance Tax Department, no tax is chargeable against the estate. This entails a large amount of expense upon the state, for which there is no remuneration under the provisions of the present law. We recommend that a fee should be charged for each waiver issued and each certificate showing that the estate is not taxable, which fee should simply be large enough to cover the expense of the administration of the department in that particular. Attorneys have raised the question as to what county the inheritance tax should be paid upon stocks and other securities of domestic corporations belonging to the estates of non-resident decedents, since that does not seem to be definitely covered in the present law. We recommend that this indefiniteness be removed and a provision inserted authorizing the payment of such a tax, when there is no estate pending in any county in this state, directly to the State Treasurer.

The importance of the Inheritance Tax Department, because of the large and growing financial return it brings to the state, demands the serious consideration of your Excellency in the incoming General Assembly, and we most respectfully urge a painstaking and careful consideration and revision of the inheritance tax law.

The record of the inheritance tax appraisers of this office during this administration is unprecedented in the large amount of revenue collected and the comparatively insignificant expense of collecting the same, consisting almost entirely of the salaries of the three appraisers—being $2,400 per annum in District No. 1, and $1,800 per annum in Districts Nos. 2 and 3—and traveling expenses of the appraisers, which have been a small amount.

Each of the appraisers has been diligent, not only in seeing that the tax from the larger estates was scrupulously assessed and collected, but also in examining each and every estate coming to his knowledge, to determine whether or not a tax was due.

The larger portion of the work has fallen upon Hon. E. R. Harper, the appraiser for District No. 1, in which the City and County of Denver is situated. His report to me is so pertinent and timely, with reference to the matters stated, that I am pleased to set out the same as transmitted, as follows:

"Hon. Benjamin Griffith,
Attorney General.

Dear Sir: I have the honor to report that during the nineteen months I have had charge of District No. 1, as inheritance tax appraiser, I have examined 524 estates, from 381 of which there was no tax due the state, while from 105 estates $210,767.19 was found due as inheritance tax.

The large majority of those estates remaining unsettled, which have gone beyond the six-month period, are of no special importance, for the reason that very little, if any, tax is due from them; while all others are being actively attended to, so that they may be settled at the earliest possible date.

The Moffat estate is the most notable that cannot now be appraised, but must await further arrangement of outside matters. Even then it is doubtful if the tax will be found of especial consequence.

It is a pleasure to be able to report that we have had the most cordial and ready assistance of all attorneys representing estates before the department. There have been honest differences of opinion, however, especially regarding the intent and purpose of the Inheritance Tax Law. Unquestionably the law needs clarifying and amending to some extent. It has become one of the most important sources

of revenue-raising, and will rapidly increase in importance; consequently, the law should be improved at once and made as complete as possible, and I hope it can be brought about that the next legislature will make the necessary changes. In that connection, permit me to submit the following suggestions as to changes which seem to me essential:

The present plan of having the state divided into three districts, with an appraiser for each, should be done away with, and instead one Commissioner of Inheritance Tax appointed to have the complete administration of that department, just as the Insurance Commissioner directs that department.

The Inheritance Tax Commissioner should have a clerk (now in the Treasurer's office), a stenographer, and the right to appoint not to exceed two appraisers for work, as directed, throughout the state. This plan will make possible the thorough systematizing of the whole state in such a way as to insure the work being carried on more promptly and efficiently, and just as economically.

Blanks, upon which the proper report of an estate may be made, should be furnished each County Court by the state, and it should be the duty of the clerk of the County Court to deliver a copy thereof to each executor or administrator at the same time other blanks for probating the estate are delivered, and it should be made compulsory upon the administrator or executor to fill out a copy of said report and send to this department at the same time other reports are filed in the County Court.

The clerk of the County Court should also promptly send to this department the name of the estate, and name and address of the executor or administrator (and attorney).

It should be unlawful for the court to close an estate until a report of the tax due, or waiver from this department, has been filed.

It should be made a criminal offense for anyone to refuse to probate an estate, or in any way secrete the property of one. If the penalty be made severe enough, we shall have less attempts to evade the tax.

It should be made more definitely compulsory for banks and trust companies to notify this department before transferring accounts or boxes of estates.

A fee should be charged for a waiver. It is necessary to clear the title to property, and almost always requires as much time and labor of the department as to appraise the estate for a tax.

The right of the commissioner or appraiser to issue subpœnas and administer oaths to witnesses without a direct order of the County Court should be made clearer than it is in the present law.

The matter of the life estate should be more clearly defined.

In closing, permit me to acknowledge the generous courtesy and kindness shown me at all times by your associates and office force, especially Mr. Mothersill, as attorney for this department. He has been ready and willing at all times to assist in every way, and his legal opinions have been so complete that not one has been questioned by court, or even appealed from by attorneys. Then I want to acknowledge my obligation for your personal loyalty and assistance. It has helped mightily to the end that, while that which has been done might have been done more efficiently, yet during it all one supreme desire controlled, and that was that there should be a faithful and honest administration of a public trust.

All of which is most respectfully submitted.

E. R. HARPER,
Appraiser District No. 1.

December 27, 1912."

BUILDING AND LOAN ASSOCIATIONS

One of the important duties devolving upon the Attorney General is that of investigating the conduct of the business of building and loan associations, under the provisions of sections 963 and 973, Revised Statutes of 1908. Under these sections, upon complaint of any party in interest, or a creditor of such an association, or the inspector of building and loan associations, the Attorney General is authorized to investigate the association complained of, and if he is satisfied that it is conducting its business in an unsafe or an unauthorized manner, he is required to apply to the District Court for the appointment of a receiver. Early in the present administration numerous complaints were made by various persons regarding several of the building and loan associations doing business in this state, the most numerous of the complaints being directed against the Continental Building and Loan Savings Association, with offices in the Continental Building in the City and County of Denver. Through the co-operation of the State Auditor, an expert accountant from the Public Examiner's department was authorized to make a thorough examination of the records and accounts of that association. Upon the report of such examiner that the association was conducting its business in an unsafe and unauthorized manner, and was jeopardizing the interest of its members, a complaint was immediately prepared, setting forth the facts relative to the conduct of the association, and an application for the appointment of a receiver was made in the District Court of the City and County of Denver. A receiver was appointed by Judge Teller, and such receiver is now engaged in collecting the assets of the association,

preparatory to distributing the same to the members; and, so far as we are able to determine, the receiver is administering his trust in an economical and satisfactory manner. It is difficult to determine what proportion of their investment the shareholders will receive, but probably not to exceed 50 per cent.

The proper examination of the accounts of the building and loan association which has been operating a few years requires weeks of work by an expert accountant, and the Attorney General has not been provided with funds sufficient to secure the services of such accountant, except to a very limited extent, which would not cover even one proper examination. We have not been able, therefore, to make an examination of some other companies which, from complaints filed in this office, we believe should be examined, and the incoming legislature should make provision whereby the Attorney General may in the future make all necessary examinations of various building and loan associations concerning which substantial complaints are made.

There are a large number of companies which have been doing business in this state—such as the Standard Home Company, and the Standard Real Estate and Loan Company—which, in our opinion, do a building and loan business and are in strict competition with domestic building and loan associations; but the officers and representatives of these companies claim that they are not within the provisions of the laws applicable to building and loan associations, their position being generally that they sell contracts to their investors, and not shares of stock in their companies, and that their investors are not members of the company, but merely contract-holders. We were of the opinion that these objections were not tenable, and, in order to test the question of whether or not the present building and loan laws covered such companies, proceedings in quo warranto were brought against the Standard Home Company in the District Court of the City and County of Denver. The District Court upon demurrer sustained the contention of the company, and the case was thereupon taken by writ of error to the Supreme Court, where it is now pending. As these companies do a business in substance identical with the domestic building and loan associations, and are building and loan associations to all intents and purposes, the legislature should amend the law so that there can be no question but that these companies shall be included within all the regulations applying to building and loan associations.

The work of the office relative to building and loan associations has indicated to us many defects in the law, which we believe should be immediately remedied, and we therefore respectfully suggest that the legislature be urged to make the following changes in the statutes relative to such associations:

First—Section 963, Revised Statutes of Colorado, 1908, relative to the appointment of a receiver for building and loan associations upon the application of the Attorney General, should be amended so as to authorize the Attorney General to act upon in-

formation furnished by the inspector of building and loan associations, as well as upon complaints by stockholders or contractholders.

This section also should be amended so as to authorize the Attorney General to secure the appointment of a receiver without notice to defendant company, upon the affidavit of someone acquainted with the facts, showing an emergency exists necessitating such action.

Second—Section 973, Revised Statutes of Colorado, 1908, should be amended so as to eliminate the thirty (30) days' notice to the directors of the association before the building and loan inspector can apply to the Attorney General for investigation and action against associations acting in an illegal manner..

The section should further be amended so as to give the inspector greater and more definite powers of investigation, and to make the section in harmony with section 963, as amended according to the foregoing Suggestion No. 1.

Third—Section 965, Revised Statutes of Colorado, 1908, should be amended so as to require foreign building and loan associations to deposit with the State Auditor a certain amount of securities, so as to protect Colorado investors in case of the mismanagement or wrong-doing of the officers of the company.

Fourth—The laws relative to building and loan associations should be amended, or additional laws passed, so as to place all companies selling bonds and contracts, and doing a business similar to building and loan associations, under the supervision and control of the building and loan inspector, the same as is provided for regular building and loan associations.

A law which would be of much greater benefit to the people of Colorado would be one absolutely prohibiting foreign corporations from selling bonds and contracts in this state of the character of those sold by the Standard Real Estate and Loan Company, which company went into bankruptcy in the summer of 1912.

This company carried on a business practically identical with that done by building and loan associations.

As the law now stands, there is very little or no protection for investors against the mismanagement of the officials or their willful wrecking of the company.

Fifth—Section 971, Revised Statutes of Colorado, 1908, should be amended, particularly as to the sixth (6) paragraph of that section, so that the words "net dues" should be stricken out, and the report be required to show the total payments received by the company or its agents on outstanding stock, and also that the report should be required to show all insurance premiums, membership fees, and withdrawal fees paid.

Sixth—The law relative to building and loan associations should be so amended as to require that every agent of such association must first obtain a license from the building and loan inspector before soliciting any business, and authorizing the can-

cellation of such licenses by the building and loan inspector upon information showing that any agent is making misrepresentations to prospective investors relative to the character of the business of the company, the character of its contracts, or its methods of doing business; and the law should also provide a penalty, making it a criminal offense for any agent to make any such misrepresentations.

Seventh—Section 952 of the Revised Statutes of Colorado, 1908, should be amended so as to specifically authorize the right of withdrawal to members of building and loan associations, after a certain number of monthly payments and upon a certain number of days' notice, to be specified in the statute.

Eighth—Officers and directors of building and loan associations should be prohibited from being compensated for their services through commissions on the sale of shares of stock or contracts of the association. Their compensation should only be by way of a definite, fixed salary.

Ninth—The law should be amended so as to prohibit the same person from acting both as an officer and a director of any one association during the same period of time.

Tenth—As the law now stands, building and loan associations doing a state-wide business require all applicants for shares of stock to appoint one or more of the officers of the association their proxies to vote at all stockholders' meetings at which the stockholder himself is not present. As most stockholders are persons of small means and live considerable distances from the home office of the association, they very seldom, if ever, attend a stockholders' meeting, and the officers of said companies have used this condition to their own financial benefit and to the disadvantage of the interest of the stockholders.

The law should be amended in some way so as to prevent the abuse of the use of proxies by the officers of these companies.

Several methods for this purpose might be devised, any one of which would be satisfactory to stockholders and greatly to their benefit.

Eleventh—The law should be so amended as to prohibit building and loan associations from deducting more than six (6) monthly payments on each certificate or contract as commissions to agents for the purpose of paying commissions, and the number of monthly payments to be deducted for this purpose should appear plainly upon every certificate of stock or contract issued, so that the investor would know without question.

Heretofore some companies have deducted ten (10), twelve (12), and even fifteen (15) monthly payments before any money from the investor went into the funds of the company for the purpose of making any earnings for the investor, and generally these payments are deducted without any knowledge thereof on the part of the investor, and apparently contrary to the cleverly worded advertisements, by laws, and general literature of the company.

THE RIGHT OF PUBLIC OFFICERS TO WITHHOLD FROM THE STATE TREASURY TAXES PAID UNDER PROTEST.

In connection with the attack upon the constitutionality of the annual corporation license tax, commonly called the "flat tax," three former state officers, whose duty it had been to collect this tax, withheld the amounts paid under protest, after the expiration of their terms of office. Suit was brought against them on behalf of the state by the Attorney General to recover the respective amounts due.

At the time such suit was brought there was pending in the Circuit Court of the United States an action against former Secretary of State Timothy O'Connor, brought by the Atchison, Topeka and Santa Fe Railway Company to recover from him the taxes so paid by that company. A demurrer interposed on behalf of O'Connor was sustained, and thereupon, by agreement, he paid into the state treasury the full amount of tax collected by him, with interest, and the suit against him for this amount was accordingly dismissed.

Subsequent to the ruling of the Circuit Court in the case of the Atchison, Topeka and Santa Fe Railway Company vs. O'Connor, the case of the Western Union Telegraph Company vs. Kansas, 216 U. S., 1, and other cases declaring similar taxes unconstitutional, were decided by the Supreme Court of the United States, and this decision resulted in the ultimate reversal of the case of the A. T. & S. F. Ry. Co. vs. O'Connor. Answer has been filed in the District Court of the United States, showing the payment into the state treasury of all these funds by the defendant O'Connor, and, in my opinion, this relieves him of all liability in connection therewith, and judgment should be rendered in his favor—the payment having been made subsequent to the judgment in the trial court in his favor, and prior to the suing out of the writ of error by the railway company.

On March 10, 1911, judgment was obtained against former Secretary of State James Cowie for $3,781.21, which sum was promptly paid to the clerk of the court by Mr. Cowie. However, in this case the Colorado and Southern Railway Company, as intervenor, sued out a writ of error, claiming the sum of $960 paid by it as annual corporation license tax to the defendant Cowie. A motion to dismiss the writ of error, filed on behalf of the state, was denied, and the case is now pending on its merits in the Supreme Court.

On April 25, 1911, judgment was secured in favor of the People against John A. Holmberg, and the American Bonding Company as his surety, for $10,128.28—the court refusing judgment for certain sums repaid by the defendant Holmberg, and also for interest, as prayed by the complaint. The defendant Bonding Company appealed the case to the Supreme Court, and cross-errors were assigned on behalf of the state for the failure

to render judgment for the full amount sought by the complaint, with interest. The court sustained our contentions in full, holding that it was the duty of the state officer, when he had collected taxes, to pay the same into the state treasury, in accordance with law, without regard to whether or not such collections were made under a constitutional law, and declaring that judgment should have been rendered for the full amount of tax received by the defendant, with interest thereon. The amount of the judgment, therefore, was increased, through the assignment of cross-errors, from $10,128.28 to $19,222.78. This case is reported in 127 Pacific, 941.

This sum, $19,222.78, was paid to me by the Bonding Company and turned over by me to the State Treasurer on January 6, 1913.

This decision makes plain and clear the duty of officials making collections on behalf of the state to make returns to the State Treasurer strictly in accordance with law, without consideration on their part as to the constitutionality of the law.

THE CONSTITUTIONALITY OF THE INSURANCE PREMIUM TAX

The action brought by the Colorado National Life Assurance Company vs. William L. Clayton, Commissioner of Insurance, to test the constitutionality of the 2 per cent premium tax upon gross premiums collected by the insurance companies doing business in the state, affects vitally the state revenues. Nearly $200,000 was collected from this source in the fiscal year ending November 30, 1911, and the collections from this source have been constantly growing—the tax collected for the fiscal year ending November 30, 1910, amounting to $182,382.06.

This case was pending in the Supreme Court on my assumption of office, and has been most exhaustively briefed and argued by my office in the Supreme Court, and an early decision is anticipated. I believe that the constitutionality of the law has been demonstrated; but, in the event of a possible adverse decision, the matter should be immediately called to the attention of the legislature, in order to supply, if possible, the deficiency which would thus be caused in the annual revenues of the state.

THE PENITENTIARY CASES

Among the important matters pending when I assumed office were the criminal cases filed some two weeks prior by the Attorney General in the District Court of Fremont County. These involved a question of law of great moment to the state; namely, whether the Attorney General had authority, at the request or direction of the Governor, to appear in the District Court to prosecute criminal cases which normally and properly would seem to fall within the jurisdiction of the district attorney, either

because of the refusal of the district attorney to prosecute, or because the particular action might be regarded of such moment as to warrant action on the part of the Governor and the Attorney General.

These cases also involved an important question of public morality, in that they had to do with the alleged misconduct of public officials in the management of the public business. They followed an investigation which covered a period of several months, and which had been widely commented upon in the newspapers and from the political platform. The investigation had been of much wider scope and had covered many matters not included in the cases filed. A preliminary examination, therefore, of a large amount of testimony and memoranda, resulting from this investigation, was necessary; and this I, with the assistance of my deputy, A. A. Lee, commenced immediately upon assuming office, supplementing it by a further examination of the affairs and conduct of the penitentiary, and a search for further evidence than had been disclosed by this investigation.

There was revealed such a deplorable condition of affairs, with regard to the lack of records and business method at the penitentiary, either unintentional or willful, and such gross discrepancies in charges and receipts, that the public welfare seemed to demand a continuation of these cases, if for no other purpose than to make it apparent to those placed in positions of public trust that public affairs should be handled with ordinary honesty and diligence.

The cases were accordingly called up, when we were met with a motion to quash capiases, and informations upon the ground that the Attorney General had no power to prosecute such cases. This motion was sustained in the District Court, whereupon I sued out a writ of error from the Supreme Court. The question was briefed and argued at length before the Supreme Court, and a decision rendered holding that, upon the request or direction of the Governor or General Assembly, the Attorney General had the power and authority to prosecute criminal cases in the District Court. This case is reported in 125 Pacific, 531.

Thereupon I applied to have said cases set down for trial, and, after the interposition and argument of various motions on behalf of the defendants, the cases were finally set for trial for November 18, 1912, and tried in the District Court of Fremont County, the trial consuming a period of four weeks and resulting in a verdict that the defendants were not guilty, but stating that it was the sense of the jury that the defendants were guilty of gross negligence in the conduct of the affairs of the penitentiary; that the circumstances were suspicious in the extreme, and reprimanding the defendants for the transaction of public business in such fashion.

While it is true that the cases did not result in a conviction, nevertheless, I believe that the general effect of such prosecution

will be beneficial to the conduct of public business in the state. The purpose of such prosecution ought not to be solely to punish the defendants, but to furnish a lesson to the community that the people of the state as a whole will require as faithful and conscientious service from public servants as they would expect from private employes.

While, of course, unpleasant to those upon whom the burden falls, I believe it is a proper and necessary task for the Governor and Attorney General, or the respective district attorneys, to perform, to check and punish, wherever possible, either malfeasance or neglect in public office. Only by the prompt and thorough application of such drastic remedies, when needed, can the public service be kept clean, wholesome, and efficient.

CONSTITUTIONAL AMENDMENT RELATING TO INITIATIVE AND REFERENDUM

This amendment, adopted by the people at the election of 1910, has been extensively utilized by them during the past election, and consequently this office has been called upon to render many opinions with reference to matters of construction coming up under the same. There has been, however, only one attack against the amendment in court—in a suit brought some months ago in the District Court of Denver County, wherein it was contended that the initiative and referendum amendment was not properly published in the Session Laws of 1910, and therefore no laws initiated or referred could be voted upon at the last general election. These contentions were upheld by the District Court, and the Secretary of State was enjoined from publishing initiated and referred measures. This office, representing the Secretary of State, defendant below, proceeded at once to review this decision by writ of error in the Supreme Court. Briefs were filed there, the case was advanced on the docket, and oral arguments were had, with the result that the Supreme Court reversed the decision of the lower court, and held that the amendment had been properly published and was in operation. This decision is reported under the name of Pearce vs. The People, ex rel. Tate, 110 Pacific, 224.

There are certain needed amendments to our present law with relation to publishing initiated and referred measures, and to preventing fraudulent signatures to the same, with regard to which I know you are well informed, and I do not consider it necessary to set the same out at length herein.

THE RIGHT OF THE PEOPLE OF COLORADO TO THE USE OF WATERS IN INTERSTATE STREAMS

Colorado lies at the crest of the Continental Divide. Certain great interstate streams flow in all directions from the

state into adjoining states—notably such streams as the Grand River, on the western slope flowing into the State of Utah; the Rio Grande River in southern Colorado, flowing into the state of New Mexico, and thence south to the Gulf of Mexico; the Arkansas River, in southeastern Colorado, flowing into the State of Kansas; the South Platte River, in northeastern Colorado, flowing into the State of Nebraska; and the Laramie River, in northern Colorado, flowing into the State of Wyoming.

Without doubt, momentous questions, affecting the welfare of the people of this state will be decided in the next decade or so by the Supreme Court of the United States in suits between the states affecting the rights of the people of the various states to the use of these waters for irrigation and other beneficial uses. The decision of the Supreme Court of the United States in the late case of The State of Kansas vs. The State of Colorado is too well known to need comment.

Efforts have been made to adjust the controversies on the Rio Grande River through the executive departments of the state and federal governments, but apparanetly without success up to this time. Also, the United States has been invited to bring a suit, and thus submit itself to the jurisdiction of the courts, with respect to the rights of the citizens of Colorado to use certain waters of this river for irrigation purposes; but the United States has not seen fit to bring any such suit, and it would now seem that the State of Colorado may be compelled in some proper manner to institute an action on its own motion, in order to determine the questions at issue.

Early in the year 1911 the State of Wyoming brought suit in the Supreme Court of the United States against the State of Colorado and others, seeking to enjoin the defendants from diverting the waters of the Laramie River into the valley of the Cache la Poudre River, in Weld County, by means of a tunnel. It is claimed on the part of Wyoming that the Wyoming irrigators residing in the Laramie valley in that state are prior in point of time to the Colorado users and proposed users of water from this stream, and that therefore the Wyoming users had the prior right, and that all the waters of this stream are necessary for use in Wyoming on lands already irrigated.

To the bill of complaint filed by the State of Wyoming this office filed a demurrer which was argued before the Supreme Court of the United States in October last, and the same was overruled without prejudice; whereupon the answer of the State of Colorado was prepared, and the same will be filed in the Supreme Court at Washington during the week of January 6, 1913.

I am informed that considerable work has been done by the State Engineer with reference to the facts at issue in this case, and I expect that the court will soon appoint a referee or commissioner to take the testimony in this case. On the sub-

mission of this evidence, it seems to me that the equities will be entirely in favor of Colorado, since it can undoubtedly be shown that only a comparatively small area of the drainage basin of the Laramie River lies in Colorado; that considerably more of the run-off of the stream originates in Wyoming than in Colorado, and unless Colorado is permitted to divert a reasonable portion of these waters into the valley of the Cache la Poudre, it will not be receiving any substantial benefit from the waters of this river.

I have every confidence that the position of Colorado can be sustained, either upon the doctrine just announced by our own Supreme Court in the case of Stockman vs. Leddy (not yet reported), wherein Mr. Chief Justice Campbell, in rendering the unanimous opinion of the court, says:

> "The waters of the natural streams of the State belong to the people, to the State, in its sovereign capacity, and its right to their distribution and control within its borders is free from any interference from any other sovereignty;"

or upon the doctrine announced by Mr. Justice Brewer in handing down the opinion of the Supreme Court of the United States in the case of Kansas vs. Colorado.

There is also a case pending in the Circuit Court of the United States, brought by certain ditch companies in Kansas against certain ditch companies in Colorado, affecting the right to certain waters of the Arkansas River. The State Engineer was originally a party to this suit, but, upon demurrer filed by former Attorney General Barnett, the State Engineer was dismissed from the suit, on the theory, I am informed, that to join him as a party defendant was virtually to make the state a party, which could not be done in the Circuit Court of the United States.

The issues in these various suits and proposed suits no doubt involve questions vital to the welfare of the people of the state. Manifestly, a great deal of investigation and engineering work will be necessary to meet the issues of fact raised—concerning which, I am informed, there is no adequate appropriation at the present time.

Further, this office should receive legal assistance in the performance of its duties, in order to cope properly with counsel representing the other side. In 1911 the State of Wyoming made an appropriation for legal counsel to assist the Attorney General of Wyoming in the case of Wyoming vs. Colorado, and at present there are two eminent lawyers assisting the Attorney General of that state in that litigation.

The Eighteenth General Assembly of Colorado made an appropriation of $50,000 for such purposes, but proceeded to invest a committee from the Senate and the House with the expenditure and the disposition of this appropriation. The committee con-

sisted of seven members, all of whom were members of the General Assembly, with the exception of the Attorney General. The State Auditor and State Treasurer refused to pay any part of this appropriation, not being satisfied as to its validity under the Constitution, since it seemed, among other things, that a legislative committee was proceeding to perform a strictly executive duty, which is forbidden by the Constitution.

Thereupon suit was brought to test the validity of this measure, and I represented the State Auditor in the District Court of Denver County, wherein the appropriation was declared to be invalid. To this decision a writ of error was sued out in the Supreme Court, and the decision of the lower court was affirmed in the case of Stockman vs. Leddy, above referred to.

While, therefore, a moderate appropriation should be made to furnish necessary legal, engineering, and other assistance to the executive officers of this state, in order to defend and prosecute adequately the interests of the state, no safeguard should be overlooked to see that the money is properly expended and that the state receives full value for every dollar appropriated.

STATE INSTITUTIONS

It has been the duty of this office to advise all state institutions with reference to their affairs, and a considerable portion of the time of the office has been taken up in the performance of this duty. Besides rendering written and oral opinions to the various state institutions, it may be noted that certain controversies arose between the United States and the State Board of Agriculture, in whose charge were entrusted the Fort Lewis Indian School at Fort Lewis and the Teller Institute at Grand Junction, relating particularly to coal and water rights. All of these matters have been successfully adjusted, the state in each instance procuring the coal rights and the water rights for which it contended, from the federal government. Mr. J. Fred Farrar, of Fort Collins, was employed by me to assist as special counsel for the State Board of Agriculture in these matters.

An appropriation was made by the last General Assembly to furnish moneys for condemnation of certain lands, comprising about four city blocks, in the city of Pueblo, which were necessary for the use of the State Insane Asylum in that city. I employed Mr. Sperry S. Packard, of Pueblo, to assist me in bringing these condemnation proceedings, all of which have been terminated—the owners of the land accepting the values found by certain commissioners appointed by the court. The moneys have been paid over to the various landowners, and the State Board of Lunacy Commissioners has taken possession of the lands in question.

STATE UNIVERSITY LITIGATION

In 1907 Andrew J. Macky, a wealthy pioneer of Boulder County, departed this life, leaving a will in which, after making certain specific bequests, he left the residue of his large estate, amounting approximately to $300,000, to the University of Colorado, to be used for the erection of an auditorium.

About two years after said will was admitted to probate, a suit was instituted by May Olds, laying claim to damages for breach of contract in a sum equal to one-third of the estate, which claim would amount to about one-half the portion to which the university claims to be entitled under the will. A demurrer having been filed to the complaint in the court below was sustained. The plaintiff took an appeal to the Supreme Court.

The regents of the university, with my approval, employed Professor Junius Henderson, of the university faculty, and John A. Gordon, of the Denver bar, to assist the Attorney General's office in the preparation of the briefs. Elaborate and exhaustive briefs were filed on both sides of the case, and the same was fully argued by this office, assisted by counsel for the university; but at the time this report goes to press no decision has been announced by the court.

Another clause of the Macky will made a bequest of $50,000, which said bequest was by the Supreme Court held invalid. At the request of the Board of Regents, the Attorney General's office petitioned the County Court of Boulder County, where the estate was being probated, for a construction of the clause of the will involved. The County Court decided that the legacy in question did not pass into the residue and go to the university, but that it went, under another clause of the will, to certain legatees named therein. From this ruling the Attorney General's office, at the request of the Board of Regents, brought the case to the Supreme Court on writ of error, and applied for a supersedeas, which was granted. Thereafter the regents employed Mr. Gordon to assist in the briefs and arguments of this case. The briefs have been filed, and the case has been fully argued, but as yet no decision has been handed down by the Supreme Court.

STRATTON ESTATE

That property and business commonly known as the Stratton Estate was investigated by my office, Mr. O'Connor having special charge of the work. My report to the Governor with reference to this estate is hereinafter set forth in full, and may be found among the opinions in this volume.

CONCLUSION

It is gratifying to state that in all suits and actions in which the state officers have been involved, and in which I have represented them, we have been successful thus far in every case decided by our own Supreme Court; and, with two or three exceptions, we have been uniformly successful in the District and County Courts of this state.

The relations of this office with the other departments of state have been reciprocally pleasant and cordial.

In turning over the office to my successor, I wish to state that such a record could not have been achieved by any one person, but it was necessary that each and every representative of the office should have brought to his or her duties superior ability and undivided time and attention. This has been the case, and I desire, in concluding, to express my high regard and great obligation to each and every member of my office force for their services and their loyalty in behalf of the state and its best interests.

Respectfully submitted,

BENJAMIN GRIFFITH,
Attorney General.

APPENDIX

List of Cases Pending and Disposed of During 1911 and 1912

Opinions Rendered for Same Period

CIVIL CASES IN THE SUPREME COURT OF THE UNITED STATES

Wyoming vs. Colorado et al.

Original bill of complaint filed by the State of Wyoming to enjoin users of water in Colorado from diverting water from the Laramie River, an interstate stream. Demurrer by State of Colorado filed ..... and overruled ..... Answer of State of Colorado filed January .., 1913.

Atchison, Topeka & Santa Fe Railway Co. vs. Timothy O'Connor.

Appeal by Railway Company from the United States Circuit Court on decision on demurrer of state. Action by Railway Company to recover moneys paid to O'Connor, Secretary of State, for corporation license tax, and turned over to the state by O'Connor. Reversed and remanded. Case is now pending again in United States Circuit Court on answer of State.

Post Printing and Publishing Co. et al. vs. John F. Shafroth, Governor of Colorado.

This action involved the validity of certain funding bonds (see Session Laws, 1909, p. 315), and the United States Supreme Court refused to take jurisdiction, the Supreme Court of Colorado having decided in favor of the validity of the bonds.

Chemgas vs. People.

Writ of error to the Supreme Court of the State of Colorado. Application for habeas corpus dismissed on motion of the State, thus leaving decision of Supreme Court of Colorado final.

Horans vs. People.

Same as last above.

CIVIL CASES IN THE UNITED STATES DISTRICT COURT

Reed vs. Ronnsevell, Horticultural Inspector.

Action for damages for the condemnation of fruit trees shipped into Colorado. Pending, and date of trial set for January 16, 1913.

CIVIL CASES IN THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES.

United States Land Office at Leadville, Colorado.

Application of John Frame, Sr., contesting land granted to the State of Colorado by the United States. Part of the land found to be mineral in character, and title found to be in the applicant.

CIVIL CASES IN THE SUPREME COURT OF COLORADO

7203. Consumers' League of Colorado vs. Colorado & Southern Railway Co., Chicago, Burlington & Quincy Railroad Co., and Union Pacific Railroad Co.

Writ of error to the District Court of the City and County of Denver. Action involved the constitutionality of the act of 1907 creating the State Railroad Commission, and its authority to fix rates. This office represented the Consumers' League of Colorado, plaintiffs in error in the Supreme Court, and secured a reversal of the decision of the lower court declaring the act unconstitutional. The Supreme Court also decided that the Commission had power to fix rates.

7218. Colorado National Life Assurance Co. vs. Clayton, State Insurance Commissioner.

Writ of error to the District Court of the City and County of Denver. This action involves the constitutionality of tax on the gross amount of premiums of insurance companies received within the state each year. Briefs filed, argued, and submitted, and now awaiting final decision.

7308. Comstock, State Engineer et al. vs. Ramsay.

Appeal from the District Court of Weld County. Water rights case. Pending.

7333. Oles vs. Wilson, Executor of the Estate of Andrew J. Macky, and the Regents of the University of Colorado.

Writ of error to the District Court of Boulder County. This action involves one-third of the Macky estate. Briefs filed and case argued, and now awaiting final decision.

7381. Galligan vs. American Savings Bank.

Writ of error to the District Court of the City and County of Denver. Mandamus to pay certain warrants. These war-

rants have been exchanged for funding bonds, series of 1910, and action has been dismissed upon stipulation of all parties.

7429. In the matter of House Resolution No. 10 Relative to the Constitutionality of House Bill No. 243 Concerning the Publication of Constitutional Amendments.

Questions propounded to the Supreme Court. Opinion by the court March 6, 1911.

7438. In re Publication of Proposed Amendments to the Constitution, and Initiative and Referendum Measures.

Questions propounded to the Supreme Court. Opinion by the court March 6, 1911.

7449. Tangeman et al. vs. Coates et al., Members of the Board of Aldermen of the City and County of Denver.

Writ of error to the District Court of the City and County of Denver. Mandamus to compel the Board of Aldermen to call an election in the Ninth Ward for the election of a member to the board from that ward. Affirmed.

7518 and 7519. People vs. Gibson et al.

Writ of error to the District Court of Fremont County. These cases involved the right of the Attorney General to file informations in the District Court. Judgment of lower court denying right of Attorney General to file reversed, rehearing denied, and case remanded for trial.

7534. Colorado & Southern Railway Co. vs. People.

Writ of error to the District Court of the City and County of Denver. Action to recover flat tax paid on foreign corporations. Briefs filed and case submitted and now awaiting final decision.

7569. Leddy, State Auditor, vs. Cornell.

Writ of error to the District Court of the City and County of Denver. Mandamus concerning salary of the secretary of the Civil Service Commission. Judgment of lower court against Auditor reversed, and case remanded with instruction to dismiss.

7582. Comstock, State Engineer, et al. vs. Larimer and Weld Reservoir Co.

Writ of error to the District Court of Larimer County. Action for injunction. Pending.

7600. American Bonding Co. vs. People.

Writ of error to the District Court of the City and County of Denver. Judgment for the State for $10,128.28 and interest against the Bonding Company on account of moneys retained by Holmberg as State Auditor. Affirmed on errors by the Bonding Company, and reversed on cross-errors by People, and remanded with directions to enter judgment for $19,222.78.

7634. Regents of the University of Colorado vs. Wilson, Executor of Estate of Andrew J. Macky et al.

Writ of error to the County Court of Boulder County. Action involves the right of the University to a $50,000 bequest under the will. Briefs filed, case argued, and now awaiting final decision.

7648. People et al. vs. Scott et al.

Quo warranto. Petition filed to test the constitutionality of the act creating the Court of Appeals and the validity of the appointments made by Governor Shafroth. Petition dismissed.

7658. Kenehan, State Treasurer, vs. Barber et al., State Board of Medical Examiners.

Writ of error to the District Court of the City and County of Denver. This action involves unpaid obligations not due and unused funds at the time of changing from one biennial period to the succeeding biennial period. Briefs filed and case submitted, and now awaiting final decision.

7667. Manville et al., Commissioners of Prowers County, vs. Leddy, State Auditor.

Writ of error to the District Court of the City and County of Denver. Mandamus involving validity of House Bill No. 200, relating to the State Highway Commission. Decision of lower court, holding the bill invalid, affirmed.

7713. Post Printing and Publishing Co. vs. John F. Shafroth, Governor of Colorado.

Writ of error to the District Court of the City and County of Denver. The decision in this case upheld the validity of the funding bonds. Affirmed.

———

7723. Farr vs. People.

Writ of error to the District Court of the City and County of Denver.

Action involves right of state officer to spend public money outside of the state, in connection with the performance of his duties, without special statutory authority. Pending.

———

7741. City and County of Denver vs. Estate of Charles M. Hobbs, deceased.

Writ of error to the County Court of the City and County of Denver. This case involves the right to tax the stock of foreign corporations held in the State of Colorado. Briefs filed, and case pending.

———

7746. Stockman vs. Leddy, State Auditor.

Writ of error to the District Court of the City and County of Denver. The decision in this case held that the legislature can appropriate money for bringing suits or defending in suits wherein Colorado water rights are involved, but the expanding of the appropriation must be delegated to an executive department and not to a legislative committee. Affirmed.

———

7808. Questions by Governor John F. Shafroth in re State Tax Commission.

Answered by the court *en banc*, May 16, 1912.

———

7885. State Board of Horticulture vs. Leddy, State Auditor, and Kenehan, State Treasurer.

Writ of error to the District Court of the City and County of Denver. Same as 7886, below.

———

7886. State Board of Agriculture vs. Leddy, State Auditor, and Kenehan, State Treasurer.

Writ of error to the District Court of the City and County of Denver. Action involves the State Fair Fund and classifi

cation of appropriations. Briefs filed and case pending. This office represents the State Treasurer and State Auditor.

7899. Pearce, Secretary of State, vs. People ex rel. Tate.

Writ of error to the District Court of the City and County of Denver. Mandamus involving validity of the initiative and referendum amendment to the Constitution. This office represented Pearce, Secretary of State. Decision of lower court, holding the amendment invalid, reversed.

7908. Colorado & Southern Railway Co. vs. State Railroad Commission and the Breckenridge Chamber of Commerce.

Writ of error to the District Court of Summit County. This action decided the State Railroad Commission had power to order an adequate railway service. Decision of lower court, upholding the order of the Railroad Commission, affirmed. Petition for rehearing denied January 6, 1913.

7919. Pease vs. Wilkin and Pearce, Secretary of State.

Writ of error to the District Court of Fremont County. Election case, involving construction of primary law. Affirmed.

7920. People vs. Standard Home Company.

Writ of error to the District Court of the City and County of Denver. Quo warranto, involving law relative to building and loan associations. Pending.

7937. McCall et al. vs. Pearce, Secretary of State.

Reviewing the District Court of the City and County of Denver. Election case, involving the primary act. Affirmed.

CIVIL CASES IN THE COURT OF APPEALS OF COLORADO

3336, Briggs vs. People; and
3337, Brown vs. People.

Appeals from the District Court of Yuma County. Land Board cases. Argued orally and submitted, and judgment affirmed.

3346. Denver Jobbers' Association et al. vs. People.

Appeal from District Court of the City and County of Denver. This case involved the right of the Attorney General to proceed to enjoin combination in restraint of trade and monopolies. Argued orally and submitted, and judgment affirmed.

3762. Pinnacle Gold Mining Co. vs. People.

Appeal from the District Court of the City and County of Denver. Action involves the right to join in one suit the collection of unpaid flat tax on domestic corporations under separate and distinct statutes. Argued and submitted October 4, 1912.

CIVIL CASES IN THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

Ireland vs. Shafroth et al., as State Board of Land Commissioners.

State Land Board case. Mandamus by Ireland and peremptory writ denied.

People vs. Whitney and the United States Fidelity and Guaranty Co.

Action to recover from the bonding company for moneys collected and retained by Whitney while State Boiler Inspector. Pending.

Pressler vs. Kenehan, State Auditor.

Action involving the constitutionality of a relief bill. Held unconstitutional.

Starbird vs. Leddy, State Auditor.

Mandamus to secure payment for certain land and water rights sold to the state. Demurrer filed in behalf of State Auditor, and demurrer sustained.

Union Pacific Coal Co. vs. Pearce, Secretary of State.

Mandamus to compel Secretary of State to accept for filing certificates of renewal of a foreign corporation. Peremptory writ granted.

People ex rel. Western Newspaper Union vs. Leddy, State Auditor.

Mandamus to compel State Auditor to issue a warrant for the payment of a printing bill contracted by the State Board of Immigration. Demurrer to petition and alternative writ sustained. No writ of error sued out.

People ex rel. Prompt Printery Co. vs. Leddy, State Auditor.

Mandamus. Demurrer to petition and alternative writ sustained. No writ of error sued out.

Green Valley Ditch Co. et al. vs. Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

People ex rel. Central Realty Co. et al. vs. Pearce, Secretary of State.

On petition of Ernest Le Neve Foster et al re Philadelphia Mines and Tunnel Co., argued on petition and alternative writ and statement of respondent's position and order by Allen, judge, for dismissal of petition on pleadings to be filed.

People ex rel. Griffith, Attorney General, vs. Continental Building and Loan Savings Association.

Receiver appointed for insolvent building and loan associations.

People ex rel. Carlton vs. Pearce, Individually and as Secretary of State.

Petition to enjoin the publication of the act relating to banks and banking. Act held unconstitutional.

Alexander vs. State Board of Land Commissioners.

Mandamus to compel State Land Board to issue a patent. Pending.

Consumers' League of Colorado vs. The Colorado & Southern Railway Co., Chicago, Burlington & Quincy Railroad Co., and Union Pacific Railroad Co.

Action involves the constitutionality of the act of 1907 creating the State Railroad Commission and its authority to fix

rates. This office represented the Consumers' League. Order of Commission upheld and motion for new trial filed.

CIVIL CASES IN THE DISTRICT COURT OF BOULDER COUNTY

Davidson Ditch Co. vs. Coal Ridge Irrigation Co. et al.
Water rights case. Real parties in interest notified.

Leggett Ditch and Reservoir Co. vs. North Boulder Farmers' Ditch Co. et al.
Water rights case. Real parties in interest notified.

Boulder and Larimer County Irrigating and Manufacturing Ditch and Reservoir Co. vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF HUERFANO COUNTY

Kincaid et al. vs. Brown, Water Commissioner, Water District No. 16.
Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF KIT CARSON COUNTY

Pfeiffer, State Bank Commissioner, vs. Stratton State Bank.
Petition for receiver. Receiver appointed.

CIVIL CASES IN THE DISTRICT COURT OF LA PLATA COUNTY

Pfeiffer, State Bank Commissioner, vs. La Plata County Bank.
Petition for receiver. Receiver appointed.

CIVIL CASES IN THE DISTRICT COURT OF LARIMER COUNTY

Ziegler vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

Greeley and Loveland Irrigation Co. vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

North Poudre Irrigation Co. vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

Finley vs. Comstock, State Engineer, et al.
Water rights case. Answer filed.

CIVIL CASES IN THE DISTRICT COURT OF LOGAN COUNTY

Julesburg Irrigation District vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF MONTROSE COUNTY.

McCue vs. Comstock, State Engineer, et al.
Water rights case. Defendant's demurrer sustained.

Page vs. Comstock, State Engineer, et al.
Water rights case. Defendant's demurrer sustained.

CIVIL CASES IN THE DISTRICT COURT OF MORGAN COUNTY.

Weldon Valley Ditch Co. vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

Upper Platte and Beaver Canal Co. et al. vs. Comstock, State Engineer, et al.
Water rights case. Real parties in interest notified.

Fort Morgan Reservoir and Irrigation Co. et al. vs. Parsons Irrigating Ditch Co. et al. and Comstock, State Engineer. (Case No. 1149.)
Water rights case. Real parties in interest notified.

Fort Morgan Reservoir and Irrigation Co. et al. vs. Comstock, State Engineer, et al. (Case No. 1301.)

Water rights case. Real parties in interest notified.

Fort Morgan Reservoir and Irrigation Co. et al. vs. Comstock, State Engineer, et al. (Case No. 1302.)

Water rights case. Real parties in interest notified.

Fort Morgan Reservoir and Irrigation Co. et al. vs. Comstock, State Engineer, et al. (Case No. 1303.)

Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF OTERO COUNTY.

Reorganized Catlin Consolidated Co. vs. Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF PARK COUNTY.

Rogers et al. vs. Antero and Lost Park Reservoir and Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

O'Neil vs. Northern Colorado Irrigation Co. and Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

CIVIL CASES IN THE DISTRICT COURT OF PUEBLO COUNTY.

Bessemer Irrigating Ditch Co. vs. West Pueblo Ditch and Reservoir Co. and Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

People vs. Applegate et al.

Petition for condemnation of certain land for the State Insane Asylum. Commissioners appointed, their report filed.

money paid into court by state and accepted by respondents, and lands turned over to Insane Asylum.

CIVIL CASES IN THE DISTRICT COURT OF WELD COUNTY.

Lower Latham Ditch Co. et al. vs. Comstock, State Engineer, et al.

Water rights case. Real parties in interest notified.

People ex rel. Griffith, Attorney General, vs. The Colorado and Wyoming Lumber Dealers' Association et al.

Action to enjoin the operations of a lumber trust. Motions and demurrer of defendants overruled. Answers of defendants filed, and case now awaiting trial.

CRIMINAL CASES IN

The following cases have been filed and

No.	Title of Cause	Offense
7422	Mitsunaga vs. People	Murder
7435	Martinez vs. People	Murder
7506	Stoltz vs. People	False pretense
7510	People vs. Organ	Unlawful sale of liquor
7512	Smith, Nordloh and Morris vs. People	Contempt
7518	People vs. Gibson et al	Conspiracy
7519	People vs. Gibson et al	False pretense
7520	McKenzie vs. People	False pretense
7523	Lee vs. People	Kidnapping
7525	Cline vs. People	Contempt
7526	Elliott vs. People	Confidence game
7527	Robbins vs. People	Illegal sale of liquor
7539	People vs. Youngberg	Larceny
7540	Wechter vs. People	Murder
7541	People vs. Orris	False pretense
7547	Foster vs. People	Larceny of live stock
7560	Newman vs. People	Receiving stolen goods
7574	LeMaster vs. People	Grand larceny
7624	Henwood vs. People	Murder
7629	Ong vs. People	Keeping disorderly house
7643	King vs. People	Murder
7660	Harris vs. People	Murder
7674	Clayton vs. People	Unlawful sale of liquor
7681	Mitchell vs. People	Larceny of live stock
7684	Almond vs. People	Murder
7685	Domencio vs. People	Murder
7690	Potyralski vs. People	Larceny of live stock
7691	Olson vs. People	Malicious mischief
7731	Bailey vs. People	Murder
7752	Sarkisian vs. People	Abortion
7754	Green vs. People	Violation of local option
7765	Denniss vs. People	Keeping disorderly house
7769	Laffey vs. People	Rape
7772	Cooper vs. People	Gambling
7787	Muller Mercantile Co. vs. People	Violation of local option law
7841	Sheely vs. People	Bribery
7846	People vs. Rose	Violating eight-hour law
7847	People vs. Rose	Violating eight-hour law
7849	Helvner vs. People	False pretense

THE SUPREME COURT

handled during this biennial period:

Supersedeas	Status
Denied Feb 18, 1911	Affirmed Jan. 6, 1913
Allowed March 28, 1911	Pending
Allowed May 11, 1911	Pending
	Dismissed
Allowed May 13, 1911	Pending
	Reversed
	Reversed
Denied June 21, 1911	Dismissed
Allowed June 26, 1911	Affirmed
Allowed July 1, 1911	Pending
Allowed July 1, 1911	Pending
	Dismissed
	Ruling on law point reversed
Allowed July 10, 1911	Affirmed
	Judgment approved
Allowed Sept. 1, 1911	Pending
Allowed Aug. 17, 1911	Pending
Allowed Sept. 21, 1911	Pending
Allowed Nov. 7, 1911	Pending
Denied Oct. 22, 1911	Dismissed
Allowed Oct 20, 1911	Reversed Jan. 6, 1913
Allowed Nov. 23, 1911	Pending
Allowed Jan. 15, 1912	Affirmed
Allowed Dec. 27, 1911	Affirmed, rehearing denied
Denied May 24, 1912	Pending
Denied March 20, 1912	Dismissed
	Affirmed
	Pending
Allowed May 9, 1912	Pending
Allowed March 26, 1912	Pending
Denied April 3, 1912	Dismissed
Allowed March 25, 1912	Pending
Allowed June 4, 1912	Pending
Denied Nov. 27, 1912	Pending
	Pending
Denied June 28, 1912	Affirmed Jan. 6, 1913
	Pending
	Pending
	Pending

CRIMINAL CASES IN THE

No.	Title of Cause	Offense
7861	Dillulo vs. People	Assault to kill
7865	Cook vs. People	Murder
7872	Willburn and Willburn vs. People	Disturbance of the peace
7877	Bonfils vs. People	Contempt
7892	Lendholm and Secord vs. People	Unlawful sale of liquor
7921	De Rinzie vs. People	Burglary
7927	Irwin vs. People	Being a pimp
7932	Stadley vs. People	Selling cocaine unlawfully
7938	Scott vs. People	Maintaining house of prostitution

The following cases were filed before the beginning of this biennial office in all of these cases,

6398	Graeb vs. Medical Examiners	Medical case
6405	Pettit vs. People	Itinerant Vendors' Act
6448	Lewin vs. People	Saloon case
6549	Everhart vs. People	Gambling
6572	People vs. Zobel	Contempt
6615	Jones vs. People	Medical case
6639	Wiley vs. People	Murder
6873	Curl vs. People	Murder
6985	Epley vs. People	Violating local option law
6986	Epley vs. People	Violating local option law
6987	Epley vs. People	Violating local option law
7008	Epley vs. People	Violating anti-saloon law
7010	Notary and Morrato vs. People	Violating Sunday closing law
7019	Coulter vs. People	Withholding a will
7101	Hardesty vs. People	Larceny
7104	Erbaugh vs. People	Forgery
7107	Powers vs. People	Confidence game
7128	Piel vs. People	Murder
7179	Clarke vs. People	Confidence game
7181	Salas vs. People	Violating anti-saloon law
7221	Jamison vs. People	Murder
7241	Brennaman vs. People	Selling liquor without license
7257	Campbell vs. People	Murder
7290	Trozzo vs. People	Keeping house of prostitution
7362	Young vs. People	Selling liquor without license
7272	Chemgas vs. People	
7324	Horans vs. People	
7355	Young vs. People	Murder
7389	Walker vs. People	Selling liquor without license

SUPREME COURT—Continued.

Supersedeas	Status
Allowed July 16, 1912	Pending
Allowed July 15, 1912	Pending
Allowed Aug. 20, 1912	Pending
Allowed Aug. 6, 1912	Dismissed
Allowed Oct. 9, 1912	Pending
Allowed Dec. 30, 1912	Pending
Denied Dec. 27, 1912	Pending
Allowed Nov. 13, 1912	Pending
Denied Dec. 30, 1912	Pending

period. Briefs have been filed or oral arguments made by this with a very few exceptions:

	Pending
Allowed Jan. 7, 1908	Reversed on confession of error
Allowed March 4, 1908	Reversed
Denied July 6, 1908	Argued and submitted Dec. 13, 1911
Allowed Aug. 13, 1908	Pending
	Reversed and rehearing denied
Allowed Sept. 25, 1908	Reversed
Allowed May 20, 1909	Affirmed
Allowed Oct. 2, 1909	Affirmed
Allowed Oct. 2, 1909	Affirmed
Allowed Oct. 2, 1909	Affirmed
Denied Dec. 3, 1909	Reversed
Denied Notary, allowed Morrato, Dec. 3, 1909	Reversed
Allowed Sept. 30, 1909	Reversed
Allowed Feb. 11, 1910	Reversed
Allowed May 3, 1910	Pending
Allowed June 21, 1910	Affirmed
Allowed March 24, 1910	Reversed
Denied July 6, 1910	Affirmed
Allowed May 31, 1910	Reversed
Denied July 30, 1910	Reversed
Allowed Aug. 13, 1910	Pending
Allowed Sept. 29, 1910	Pending
Denied Dec. 15, 1910	Reversed
	Affirmed
	Application for habeas corpus denied
	Application for habeas corpus denied
Denied Jan. 18, 1911	Argued and submitted Oct. 22, 1912
Allowed Dec. 31, 1910	Pending

OPINIONS.

(Opinion Book 4, p. 40.)
January 19, 1911.
To Insurance Commissioner.
By Mr. Mothersill.
In re: Southern Surety Co.

1. A foreign corporation has no other or greater powers than a domestic corporation of like character.
2. A foreign corporation authorized by its charter to guarantee fidelity of persons holding places of trust, public and private, and to guarantee titles to real estate, may not be licensed by Insurance Commissioner to do both classes of business in Colorado.

Hon. W. L. Clayton,
Commissioner of Insurance,
Denver, Colorado.

Dear Sir: In reply to your letter of November 19, 1910, directed to Hon. John T. Barnett, Attorney General, and by him referred to the undersigned, upon the latter assuming the duties of this office, on January 10, 1911, the following opinion is respectfully submitted:

You inquire, in substance, whether the Southern Surety Company, a foreign corporation, authorized by its charter to guarantee the fidelity of persons holding places of trust, public and private and to guarantee titles to real estate, may be licensed by your office to do both classes of business in the State of Colorado.

It appears from your letter that the company in question was, under date of September 9, 1910, authorized to transact a fidelity and surety business.

Section 917 of the Revised Statutes of Colorado, 1908, provides that every foreign corporation—

"* * * shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

The right of the state to fully control foreign corporations doing business within its borders has been repeatedly upheld by the courts of last resort. In this connection, see:

Int. Tr. Co. vs. Leschen etc. Co., 41 Colo., 299, 305.

The insurance laws of this state (sec. 3116, Revised Statutes of Colorado, 1908) provide for three general classes of insurance companies: first, fire; second, life; third, accident insurance companies.

Under the third class the statute specifically includes, in the seventh subdivision, "guaranteeing the fidelity of persons holding places of trust, public and private."

The same section also contains the following provision:

"Provided, that no company shall be organized to issue policies of insurance for more than one of the three above mentioned purposes; and no company that shall be organized for one of said purposes shall issue policies of insurance for any other."

It is not entirely clear from this provision whether the words "any other," at the close, refer to any other kind of insurance whatever, or only to any other of the three main classes of insurance. If the prohibition applies to any kind of insurance, then the Southern Surety Company would plainly be inhibited from carrying on both a fidelity insurance business, which is an insurance included in the third class, and a title guarantee insurance business, since the latter is a generally recognized form of insurance.

Revised Statutes, Colorado, 1908, secs. 941, 947.

28 Am. & Eng. Ency., 229.

People ex rel. Kasson vs. Rhodes, 174 Ill., 310; 44 L. R. A., 124.

Stensgaard vs. St. Paul etc. Co. (Minn.), 17 L. R. A., 575.

But, whether a company authorized to do a fidelity insurance business is or is not prohibited by section 3116, Revised Statutes of Colorado, 1908, from also doing a title guaranty business, the question, in our mind, is definitely settled against the right of the Southern Surety Company to do both kinds of business by other important provisions of the statutes and general rules of law.

First, and of least importance, section 846 of the Revised Statutes, 1908, requires that the "corporate name of every corporation hereafter organized (except banks and corporations not for pecuniary profit) shall commence with the word 'The' and end with the word 'corporation', 'company', 'association' or 'society', and shall indicate by its corporate name the business to be carried on by said corporation."

The name of the company in question is "Southern Surety Company." "The" is omitted, contrary to the requirements of the statute, and the words "surety company" do not, in our opinion, indicate a title guaranty business.

Surety companies are authorized by a special statute and carry on a specific kind of business, generally understood and recognized throughout this and other states. Title guaranty companies are authorized in Colorado under a statute entirely separate and distinct from that authorizing surety companies, and they carry on a particular kind of insurance well understood among lawyers and business men generally, and which is distinct and separate from so-called surety business.

Second, the General Incorporation Act, passed in 1877 and still in force, authorized the association of three or more per-

sons "for the purpose of carrying on any lawful business." (R. S. 1908, sec. 847.)

Ten years later the legislature passed a special act relating to title and guaranty companies, providing for the manner of their formation, and enumerating their general powers. (R. S. 1908, secs. 941-949.)

It is a general rule of statutory construction that a special act upon a particular subject governs where it conflicts with a general act covering the same subject.

Greathouse vs. Jameson, 3 Colo., 397, 398.

It is also the general rule that a corporation is a creature of statute, and has only such powers as are authorized by the particular statute under which it is created.

1 Thompson on Corporations, secs. 4, 35, 41.

Denver Fire Ins. Co. vs. McClelland, 9 Colo., 11, 27.

The special act authorizing the formation of title and guaranty companies provides, in section 941, Revised Statutes of 1908, that persons may associate together under the act—

"* * * for the purpose of engaging in and carrying on the business of the insurance of owners of real estate, mortgages (mortgagees?) and others interested in real estate, from loss by reason of defective titles, liens and incumbrances and the insurance of loans of every and all kinds in such manner and on such terms as may be agreed on between them and the parties contracting with them, with power herein conferred."

The act also enumerates the particular items of authority of such companies to be as follows:

"First—To make insurance of every kind pertaining to, or connected with the titles to real estate, and shall have the power and right to make, execute and perfect such, and so many contracts, agreements, policies, and other instruments as may be required therefor, for compensation or otherwise.

"Second—To acquire by purchase or otherwise, and to own, manage and maintain sets of abstract books, showing abstracts of title to real property in the county of Arapahoe and state of Colorado, or elsewhere, and to dispose of the same at pleasure.

"Third—To furnish good and sufficient guaranties as to title to real estate, which guaranties may be for compensation by percentage or otherwise, and shall be under seal or otherwise, and in such amounts as may be required.

"Fourth—To negotiate loans for said association, or for other parties, and to furnish for compensation by percentage or otherwise, good and sufficient guaranties under seal or otherwise, as to the quality and security of such loan.

"Fifth—To acquire by purchase or otherwise, and to hold, sell, mortgage, or otherwise dispose of, real estate and personal property, either within or without the state of Colorado, for said

association, or for other persons and associations, and to loan or borrow money upon such real estate or personal property.

"Sixth—To acquire by purchase or otherwise, and to hold or sell bonds, warrants and all classes of securities, and to borrow or loan money upon the same.

"Seventh—To borrow money, either with or without giving security therefor, and to loan money either with or without taking security therefor, and to purchase or discount promissory notes and other evidences of indebtedness.

"Eighth—To act as agents for the collection of rents and incomes from any source, for any person or corporation."

None of these particular powers include, directly or by implication, authority to do a surety business, and a domestic corporation organized under the Title and Guaranty Companies Act could not, at the same time, exercise powers conferred by the act authorizing surety companies.

1 Thompson on Corporations, sec. 41, and cases cited.

We are, therefore, of the opinion that your department is not authorized to issue a certificate to the Southern Surety Company to issue policies guaranteeing titles to real estate.

Very respectfully,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 47.)
January 25, 1911.
To the Speaker and House.
By Mr. Griffith.
In re: Application of provisions of constitutional amendment to limit of legislative session and compensation of employes.

The Eighteenth General Assembly is acting under the constitutional amendment.
The compensation of *all* members of the Eighteenth General Assembly is fixed by said amendment.

To the Honorable, the Speaker
and the Members of the House of Representatives
of the Eighteenth General Assembly.

Gentlemen: Under date of January 17, 1911, there was transmitted to this office House Resolution No. 3, wherein was requested the opinion of the Attorney General as to whether the present session of the legislature of Colorado is acting under the constitutional amendment relating to the limit of sessions of the General Assembly and to compensation of the members thereof,

which was voted upon at the last general election, on November 8, 1910.

In response to said resolution, the following opinion of the Attorney General, together with his reasons therefor, is respectfully submitted.

First—As to the length of the legislative session.

The constitutional provision (Art. XIX, sec. 2) under which the amendment was proposed and voted upon, provides that if a proposed amendment shall be voted for by two-thirds of all members elected to each house, and entered in full on their respective journals, it shall be published in each county for four consecutive weeks previous to the next general election for members of the General Assembly; and then uses the following language:

" * * * And at said election the said amendment or amendments shall be submitted to the qualified electors of the State for their approval or rejection, *and such as are approved by a majority of those voting thereon shall become part of this constitution.*"

Section 1 of the act submitting the amendment to the people (Laws of 1909, p. 314) provides that the amendment, "*when ratified by a majority of those voting upon it, shall be valid as a part of the constitution.*"

The language of both the Constitution and the statute submitting the amendment so plainly indicates an intention that the amendment shall become effective upon the day the vote is cast referring it, that there is little room for construction; and this evident meaning of the language used is in accordance with the general rule of law relating thereto, and the adjudicated cases in this state.

The general rule is stated in 8 Cyc. of Law and Procedure to be as follows:

"Provisions are always made designating the time when constitutional amendments or new constitutions shall take effect, the usual language of such being that the amendment shall become a part of the constitution if adopted by a majority of the electors, or, that the new constitution shall become effective if adopted by a majority of electors; and if nothing further is added, the instrument shall take effect immediately upon ratification,—that is, upon the day the vote is cast. * * *

"If, however, the language of the instrument is that it shall take effect upon the canvass of the election returns, if adopted by a majority of the electors, or upon proclamation of the result by the executive, it will not take effect until such canvass is completed or such proclamation issued."

8 Cyc., 744.

"As a general rule, a constitutional amendment takes effect from the date of its ratification by the voters to whom it is submitted for that purpose."

State vs. Kyle (Mo.), 56 L. R. A., 115, 117.

"The rule of the common law is that every law takes effect immediately upon its passage unless some other time is therein prescribed for that purpose."

Real vs. People, 42 N. Y., 270.

In the case of *Nesbit vs. People,* 19 Colo., 441, the court, on page 448, says:

"Before a proposed amendment can become a part of the constitution it must receive the approval of a majority of the qualified electors of the state voting thereon at the proper general election. *When thus approved, it becomes valid as part of the constitution by virtue of the sovereign power of the people constitutionally expressed."*

In the case of *City and County of Denver vs. Adams County,* 33 Colo., 1, one of the points involved was to determine when the amendment creating the City and County of Denver went into effect. The act submitting the amendment contained the same language relative to the voting of the people thereon as is found in the amendment here in question, and also contains section 3, which provides that—

"Immediately upon the canvass of the vote showing the adoption of the amendment, it shall be the duty of the Governor to issue his proclamation accordingly, and thereupon the city and county of Denver and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city shall merge into the city and county of Denver."

After some argument of the point, the court, on page 12, used the following language:

"This question was recently before our Court of Appeals in the case of Boston and Colorado Smelting Co. vs. Elder, 20 Colo. Appeals, 96; 77 Pac. 258. That tribunal, speaking by President Judge Thomson says in effect that the city and county of Denver was not brought into being until the day that the Governor issued his proclamation stating the result of the official canvass. The learned judge well says that a law is none the less effective as such because it provides for something to be done in the future. While the amendment may have become effective when adopted by a majority vote, it fixed a time in the future at which the consolidation it provided for should take place. *So we may safely say here that* the amendment itself became effective November 4, 1902, when it was ratified by the people; but the city and county of Denver, for which it provided, did not come into being until the day of the issuing of the Governor's proclamation on December 1, 1902, for the amendment itself expressly so provides."

The amendment under consideration, however, contains no provision postponing the date on which it shall become effective to a time beyond the date of the vote.

When the amendment became a part of the Constitution, it necessarily obliterated that part of the Constitution for which it was a substitute, and became the supreme law of the state upon the particular matters contained in it, and all departments and functions of government to which it applies must, from the moment it became effective, conform thereto, except as other coordinate provisions of the Constitution may restrict its operations.

The Constitution of Florida contains provisions relative to the submission of constitutional amendments practically identical with those in our own Constitution, and the question arose in that state as to when a certain amendment went into effect. The Supreme Court of that state, in its opinion deciding the matter, among other things, said:

"Under this provision of the Organic Act there seems to us to be no room for doubt but that any amendment thereto that is proposed, approved and adopted in the manner therein pointed out, becomes operative and of full force and effect as part of the constitution *eo instante* upon its approval and adoption by a majority vote of the electors of the State * * * . The effect of the approval and adoption of said amendment by a majority of the electors voting up the same at the general election held in October, A. D. 1894, under its submission to the electors of the State for their approval or ratification in the manner prescribed, was to substitute said amendment at once upon the majority of the votes being cast in favor of its approval, in the place and stead, as part of the constitution, of the original section to which it was an amendment; and the original section that said amendment then took the place of, at once ceased to be operative as any part of the original law."

An Advisory Opinion to the Governor, 34 Fla., 500.

The Attorney General is, therefore, of the opinion that the Eighteenth General Assembly of Colorado is acting under the constitutional amendment which was adopted and became effective on November 8, 1910.

Second—As to compensation of members.

From the foregoing consideration the necessary conclusion is that the compensation of all members elected to both houses of the legislature at the election held on November 8, 1910, is fixed by the constitutional amendment which was adopted on that date.

The only other question, then, is whether the well-known provisions of the Constitution which prohibit the increase or decrease of the compensation of members of the General Assembly and of public officers by any law passed during their terms of office, affect those senators elected in November, 1908, and who

hold over into the present General Assembly by virtue of their four-year term.

These restrictive provisions are found in sections 9 and 30 of Article V of the Constitution, and are as follows:

Article V, section 9:

"No member of either house shall, during the term for which he may have been elected, receive any increase of salary or mileage under any law passed during such term."

Article V, section 30:

"Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment; Provided, that on and after the first day of March, A. D. 1881, the salaries of the following designated public officers, including those thereof who may then be incumbents of such offices, shall be as herein provided, viz.:

"The governor shall receive an annual salary of five thousand dollars, and the further sum of fifteen hundred dollars for the payment of a private secretary.

"The judges of the Supreme Court shall each receive an annual salary of five thousand dollars.

"The judges of the district court shall each receive an annual salary of four thousand dollars."

That the words "any public officer," in section 30, include members of the legislature, in the opinion of the Supreme Court, appears from the case of *Carlile vs. Henderson,* 17 Colo., 532, wherein said section is discussed in connection with other constitutional provisions.

If the words "any law" in the last line of section 9, and the words "no law" in the first line of section 30, include constitutional provisions, then it is evident that the constitutional amendment voted upon on November 8, 1910, would not affect the hold-over senators, since it would be a law passed after their election and during their respective terms.

It is, therefore, important to determine whether these words apply to constitutional provisions; and light will be thrown upon this question by an examination of those provisions of the Constitution relative to compensation of members of the General Assembly adopted in the original Constitution.

The original section 6 of Article V read as follows:

"Each member of the *first* general assembly, as a compensation for his services shall receive four dollars for each day's attendance and fifteen cents for each mile necessarily traveled in going to and returning from the seat of government; and shall receive no other compensation, perquisite or allowance whatsoever. No session of the general assembly after the first, shall exceed forty days. After the *first* session, the compensation of the members of the general assembly shall be as provided by law; Provided, that no general assembly shall fix its own compensation."

This section fixed the salary of the First General Assembly, and, by its last sentence, clearly provided for the fixing of the compensation of members of the legislature by a law to be passed by the legislature—the only limitation being that no General Assembly shall fix its own compensation.

No other meaning can be reasonably deduced from the language used in this section, if the general rule of construction is followed, that constitutional provisions shall be construed according to their plain meaning and the common acceptation of the language used.

In the case of *Alexander vs. The People*, 7 Colo., 155, 165, the Supreme Court of this state, in supporting a certain view of a constitutional provision, said:

"This is but enforcing the rule anounced by Chief Justice Marshall in 9 Wheat. 188, that the framers of the constitution and the people who adopt it must be understood to have employed words in their natural sense and to have intended what they had said."

Again, in construing a section of the Constitution, the Supreme Court of Colorado used this language:

"While the ultimate inquiry is always the intent of the people who adopted the constitution, the intent of the framers is an associate inquiry. The people are supposed to have accepted and ratified the instrument in that sense most obvious to the common understanding."

Cooley's Const. Lim., 80.

People vs. May, 9 Colo., 80, 98.

The Supreme Court of the United States, in answering the contention that a constitutional provision should be construed to have a meaning other than that plainly expressed in *Board of County Commissioners vs. Rollins*, 130 U. S., 662, uses the following language:

"The object of construction applied to a constitution is to give effect to the intent of its framers and of the people in adopting it. This intent is to be found in the instrument itself; * * * To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning apparent upon the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to or take from it."

If we understand the language of the original section 6 of Article V of the Constitution to mean that it was the intention and expectation of the framers of the Constitution, and of the people who adopted it, that, after the first session, the compensation of members of the General Assembly should be fixed by law passed

by the General Assembly, then the meaning of the words "any law" in section 9, and "no law" in section 30 of the same article, and which sections were adopted at the same time as original section 6, is perfectly plain; viz., that the words relate to a law passed by the legislature, and commonly called "statute law," as contra-distinguished from the fundamental law or constitutional provisions. So that we may read section 9, extending it to its full meaning, as follows:

"No member of either house shall, during the term for which he may have been elected, receive any increase of salary or mileage under any law passed (by the legislature) during such term."

And section 30 would read:

"Except as otherwise provided in this constitution, no law (passed by the legislature) shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment."

That this construction of these restrictive provisions is the one to be adopted at the present time appears from an examination of the changes which have been made in original section 6.

In 1883 an amendment to section 6 of Article V was proposed and adopted at the election held on November 4, 1884, and such amendment was in force at the time the present amended section 6 was proposed and voted upon, and reads as follows:

"Each member of the general assembly, until otherwise provided by law, shall receive as compensation for his services, seven dollars ($7.00) for each day's attendance and fifteen (15) cents for each mile necessarily traveled in going to and returning from the seat of government; and shall receive no other compensation, perquisite or allowance whatsoever. No session of the general assembly shall exceed ninety days. No general assembly shall fix its own compensation."

A comparison of this section with the original section shows that the only change made was in the amount of the *per diem* and the limitation upon the length of the session. The clause in the original section, reading, "After the first session, the compensation of the members of the general assembly shall be as provided by law," is condensed in the amendment to the words: "until otherwise provided by law;" and the clause, "that no general assembly shall fix its own compensation," is retained verbatim, with the exception of the word "that."

So that the framers of the amended section evidently contemplated, as did the framers of the original section, that the General Assembly could fix the compensation of the members, except that the action of any General Assembly in this regard could not apply to itself.

Sections 9 and 30, so far as they relate to the change of salary of public officers, have always remained as they were originally adopted, up to the time of the submission of the present amended section 6; so that the words "any law" and "no law" have continued to refer to laws passed by the legislature.

It is a general rule of law that no public officer has any property right to the salary of his office, and that such salary may be increased or diminished during his term of office, in the absence of constitutional restrictions.

"The general rule undoubtedly is, that in the absence of any constitutional restriction, the salary of a public officer may, by proper legislative authority, be either increased or diminished during his official terms. Mechem on Public Officers, 857; Cooley's Const. Lim. 276."

Carlile vs. Henderson, 17 Colo., 532, 534.

As we have seen, the restrictions in the Constitution relative to the increase or decrease of salaries of public officers have to do solely with laws passed by the General Assembly, and not to provisions of the Constitution, which are adopted directly by the people. Consequently, the people, in their sovereign capacity, through amendments to the Constitution, may raise or lower official salaries, if they see fit, without violating any right or rule of law.

By the recent amendment the people of the State of Colorado have fixed the compensation of members of the General Assembly "until otherwise provided by law." This amendment became effective November 8, 1910, and is subject to no restriction relating to the increase or decrease of the compensation of public officials during their terms.

Furthermore, we have the practical construction given to similar constitutional amendments by the executive officers of the State of Colorado. The amendment to section 30 of Article V of the Colorado Constitution, proposed in 1881 and adopted at the election held November 7, 1882, fixing the salary of the Governor and certain judicial officers, was treated as being effective from the time of its adoption, and salaries drawn in accordance therewith.

See:

People vs. Sours, 31 Colo., 369, 393.

And the records of the Auditor's office show that the amendment to section 6 of Article V, changing the compensation of members of the General Assembly from four dollars to seven dollars a day, which was proposed in 1883 and adopted by vote of the people in November, 1884, was treated by the executive department as being effective from the time of its adoption, and senators who had been elected in 1882, and whose terms did not expire until 1886, received the seven dollars a day, beginning with January, 1885, under the terms of the amendment adopted, as stated above, in November, 1884—in the midst of their respective terms.

It has been held by the Supreme Courts of numerous states that long-continued and unquestioned interpretation of a paragraph of a Constitution, by the General Assembly, or the officers

whose duty it is to carry into effect the provisions of the paragraph, is a strong argument in favor of its interpretation.

See:

Epping vs. City of Columbus, 117 Ga., 263.
Nye vs. Foreman, 215 Ill., 285.
State vs. Gray (Nevada), 19 L. R. A., 134.

We are, therefore of the opinion, both upon principles of law and practical construction by executive officers of the State of Colorado, that the compensation of hold-over senators in the present General Assembly, as well as of all other members of that body, is fixed by the amendment relative thereto adopted by the people at the last general election, November 8, 1910.

Respectfully,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 59.)
January 27, 1911.
To State Auditor.
By Mr. Mothersill.
In re: Application of constitutional amendment to section 6, Article V, of the Constitution, voted on November 8, 1910, to members of the legislature.

1. The amendment applies to all of the senators and to all of the representatives.
2. All members of the General Asembly are authorized to receive seven dollars per day, and all actual and necessary traveling expenses, such as actual railroad fare, necessary meals, and sleeping-car accommodations.
3. All expenses are to be paid as incurred, and salaries are to be paid monthly.

Hon. Michael A. Leddy,
Auditor of State,
Denver, Colorado.

Dear Sir: In response to your letter of recent date, making certain inquiries relative to your duties, if any, under the amendment to section 6 of Article V of the Constitution, voted upon on November 8, 1910, the following opinion is respectfully submitted:

Upon the general question as to when the amendment in question became effective, and as to what members of the General Assembly the compensation therein provided applies, this office has just rendered an opinion to the Speaker and House of Representatives of the present General Assembly, a copy of which is hereto attached, and to which you are respectfully referred for the rules of law upon which we base our answers to the following categorical questions which you have asked.

"*First*—What senators come under this act? Does this act apply to the whole of the senators?"

Answer—In our opinion, the constitutional amendment applies to all of the senators of the present General Assembly.

"*Second*—If not, does the Auditor audit and the Treasurer pay the hold-over senators their salary, mileage, and expense the same as has been done previously?"

Answer—The foregoing answer replies to your second question.

"*Third*—How does the law apply regarding the senator's elected November 8, 1910: First, as to the seven dollars per day? Second, what constitutes their expenses, and in what manner are they to furnish bills for such expenses?"

Answer—As stated above, in our opinion the amendment applies to senators elected November 8, 1910, and to all members of the General Assembly, and they are thereby authorized to receive seven dollars per day.

The expenses allowed by the amendment are "all *actual* and *necessary* traveling expenses," and, under the rule that constitutional provisions must be understood according to the ordinary signification of the language used, we take this to mean the actual railroad fare paid by members in going from their respective homes to the seat of government and returning to their homes by the most direct route; also, the actual expenses for necessary meals and sleeping-car accommodations while making such journey.

The amendment does not provide any particular manner in which members of the General Assembly shall furnish bills for their traveling expenses, but section 2905 of the Revised Statutes, 1908, which has been upon the statute-books for many years, provides as follows:

"Each member of the general assembly shall receive from the presiding officer of the house to which he belongs a certificate setting forth the number of days of attendance of such member and the amount due for mileage, and such certificate, when presented to the Auditor, shall entitle the holder thereof to a warrant for the amount due, and the Auditor shall draw his warrant accordingly."

This section indicates the procedure for the members of each house to follow in presenting their claims for compensation and expenses to your office.

"*Fourth*—Does this amendment apply to where members have paid no fare from leaving home to attend a session? Can they draw railroad fare?"

Answer—The language of the amendment is "all *actual* and *necessary* traveling expenses," and it is our opinion that members would have no right to draw railroad fare when none had been paid, either from failure to travel, or because of having ridden upon a pass or any gratuitous transportation.

"*Fifth*—In what manner does the amendment apply to the members of the House of Representatives? And is the expense made up now or at the end of the biennial period?"

Answer—It is our opinion that the amendment applies to all members of the House of Representatives.

The amendment provides that the expenses of members allowed by the amendment are to be paid "after the same have been incurred and audited," from which it is our opinion that these expenses are to be paid by the Auditor, from time to time, as they occur, and are duly allowed by your department upon the presentation of certificates, as indicated in the answer to your third question.

"*Sixth*—At what time is the expense incurred? At what time shall I draw warrants for the expenses incurred by the members of the legislature?"

Answer—The first part of this question is practically answered by the answers to your fifth question.

The statutes provide that the state officers generally shall be paid monthly, and since there is no law, of which we are aware, directing when the compensation of members of the legislature shall be paid, we take it that, for the convenience of your office, the members should be paid each month, at the time the state officers are paid.

"*Seventh*—Under No. 7 you make inquiry relative to certain possible contingencies which might arise upon the death of a member of the General Assembly."

We would respectfully defer answering that question until the situation or situations suggested actually arise, since each case would undoubtedly have its particular features which might vary any rule we might now lay down.

Yours respectfully,

BENJAMIN GRIFFITH,
Attorney General,

By PHILIP W. MOTHERSILL,
Assistant.

(Opinion Book 4, p. 65.)
January 28, 1911.
To the Speaker and House.
By Mr. Lee.
In re: Right of legislature to adjourn over Sunday, while the election of United States senator is pending.

An adjournment over Sunday is proper and permissible, and will not impair the result of the election.

To the Honorable, the Speaker
and the House of Representatives
of the Eighteenth General Assembly.

Gentlemen: In response to House Resolution No. 6, with regard to the right of the legislature to adjourn over Sunday while the election of United States senator is pending, the following opinion of the Attorney General is respectfully submitted:

The question of adjournment depends upon the following language of the act of Congress of July 25, 1866, Chapter 245; 14 Statutes at Large, 245, and 2 Federal Statutes Annotated, page 210:

"If no person receives such majority on the first day the general assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected."

The query stated will be answered or resolved by ascertaining the true meaning of the word "session" as there used. It does not have a single fixed and definite meaning, but is variously used in the statutes and Constitutions. It is sometimes employed to indicate an actual sitting of a court, legislative body, or other assembly, not interrupted by adjournment. Again, it is employed to indicate an actual sitting, continued by adjournments in ordinary course, from day to day, or over Sundays and holidays, but not interrupted by adjournment to a distant day. And at other times it is employed to indicate the entire period intervening between the convening of a particular assembly and its final adjournment.

The true meaning is ascertained in each instance by reference to the context, and the object of the statutory or constitutional provision under consideration.

United States vs. Dietrich, 126 Fed. R., 659.

The apparent scope and intention of this part of the act of Congress is to insure prompt and diligent attention of the legislature to the election of senators. It must be construed in connection with the laws and rules of procedure governing the particular legislative session.

The Constitutions of the United States and of a larger number of the states provide for adjournments from day to day, provided that there shall not be such an adjournment for more than three days, without the consent of both houses of the legislature. This must have been within the contemplation of Congress when this act was passed. It must also have been within the contemplation of Congress that legislatures do not ordinarily meet upon Sunday.

The reasonable interpretation to be given the language used would, therefore, seem to be that, if no person received a majority upon the first day, at least one vote shall be taken upon each succeeding day upon which the legislature meets for the transaction of business during the session of the legislature.

"The correct construction of this clause depends upon the definition of the word 'session' as therein used. The prime definition of this word when applied to a legislative body, is the actual sitting of the members of such body for the transaction of business. It also may be used to denote the term during which the legislature meet daily for business, and also the space of time between the first meeting and the adjournment. The context affords the light for determining the meaning of the word 'session' when used in the constitution. * * * The 'last three days of the session,' in section 11, means working days, when the legislature is in actual session for the transaction of business."

Farwell Co. vs. Matheis et al., 48 Fed. R., 363, 364.

To the same effect in construing the meaning of "session" are the cases of:

Moog vs. Randolph, 77 Ala., 597, 607.

Sayre vs. Pollard, 77 Ala., 608.

Cheyney vs. Smith, 3 Ariz., 143.

Precedent in this state is in accord with this view. In the election of senator in 1883 the General Assembly adjourned on Saturday, January 20, until Monday, January 22.

It is, therefore, my conclusion that an adjournment over Sunday is proper and permissible, and will not impair the result of the election.

Respectfully,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 68.)
January 28, 1911.
To State Treasurer.
By Mr. Mothersill.
In re: Suggested act terminating interest on certificates of indebtedness issued for suppressing insurrection during the years 1899, 1903, and 1904.

Such an act would be unconstitutional, on the ground that it would impair the obligation of contracts, which is prohibited by section 5, Article II, of the Constitution.

Hon. Roady Kenehan,
State Treasurer,
Denver, Colorado.

Dear Sir: In regard to the suggested act, entitled: "An Act terminating interest on certificates of indebtedness issued for suppressing insurrection during the years 1899, 1903 and

1904," which you recently referred to this office for an opinion as to its legality and proper form, we respectfully submit the following:

The act suggested by you provides, in section 1, that the State Treasurer shall give notice by publication to all persons holding certificates of indebtedness for suppressing insurrection during the years 1899, 1903, and 1904, that all interest on the same shall cease April 1, 1911.

These certificates bear interest according to an act approved March 25, 1885 (Session Laws, 1885, p. 206), and an act approved March 30, 1901 (Session Laws, 1901, p. 175, sec. 1).

By virtue of these acts, the state became obligated to pay interest on the certificates in question, which were issued subsequent to the passage of the act.

36 Cyc., 899.

26 Am. & Eng. Enc., 478.

We are of opinion that the act suggested by you is unconstitutional, on the ground that it would impair the obligation of contracts, which action on the part of the state is prohibited by section 5, Article II, of the Constitution, which reads as follows:

"That no *ex post facto* law, no law impairing the obligation of contracts * * * shall be passed by the general assembly."

The holders of certificates bearing interest are entitled to such interest until the same is tendered, or paid by the state, or a compromise is made.

Very respectfully,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant.

(Opinion Book 4, p. 70.)
January 30, 1911.
To Captain, Colorado State Penitentiary.
By Mr. Talbot.
In re: Application of "eight-hour labor day for public employes" to employes of the State Penitentiary.

The statute has no application to the employes in the State Penitentiary.

Mr. H. P. Dunbaugh,
Captain, Colorado State Penitentiary,
Canon City, Colorado.

My Dear Sir: I have your letter of January 27, in which you state that in your opinion section 3921 of the Revised Statutes of Colorado, 1908, relating to the "eight-hour labor day

for public employes," applies to the employes of the State Penitentiary.

In this, in my judgment, you are clearly mistaken. I think the section refers only to those employed by the day. The reading is: "It shall be unlawful * * * to employ any mechanic, working man or laborer in the prosecution of any such work for more than eight hours a day."

The position we take is supported by authority.

The State of Kansas has a statute which is stronger than ours, which reads as follows:

"It shall be unlawful for any such corporation, person or persons to require or permit any laborer, workman, mechanic or *other person*, to work more than eight hours per calendar day in doing such work," etc.

In construing that statute, Horton, chief justice, in the case of State of Kansas at the relation of the Attorney General vs. Martindale, et al., handed down an opinion in which it was held that the statute had no application to the employes of the state penitentiary. He said, among other things:

"Then, again, the officers and employes mentioned in said section 20, of chapter 152, are paid annual salaries and not per diem wages for each day. The words 'laborers, workmen, mechanics and other persons' in section 1 of chapter 114, evidently do not embrace any officer or employe for whom an annual salary has been specifically named and appropriated by the legislature."

It seems that this case is directly in point; and my opinion, therefore, is clearly that the statute has no application to the employes in the State Penitentiary.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By GEORGE D. TALBOT,
Special Counsel.

(Opinion Book 4, p. 74.)
January 30, 1911.
To the State Auditor.
By Mr. Griffith.
In re: Application of Chapter 68, Session Laws of 1909, providing for additional officers and employes of the General Assembly.

The act related not only to the Seventeenth General Assembly, but also to each succeeding assembly, and it would be proper to pay employes provided for in Chapter 68 out of any moneys appropriated for paying salaries of employes and officers of the Eighteenth General Assembly.

Hon. Michael A. Leddy,
State Auditor,
Denver, Colorado.

Dear Sir: In reply to your letter of January 27, in which you make certain inquiries in regard to Chapter 68, Session Laws of 1909, I beg leave to submit the following:

As I understand it, you ask whether the provision of section 2 of said act, providing for additional officers and employes of the General Assembly, related only to the Seventeenth General Assembly, or whether these officers may be appointed in the manner therein designated for each succeeding assembly.

There is no question but that the amount of money appropriated was for salaries for January, February, and March of the fiscal year 1909. Section 2 of the act reads:

"Section 2. From and after the passage of this act, additional officers and employees of the General Assembly while the same is in session, shall be provided for as follows: * * * " Then follow sections 3, 4, and 5, which name these officers and employes, and prescribe their method of appointment and their compensation.

The Constitution of the state, in section 27 of Article V, provides as follows:

"The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House; and no payment shall be made from the state treasury, or be in any way authorized to any person except to acting officers or employees elected or appointed in pursuance of law."

It was held in The People vs. Spruance, 8 Colo., 307 that this provision of the Constitution was mandatory, and it would follow, therefore, that all officers and employes of the assembly must be provided for by law.

Prior to Chapter 68 of the Session Laws of 1909, the law with relation to legislative employes is found in Chapter 112, at page 245, of the Session Laws of 1899, which was an act to prescribe the number, duties, and compensation of the officers and employes of the General Assembly. Section 1 thereof reads as follows:

"Section 1. Until otherwise provided by law, the officers and employees of the respective houses of the General Assembly of Colorado, may be and shall not exceed the following: * * * " Then follow other provisions and sections relating to the officers, their compensation, etc.

Neither in Chapter 112 of the Session Laws of 1899 nor in Chapter 68 of the Session Laws of 1909 is there anything designating any particular General Assembly to which those acts apply, and I see no reason why the same construction should not apply to the latter act as well as to the former; namely, that what was intended by the former act was to fix, in accordance with the constitutional mandate, certain officers and employes for the General Assembly, as the same should meet from time to

time, without respect to any particular assembly, since no particular assembly was mentioned. So, in the latter act, by reading it and the former act together, it seems to me that it intended to supplement and amend the former act by providing for certain additional officers; the former act reading that "until otherwise provided by law certain officers should be appointed," and the latter act reading that "from and after the passage" thereof *additional* officers named therein should be appointed. The latter act nowhere refers to any particular assembly, but merely mentions the General Assembly; and while it is true that the act of 1909 provides for compensation for a limited period only, the compensation provided for was to cover the period designated by the short appropriation bill, which was approved on January 25, 1909, and Chapter 68 was not approved until March 2 of that year, and, accordingly, the appropriation for the short period for these employes could not have been included in the short appropriation bill, and arrangements had to be made for them otherwise; namely, by a separate act.

In the case of The People vs. Spruance, 8 Colo., 307, the case of Tenney vs. The State, 27 Wis., 387, is commented upon and approved. In the Wisconsin case a law was passed providing for certain compensation for a clerk. It was contended in that case that, since the act provided for the appointment of a clerk and did not specify his term of office, it applied to a single session only; but it was said that, "although this law was passed at a previous session of the General Assembly, there being nothing in its language to indicate that it was intended to apply to a single session, it must be held to continue in force."

The Wisconsin court says:

"It is true that in the amended act [the act under construction] the word 'annually' was omitted from the appropriation clause, the same being in the original act, but it was doubtless an inadvertence and there was nothing in the language of the amended act from which it can be inferred that the same should only be applicable to a single session of the legislature; had such been the intention of the legislature it would doubtless have repealed the law of 1860 entirely, and restricted that of 1868 to the session of that year. The object of the law of 1868 evidently was to so amend that of 1860, that the pay of certain officers and employees should be increased, and that it should provide for paying certain employees who were not included in the original act, and not to repeal the law."

In conclusion, I am of the opinion that the employes provided for in Chapter 68 are intended for each session of the legislature, until the law appointing them is amended or repealed, and under those circumstances it would be proper to pay their salaries out of any moneys appropriated for the purpose of pay-

ing the salaries of employes and officers of the Eighteenth General Assembly.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 79.)
January 31, 1911.
To Superintendent of Colorado State Home for Dependent and Neglected Children.
By Mr. Stuart.
In re: Authority of judge of the Juvenile or County Court to commit children to the State Home for Dependent and Neglected Children for a *limited* period.

The court may decide whether a particular child is a dependent and neglected child, and may commit the same to the State Home, but not for a *definite* period. After commitment, the child is under the power and authority of the board of control, as fixed by law, during its minority.

Mr. H. W. Cowan,
Superintendent Colorado State Home for Dependent and Neglected Children,
2305 South Washington Street, Denver, Colorado.

Dear Sir: Replying to your inquiry of the 28th inst.: "Has the judge of the Juvenile or County Court authority to commit children to the State Home for Dependent and Neglected Children for a limited period—say, ninety days, or six months, or any other stipulated time?" We beg to advise that the court has no such authority. Section 557 of the Revised Statutes of 1908 provides, in part, that—

"The court may commit a child to the Dependent Home, or if for any other reason it shall appear to the best interests of said child, then the court may make such disposition of said child as seems best for its moral and physical welfare."

Section 558 is, in part, as follows:

"Any dependent child committed to the State Home for Dependent and Neglected Children shall as to its care and disposition by said Home be subject to the provisions of the Act approved April 10, 1895;"

the act referred to being the act which created the Home for Dependent and Neglected Children. And section 572 of the Revised Statues, being a portion of said act, provides, among other things, that—

"The board shall retain said children only until they can be placed in family homes;"

and further:

" * * * and they shall be retained therein until they are sixteen years of age unless they shall before that age be sent out as herein provided."

The board is then given discretion to retain children in said home even after reaching the age of sixteen years, and said board is made the legal guardian of said children so committed *during their minority.*

Section 577 provides:

" * * * an examination and determination by said court as to said alleged dependency, and should the child be found by said court to be dependent on the public for support, that an order be entered sending it to the state home."

The intention of the legislature, as manifested in the above sections, seems to be to give the court the legal authority to decide whether or not a particular child is a dependent and neglected child; then, in event the court so finds, to commit said child to the State Home, or make other disposition; but when a child is so committed to the State Home by the Court, it is no longer a ward of the court, but is an inmate of the home. Once it enters the home it becomes subject to the rules and regulations of said institution, and under the power and authority of the board of control, as said power and authority is now defined and fixed by law. They may find the child a home in a family and place it therein; or they may retain said child in the home until it becomes sixteen years of age, or longer. They are and remain the legal guardian of said child during the period of its minority.

When, however, the court enters an order placing a child in your custody for a specified time, you are under no obligation to accept the child; but should you accept the custody of the child under the said order, and then refuse to comply with the provisions of the order, you might be in contempt of court; and on your right to take the child under the order of the court, and then later refuse to comply with it, we do not express any opinion.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STAURT, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 89.)
February 7, 1911.
To Superintendent of Public Instruction.
By Mr. Stuart.
In re: State Library—its control and disposition by the General Assembly.

Traveling expenses of Superintendent of Public Instruction: Cannot use appropriation for expenses of trip outside the state.
Meaning of word "contingent" in statute.
Expense of printing and mailing biennial report of predecessor in office.

Mrs. Helen M. Wixson,
Superintendent of Public Instruction,
Capitol Building, Denver, Colorado.

Dear Madam: Your favor of January 23, propounding certain questions, received, and the same has had our attention.

Your first question is as follows:

"1. A joint resolution to dispose of the State Library by a gift to any institution willing to take it has been introduced in the Senate. Can the library be so disposed of during my term of office? Would it not require a constitutional amendment to so abolish it?"

The only reference in the Constitution to the State Library, that has come to our attention, is section 20 of Article IV, which provides as follows:

"The Superintendent of Public Instruction shall be ex-officio State Librarian."

Therefore it would seem that the State Library is a matter of legislative control and disposition by proper legislative enactment, without respect to a constitutional amendment; yet, on the other hand, since you are designated by the Constitution as ex-officio State Librarian, you could not be deprived of this position without a constitutional amendment.

The statutes provide (secs. 3951 et seq., Revised Statutes of 1908) that the State Library shall be kept in the rooms provided by the state for the same; and then follow various provisions in regard to the hours that the library shall be kept open, the control and disposition of books, other documents, etc.

Since you have requested an immediate answer to your second question, hereinafter set forth, we have not had the necessary time to determine whether the State Library could be disposed of by joint resolution; but from the limited time that we have had to look into this matter, we are inclined to think that any such disposition which would be a repeal of the existing law would have to be made by an authority of equal dignity with the present statute; to-wit, an act of the General Assembly.

Your second question is:

"2. A question arises regarding the money set apart for the traveling expenses of the State Superintendent of Public Instruction. Can the money be used to pay her expenses outside of the state when the trip is made in the interest of this department?"

The statute relating to the duties of the Superintendent of Public Instruction, with reference to visitations and traveling, and with reference to the appropriation for that purpose, is found in section 5875, Revised Statutes of Colorado, and reads as follows:

"5875. Report of Superintendent—Visitations—Investigations—Expenses.—Sec. 10. He shall, on or before the tenth day of December in every year preceding that in which shall be held

a regular session of the general assembly, report to the governor the condition of the public schools, the amount of the school fund appropriated, and sources from which derived, with such suggestions and recommendations relating to the affairs of his office as he may think proper to communicate. It shall be his duty to visit annually such counties in the state as most need his personal attendance, and all counties, if practicable, for the purpose of inspecting the schools, awakening and guiding public sentiment in relation to the practical interests of education, and diffusing as widely as possible, by public addresses and personal communication with school teachers and parents a knowledge of existing defects and of desirable improvements in the government and instruction of the schools; and he shall open such correspondence as may enable him to obtain all necessary information relating to the system of public schools in other states; and he shall receive out of the state treasury, for actual necessary traveling expenses, and other expenses while traveling on the business of the department, not exceeding five hundred dollars per annum, for which he shall render an itemized bill to the auditor of state, who is hereby authorized to draw his warrant therefor; and all office, fuel, furniture, postage, books, stationery, and other contingent expenses pertaining to his office, shall be furnished in the same manner as those of the other departments of the state government."

If the power is given to the Superintendent of Public Instruction to attend meetings or to look after interests of the department outside of the limits of the state, it must be found in this section.

The only direct provision with relation to traveling relates exclusively, it seems to me, to traveling within the state, since the statute reads as follows:

"It shall be his duty to visit annually such counties in the State as most need his personal attention, and all counties, if practicable, for the purpose of," etc.

Then follows a provision that he shall open such correspondence as may enable him to obtain all necessary information relating to the system of public schools in other states. Then follow the words:

"And he shall receive out of the state treasury for actual necessary traveling expenses, and other expenses while traveling on the business of the department, not exceeding five hundred dollars per annum, for which he shall render an itemized bill to the auditor of state."

The ordinary rule of construction in this case would be that the traveling expenses mentioned would refer to journeys made while in the performance of such duties as have been designated by the statute, and, as before stated, the only duty the statute prescribes for Superintendents of Public Instruction in traveling

relates to visits to schools within the state. The statute also provides that—

"All office fuel, furniture, postage, books, stationery and other *contingent* expenses pertaining to his office shall be furnished in the same manner as those of the other departments of the state government."

A question may arise as to the proper meaning of the word "contingent" as used in the above statute, and whether it would be broad enough to cover traveling outside of the state in the interest of your department. The word "contingent" in law seems to have a special and technical meaning, and, as was said in Dunwoody vs. The United States, 22 Court of Claims Reports, 280:

"The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses,' or 'incidental expenses,' or 'miscellaneous expenses.'"

If this construction of the word is adopted, it may well be that what is authorized by "contingent expenses" are small and miscellaneous items, necessarily incident to the office, but not expressly enumerated; and since the duties of the superintendent, with reference to traveling, are specifically set forth, it would not include any other kind of traveling expenses.

Furthermore, the statute reads that these contingent expenses pertaining to the office shall be furnished in the same manner as those of the other departments in the state government; which would seem to refer to supplies furnished, office equipment, etc., and not to traveling expenses.

I understand, furthermore, that this question of the traveling expenses of the Superintendent of Public Instruction has long been a mooted one, and the precedent has been, with one exception, to allow these traveling expenses; but if the Auditor should inquire of this office whether or not he should pay out these expenses, I believe at least that there is sufficient doubt concerning the legal authority for paying the same out to warrant this office to advise the Auditor that he should do so only under judicial authority.

In Carlile vs. Hurd, 3 Colo. Appeals, 11, the right of a deputy insurance commissioner to collect for expenses incurred in attending insurance conventions outside of the state, and examining the condition of foreign insurance companies at the home office, is denied; and while the statutes with relation to the insurance department and the Superintendent of Public Instruction are not

identical at all, with reference to traveling expenses, yet the court in that case refuses to recognize bills for expenses, where the authority for such expenses is not conferred in the statute.

Your third question is:

"3. The biennial report of my predecessor has just been turned over to us by the printers. Must this office assume the expense of said report, printing and mailing same? The report of 1909 was received and mailed before the office was turned over to Mrs. Cook. In what way can the report of 1909-1910 be provided for, so that it will not appear as an expense of my administration?"

So far as the expense of printing the report is concerned, the short appropriation bill recently passed by the General Assembly and approved by the Governor, being House Bill No. 108, provides for an appropriation, as follows:

"Section 31. For printing biennial reports of the various officers, bureaus, boards and departments, as provided by law, the sum of ten thousand dollars, or so much thereof as may be necessary."

It would therefore seem that the printing of these reports would be covered by this appropriation, and not by any appropriation made to your office.

In regard to mailing these reports, it is necessary to inquire what the law says with reference to mailing the same.

Section 5875, Revised Statutes of 1908, provides that the Superintendent of Public Instruction shall, on or before the tenth day of December in every year preceding a regular session of the General Assembly, report to the Governor the condition of the public schools, etc.

Section 4710, Revised Statutes of 1908, provides that there shall be 2,000 copies of the report of the Superintendent of Public Instruction, and provides a penalty in case a copy of the same is not delivered to every member of the General Assembly on or before the tenth day of the legislative session following the biennial period reported upon. There do not seem to be any provisions requiring these reports to be mailed to any particular officer, such as is the case with reference to the codification of the school laws. As a matter of precaution, you should see that each member of the legislature has a copy of these reports, and outside of that requirement I do not know of any law requiring you to mail these reports to any particular individual or person.

The law provides, however, for the printing of 2,000 copies of this report, and no doubt it is the intention that the same should be distributed in places and to persons where the same would be of interest, and it is properly a matter of discretion where these reports shall go. While it is not obligatory upon you to send them out, it would seem to me to be the wise and beneficial course to pursue, if the same could be done without curtailing your own appropriation; and in that respect I beg leave to call your atten-

tion to the fact that the short appropriation bill gave an appropriation of $400 to your office to provide for the incidental and contingent expenses, including postage, etc. This bill is intended to make appropriations for a period covering December, January, February, and March. Therefore, out of the $400 appropriated the sum of approximately $133 might properly be set off to the term of office of your predecessor from December 1, 1910, until January 10, 1911. If any part of this amount has not been heretofore expended by your predecessor, it would seem that it could be spent now for postage without curtailing or cutting in upon your own appropriation. The Auditor could probably inform you as to what part of this appropriation has been expended by your predecessor.

Trusting that the above satisfactorily answers your queries, I am,

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

By T. M. STUART, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 116.)
February 14, 1911.
To the Governor.
By Mr. Mothersill.
In re: Right of S. S. Kendall to perform the duties and receive the salary of railroad commissioner after February 15, 1911.

1. Intent of the legislature must determine construction of a law.
2. An act of the extra session of the Seventeenth General Assembly, 1910, amending the State Railroad Commission Act of 1907, did not repeal the latter act except as to inconsistent provisions.
3. No vacancy in the office of state railroad commissioner for the term beginning January 10, 1911, was created by the going into effect, on February 15, 1911, of the act of the extra session of the Seventeenth General Assembly, 1910, amending the State Railroad Commission Act of 1907.

(Opinion Book 4, p. 130.)
February 8, 1911.
To Hon. John F. Shafroth.
By Mr. Griffith.
In re: Proposed coal mine inspection fund.

If inspection comes under the police power of the state—that is, relates to the public health, the public safety, or the public morals—it is proper to provide for the payment of the inspection by fees collected from the owners of the property inspected.

An inspection fee should not be so large as to yield an amount largely in excess of the cost of inspection; if so, the act would be invalid, as being a revenue law in the guise of an inspection law.

(See also Opinion Book 4, p. 104.)

(Opinion Book 4, p. 137.)
February 16, 1911.
To the Board of Capitol Managers.
By Mr. Griffith.
In re: Authority of the board to contract and pay for an expert accountant to check up the books and accounts of the secretary of the board.

Under the Laws of 1897, Chapter 34, section 3, the board has power to employ an expert accountant.

(Opinion Book 4, p. 147.)
February 18, 1911.
To Mr. J. Y. McLean.
By Mr. Stuart.
In re: Exemption from taxation.

1. Personal property of every person being the head of a family, to the value of $200, shall be exempt from taxation.
2. Improvements on homesteads are taxable.
3. Improvements on homesteads are real property and cannot be included in the $200 exemption on personal property.
4. It is the duty of every person to list all his property on his tax schedule and set forth whether he is the head of a family and whether he claims a personal property exemption. The assessor will allow the exemption if he believes it just, and in case the assessor disallows the exemption, the taxpayer may make complaint to the assessor, and in turn carry the matter to the County Commissioners and to the District Court.

Mr. J. Y. McLean,
Kirk, Colorado.

Dear Sir: We are duly in receipt of your letter of the 7th inst., submitting several inquiries for answer; and while the same as abstract legal propositions do not come within the province of this office, yet they involve matters of public welfare to such an extent that we have given them our careful attention, and herewith submit our opinion as fully as we are able to do so at this time.

Your first question is: "Is the head of a family allowed a $200 exemption on personal property from taxes? If not, what is the exemption, and when was the law passed?"

Answer to this inquiry requires that legislative history be set forth in order to make clear our position. Section 3 of Article X of the Colorado Constitution, on which section the allowance or refusal of this exemption must be founded, as it stood when the Constitution was originally adopted, contained no provision whatever for said exemption of household goods or personal property of the head of a family from taxation. In 1879 the General Assembly proposed an amendment to said section, whereby it was provided—

"That the household goods of every person being the head of a family to the value of $200.00 shall be exempt from taxation."

This proposition was carried by vote of the people, and said section in its amended form became a part of the Constitution. Subsequently thereto the General Assembly enacted said constitutional exemption into a statute, following the terms of said section, and such statute appears in force today in the Revised Statutes of Colorado of 1908, its present form being an act passed by the General Assembly of *1902* which act provides that the *household goods* of every head of a family, to the extent of $200, shall be exempt from taxation. In 1903 the General Assembly proposed another amendment to said section, whereby said exemption was changed to read:

"That the personal property of every person being the head of a family to the value of $200.00 shall be exempt from taxation."

This section, in its second amended form, was carried by vote of the people and became a part of the Constitution in November, *1904*, and is in force and effect today. However, since 1902 the General Assembly has not passed any statute to conform with said amended section as it now stands, and we find therefore a peculiar situation, because of the fact that the statute of 1902 exempts said $200 worth of *household goods*, while the Constitution of 1904 exempts said $200 worth of *personal property*. Whether or not said amended section is self executing and becomes fully operative without statutory enactment, is a judicial question that we would not be warranted in determining. However, it is our opinion that the General Assembly has treated it as self-executing, in that in 1907 it passed an act defining the phrase "head of the family," as used in said amended section, and evidently did not deem it necessary to amend said exemption statute of 1902 and change "household goods" to "personal property" therein.

Said definition may be of material value to you in the matter, and we therefore submit it. Said phrase is by statute declared to mean and refer to the following persons:

First—In case of a married man living with his wife, it shall mean the man, unless the wife is supporting the family, when it shall mean the wife.

Second—If the husband or wife is dead, then it shall mean the survivor, if there are children of the family supported by him or her.

Third—If the husband and wife are separted (living apart from each other) and there are children, then it shall mean the husband or wife who is supporting the children.

Fourth—If an unmarried person is the sole support of parent or parents or brothers or sisters, unable to support themselves, it shall mean such person.

Your second question is: "Are the improvements on homesteads assessable?"

They are declared assessable and taxable by the terms of the Colorado law, and the law further provides that all im-

provements on public lands, and all interest or title which any person owning such improvements may have in the land upon which the same are made, on which the taxes have not been paid prior to August 1 each year, shall be subject to sale.

Your third question is: "If assessable, would such improvements be included in said exemption, if there is not enough personal property to amount to $200? Are said improvements real or personal property?"

Construing the terms used in the revenue laws of Colorado, we are of the opinion that they declare such improvements to be real property, and hence could not be included under such exemption. It is provided that "improvements," wherever used in the revenue laws, includes all buildings, water rights, structures, fixtures, and fences erected upon or affixed to land, whether the title has been acquired to said land or not; and it is further provided that wherever "real estate" is used in said revenue law that it shall include improvements.

Your fourth question is: "If the head of a family is assessed on horses $50, cattle $20, farming tools $20, hogs $30, buggy $10, improvements $40, and household goods $30, making a total assessment of $200, would he have any taxes to pay?"

If the beforementioned section of the Constitution as it now stands is self-executing, he would be entitled to claim an exemption on all of said property, except "improvements $40." If said section is not self-executing, he would be entitled only to an exemption on said "household goods $30."

Your fifth question is: "If he is assessed with improvements $40 and his other personal property $35, would he have any taxes?"

This question is answered by the preceding answer; i. e., the improvements would not be exempt, and the exemption of the personal property would depend upon a judicial construction of said amended section.

Your sixth question is: "Whose place is it to deduct the exemption?"

It is the duty of every person to return each year a full list of his personal property for taxation upon blanks or schedules furnished him by the assessor.

It has been the practice that each person, upon returning said list of property, sets forth on said blank whether or not he is the head of a family, and whether or not he claims the personal-property exemption. If it is claimed, the assessor in making the assessment roll should allow it, if he believes the facts warrant it. In case he does not allow it, it is the duty of the person aggrieved to appear before the assessor and make complaint, and in the event that said assessor still refuses to allow the exemption, it is his duty to carry the matter before the county commissioners in the manner of procedure required by law. If the action of said commissioners is adverse to him, he has the right to appeal to the District Court.

Any attempt on our part to pass upon the validity, constitutionality, or operation of any of the laws mentioned herein would be entirely extrajurisdictional and of no benefit whatever to you. However, while we are satisfied that the head of a family is not entitled to an exemption from taxation on both $200 worth of household goods and $200 worth of his other personal property, we are inclined now to believe, from the investigation we have made, that his claim for such exemption on $200 worth of his personal property—including, if he desires, his household goods, at their taxable value—would be sustained and allowed by the court.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By T. M. STUART, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 166.)
February 28, 1911.
To Superintendent of Insane Asylum.
By Mr. O'Connor.
In re: Registered pharmacist.

Dr. A. P. Busey,
Superintendent Colorado State Insane Asylum,
Pueblo, Colorado.

My Dear Sir: Replying to your esteemed inquiry of the 25th inst., I beg to advise that the law of 1907, regulating pharmacies, is intended to apply to stores and places of business where the selling of medicines and the filling of prescriptions is a part of said business.

If you keep on hand drugs and medicines, and fill the prescriptions prescribed by physicians for your inmates, this you might do, I take it, without having a registered pharmacist in charge. The physician filling the prescription could be considered as doing so for the doctor who actually prescribed, and would have the same right under the circumstances to fill the prescription as if he were the doctor who had written the prescription.

You would have no right, without a registered pharmacist in charge, to sell, or vend drugs, or to fill prescriptions for persons other than the inmates of the asylum.

Very respectfully yours,

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
Assistant.

(Opinion Book 4, p. 177.)
March 3, 1911.
To the State Bank Commissioner.
By Mr. Talbot.
In re: Production of telegrams in evidence.

Hon. E. W. Pfeiffer,
State Bank Commissioner,
Denver, Colorado.

My Dear Sir: Referring to your letter of February 27, in relation to the power of the State Bank Commissioner, or his deputy, to compel the production of telegrams in the case put, I will say:

Telegrams are not privileged communications, and may be called for and given in evidence whenever, in the opinion of the court, they are proper and competent evidence; and, on the refusal of the telegraph company's agent to produce the same, he may, by proper process, be compelled to do so.

Of course, certain formalities must be complied with, by which the district attorney or the party representing you will be advised. You might refer him to the following cases where the matter is discussed:

State vs. Litchfield, 58 Me., 267;
National Bank vs. National Bank, 7 W. Va., 544;
Ex parte Brown, 77 Mo., 83-91;

by which, if in doubt, he will be advised as to the preliminary steps and procedure.

Very truly yours,
BENJAMIN GRIFFITH,
Attorney General,
By GEORGE D. TALBOT,
Special Counsel.

(Opinion Book 4, p. 178.)
March 2, 1911.
To the State Auditor.
By Mr. Mothersill.
In re: Increase of salary of clerk of State Railroad Commission.

1. The clerk and assistant secretary of the State Railroad Commission is not a public officer within section 30 of Article V of the Constitution.
2. Salary of clerk and assistant secretary of State Railroad Commission may be increased or diminished after his appointment.

Hon. M. A. Leddy,
Auditor of State,
Denver, Colorado.

Dear Sir:—We are in receipt of your letter of February 27, asking for an opinion concerning the salary of John W.

Flintham, as clerk and assistant secretary of the State Railroad Commission.

It appears that Mr. Flintham was appointed clerk of the Railroad Commission on January 12, 1909, under section 19 of the act creating the Railroad Commission (Session Laws 1907, p. 351).

When the new commissioner, elected in 1910, took office action was taken by the commission retaining Mr. Flintham in his position as clerk "until a new law goes into effect."

At the special session of the legislature, held in 1910, an act relative to the Railroad Commission was passed, which went into effect on February 15, 1911. Section 18 of this act provides: "The Commission may appoint an Assistant Secretary at an annual salary of twenty-five hundred dollars."

The Railroad Commission met on February 15, 1911, the day the act went into effect, and the minutes of that meeting show the following action:

"John W. Flintham was elected Assistant Secretary of the Commission, by unanimous vote, at an annual salary of twenty-five hundred dollars."

You desire to know, as we understand, whether Mr. Flintham is entitled to the increase of salary from the 15th of February under this appointment.

Section 30 of Article V of the Constitution provides:

"Except as otherwise provided in this Constitution, no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment."

Section 28 of the same article of the Constitution provides:

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

The question is whether Mr. Flintham is a public officer under section 30, or whether he comes within the provisions of section 28.

It has been held by the Supreme Court that the clerk of the Supreme Court is not a state officer; that he derives his office by appointment from the judges, and holds during the pleasure of the judges, and may be removed by them.

In re Speakership, 15 Colo., 532.

It is often difficult to distinguish between a public office and an employment in a public position. In this connection the learned editor of the American and English Encyclopedia of Law writes as follows:

"While an office is a public charge or employment, not every employment is an office. It is difficult, however, to dis

tinguish between employments which are and those which are not public offices. The distinction has been thus stated: 'Where an employment or a duty is a continued one defined by rules prescribed by law and not by contract, such a charge or employment is an office. A duty or employment arising out of a contract and depending for its duration and extent upon the terms of such contract is not an office.'

"And, again, in distinguishing between these terms, it has been said that an office differs from an employment in that the former implies a delegation of a portion of the sovereign power to and the possession of it by the person filling the office."

23 Am. & Eng. Ency. Law, 324.

The Supreme Court, in its opinion in In re H. B. 166, 9 Colo., 628, defines an office as follows:

"A governmental office is defined to be 'a public institution or employment conferred by the appointment of the government. The term embraces the ideas of tenure, duration, emolument and duties.'"

It was held in State vs. Johnson, 123 Mo., 43, that a provision of the Constitution similar to section 30 of Article V of our Constitution embraced only officers who were elected or appointed for some specified or definite term, and does not apply to officers who do not have a fixed term of office.

In the case of Mr. Flintham it appears that his duties are not prescribed by statute; it is not a position which must be filled; he exercised no portion of the sovereign power of the state; nor does he hold his position for any fixed term or period. His appointment and removal are at the pleasure of the Railroad Commission.

So that, from the foregoing facts and authorities, we are of the opinion that Mr. Flintham does not fall within the provisions of section 30 of Article V.

Neither does he come within the provisions of section 28 of Article V of the Constitution, since the law increasing his compensation does not give extra compensation for services already rendered; nor was he appointed under any contract for any definite time or services.

We are, therefore, of the opinion that Mr. Flintham is entitled to the increase of salary from the 15th of February 1911, as provided by the act creating a Railroad Commission (Session Laws, 1910, p. 45).

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant.

(Opinion Book 4, p. 182.)
March 6, 1911.
To the State Treasurer.
By Mr. Mothersill.
In re: Salaries of officers and employes of the State Land Board.

1. Amendment to section 6 of Article IX of the Constitution, providing for a State Board of Land Commissioners, which went into effect January 10, 1911, did not repeal statutes then in force in reference to the methods of doing business by the board.
2. Certain officers and clerks of the State Land Board authorized by statute, and whose salaries are provided for in short appropriation bill, may be paid on vouchers signed and issued by the register.

(Opinion Book 4, p. 189.)
March 8, 1911.
To the State Auditor.
By Mr. Griffith.
In re: Charge of legislators for time consumed coming to attend session, and for return railroad fare, sleeping- and dining-car service.

1. The per diem provided for by statute relates only to the regular and special sessions. The time consumed in coming to the session, being prior thereto, could not be allowed for.
2. Under the recent constitutional amendment, allowing $1,000 for compensation for the biennial period, the question of per diem can make no difference.
3. Actual and necessary traveling expenses are to be paid after the same have been incurred.

Hon. M. A. Leddy,
Auditor of State,
Denver, Colorado.

Dear Sir: Your favor of March 7 received, in which you inquire, first, whether members of the legislature should charge per diem of $7 for time consumed in coming to Denver to attend the session; second, whether they should charge at this time for return railroad fare, sleeper and dining-car service.

Answering your first query, I beg leave to say that, by the adoption of the recent constitutional amendment relating to compensation of members of the General Assembly, it is provided that—

"Each member shall receive as compensation for his services the sum of one thousand dollars ($1,000.00) for each biennial period payable at the rate of seven dollars ($7.00) per day during both the regular and special sessions. The remainder, if any, payable on the first day of the last month of each biennial period; together with all the actual and necessary traveling expenses to be paid after the same have been incurred and audited."

The per diem seems to be provided for the regular and special sessions, and no other time. The time consumed in coming to Denver to attend the session, and which relates, we suppose, to a

time prior to the first day of the regular session, would not, in our opinion, be time for which a per diem could be allowed. The per diem could only be allowed for days during which the legislature was in session. Furthermore, ultimately, the determination of this question will not make any difference one way or the other to the legislator or to the state, since he is permitted a sum of $1,000 for his services for the biennial period, and no more, and even though the legislature would not be in session for a sufficient number of days to make up this sum at the rate of $7 per day, yet the law provides that any remainder shall be paid on the first day of the last month of each biennial period.

Answering your second question, the law itself is explicit in saying that the actual and necessary traveling expenses are to be paid after the same have been *incurred*. Certainly no expenses have been incurred this time for return railroad fare, etc., as you state in your letter, and I would not think, therefore, that it would be proper to allow expenses for return railroad fare, return sleeping-car service, and return dining-car service, until said expenses have been incurred.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 195.)
March 9, 1911.
To Game and Fish Commissioner.
By Mr. Talbot.
In re: Permit to capture mountain sheep.

1. The Game and Fish Commissioner may issue a permit to the owner of a private park to capture mountain sheep, and place them in said park for propagation and exhibition.
2. The Governor's permission must be had, and a proviso in the permit that said sheep and their increase shall be the property of the state, and removable to public parks at the option of the proper authorities.

(Opinion Book 4, p. 199.)
February 10, 1911.
To the Public Examiner.
By Mr. Talbot.
In re: Delinquent taxes, etc.

1. The county treasurer is liable for any wilful or negligent failure to collect interest on delinquent taxes.
2. He has no right to postpone the date of payment.
3. He can be held on his official bond, if his failure to collect is wilful or negligent.
4. It is the duty of the State Auditor as general accountant to see that the state's proportion of delinquent taxes, penalties, and interest is turned into the treasury.
5. The penalty for failure to see that the state's portion of money is turned into the treasury is fine and imprisonment, not to exceed $5,000 nor one year.

(Opinion Book 4, p. 202.)
March 11, 1911.
To the Public Examiner.
By Mr. Stuart.
In re: Power of county commissioners to engage and pay auditors for examining county books.

Under sections 2552 and 2553, Revised Statutes of 1908, the county commissioners shall audit the monthly report of receipt of fees, commissions, and emoluments, and the disbursements made by various county officers.
Sections 1335-1340 provide for investigation of accounts and affairs of county treasuries by order of the District Court.
Section 7, Laws of 1909, page 458, requires the Public Examiner to make an examination at least once a year of the financial affairs of every county public office and officer, etc., but this provision is not intended to exclude the county commissioners from examining the records of county offices when necessary.
Said board may in its discretion call in expert accountants to make such examination, and may provide for the expense from the proper fund.

Mr. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: Your letter of February 21 makes inquiry as to the legal right of the county commissioners of any county to pay from the county funds bills of auditing firms, for the examination of county books, stating that it is your understanding that the law provides that the county commissioners themselves shall audit these accounts.

We are of the opinion that your understanding is based upon section 2553 of the Revised Statutes, which we believe, when construed with section 2552, provides that said commissioners shall audit only the monthly report of the receipt of fees, commissions, and emoluments, and the disbursement of expenses made by the various county officers, as provided in said section.

Sections 1335-1340 provide only for the investigation of the accounts and affairs of the treasury of the several counties by order of the District Court, and do not apply to the other county offices. This investigation is meant to be a safeguard over the county funds, but does not purport to be exclusive.

Section 7 of the act establishing the office of Public Examiner (Laws 1909, p. 458) authorizes the State Auditor, Public Examiner, or State Examiner, either personally or through a duly appointed representative, at least once a year, to examine into all the financial affairs of every county public office and officer; to make inquiry as to the financial condition of the taxing body authorizing the appropriations disbursed by said office, whether the requirements of law have been complied with; and also to investigate the methods and accuracy of the accounts thereof.

We do not believe that such provision is intended to exclude the board of county commissioners from examining into and investigating the records of all the county offices, when necessary to their general supervision of the county affairs.

We believe that, under the broad grant of powers given by section 1204 to the board of county commissioners, said board may, in the exercise of a sound discretion, call in expert accountants for the purpose of a thorough examination and auditing of the books and records of the various county offices, and make provision to pay the expense thereof from the proper fund.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STUART, JR.,
Assistant.

(Opinion Book 4, p. 206.)
March 13, 1911.
To the Secretary of State.
By Mr. Mothersill.
In re: Change of state bank into national bank.

No provision of law which requires such conversion to show on the Secretary of State's record.
If the bank continues for purpose only of clearing up matter of titles, though doing no banking business, there would not be an actual dissolution, and it would be subject to payment of the usual flat tax.
If there is actual dissolution, the Secretary of State should be notified, as in case of other corporations.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: In reply to your communication, making inquiry as to what steps must be taken by the officials of a state bank which has been converted into a national bank, in order to have your records show such change, we respectfully submit the following:

We understand that it is frequently the case that when a state bank is converted into a national bank the organization of the state bank continues for several years for the purpose of giving deeds and clearing up matters of title in connection with any property it may have held, although it does no active banking business—the assets of the bank being transferred to the new corporation.

It would seem to us that in such a case there would not be an actual dissolution of the state bank, and that it would be subject to the payment of the flat tax.

We know of no provision in the law which requires the fact of such conversion to be shown upon your records. If, however, at the time of the conversion of a state bank into a national bank, there is an actual dissolution of the state bank, then the requirement of the law for the notice of such dissolution to be filed in the office of the Secretary of State would apply.

The section requiring such notice is section 895, Revised Statutes of Colorado, 1908. This is a provision which applies generally to all corporations in Colorado, and would, in our opinion, include state banks.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant.

(Opinion Book 4, p. 208.)
March 13, 1911.
To the Secretary of State.
By Mr. Mothersill.
In re: Payment of flat tax by a corporation whose charter has expired, but has been renewed.

It is not a new company, but simply a continuation of the old company; and its rights and liabilities are not affected. It is subject to payment of delinquent taxes.

The acceptance of tax for 1910 would not bar the state from collecting the delinquent taxes, nor be a waiver of former delinquencies.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir:—In reply to your recent letter, asking for an opinion as to the payment of the flat tax by a corporation whose charter had expired by reason of the twenty-year limitation, but was renewed within the time provided in accordance with the statutes which allow the renewal of corporate existence, we submit the following:

It appears from your letter that the corporation in question was delinquent in the payment of its corporation license tax for the years 1902 to 1906, inclusive; that on September 29, 1910, it filed in your office a certificate of renewal of its corporate life, which was within the time of one year provided by the statute; that upon the filing of such renewal certificate the company offered $15 for corporation license tax, and refused to pay the delinquent taxes and penalties for the years 1902-1906.

The reasons given by the company for its refusal, as appears from your letter, are that the original company ceased to exist on November 2, 1902, the date of the expiration of its

original charter, and that at that time its property passed out of its hands, and that the new company is not responsible for the old company's debts.

We are of opinion that these reasons are entirely incorrect. The general rule is that where it is provided by law that a corporation may at the expiration of the term of its original charter renew its corporate life for a given period, the company thus revived is not free from its former obligations or rights; that it is not a new company, but simply a continuation of the old, and its former rights and liabilities are not affected.

"When the charter of a corporation is renewed as provided by law, it does not have the effect of creating a new corporation, but merely continues the existence of the old. * * * The mere extension of the charter of a corporation before its expiration in the manner permitted by law, merely continues the existence of the old corporation without affecting its identity or its rights and liabilities."

5 Thompson on Corporations (2nd ed.), See 5982.

"The extension, revival or renewal of a corporate charter for an additional period of time, on the expiration of the original charter, merely revives and continues the old corporation without interruption or change, and does not create a new corporation."

5 Thompson on Corporations (2nd ed.), Sec. 5984.

The officers of the corporation in question are incorrect in saying that at the expiration of the original term of the charter of their company the property of the company passed out of its hands. If there had been an actual dissolution of the old company, the directors of the company would, as provided by law, hold the property as trustees for the stockholders, and the property would be distributed to such stockholders after the payment of the debts of the corporation, which would include, of course, the delinquent license tax.

But the renewal of the corporation would prevent such distribution of the property, and the renewed organization would be liable for the former debts as though there had been no interruption of its existence.

We do not understand, however, that the acceptance by you of the license tax for 1910 would prevent the state from collecting the delinquent taxes for the years 1902-1906, and we believe that you would be warranted in receiving the tax for 1910, and that it would not be a waiver of any former delinquencies.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.
By PHILIP W. MOTHERSILL,
Assistant.

(Opinion Book 4, p. 215.)
March 18, 1911.
To Hon. J. H. Slattery, chairman of the Committee on Appropriations, House of Representatives.
By Mr. Stuart.
In re: House Bill No. 60, Eighteenth General Assembly, relative to an appropriation of $50,000 from the Internal Improvement Fund for the Larimer Street viaduct.

It would seem that said viaduct would come within the meaning of "internal improvements," and the use of the Internal Improvement Fund would not be prohibited.

Hon. J. H. Slattery,
Chairman of the Committee on Appropriations,
House of Representatives,
State House, Denver, Colorado.

Dear Sir:—Your letter of March 16th asks, as I understand it, my opinion on that part of House Bill No. 60, Eighteenth General Assembly, by which it is proposed to appropriate $50,000 from the Internal Improvement Fund to aid in the enlargement, rebuilding, or construction of a certain viaduct, known as the Larimer Street Viaduct, located in the City and County of Denver. You further state that it is important that your committee should have this opinion as soon as possible, and therefore I have given the matter my immediate attention, and herewith submit my view as fully as I am able to from the limited time I have had for investigation.

The legality of appropriating money from said Internal Improvement Fund to build, or aid in building, a bridge or viaduct located within the corporate limits of a city, appears never to have been passed upon by the Colorado Supreme Court, nor has the opinion of any of my predecessors in office, on this direct point, been called to my attention. Therefore, in determining the legality of appropriating said funds for such a use, I am compelled to draw my conclusions from decisions construing and defining "internal improvements."

The Colorado Supreme Court has said:

"It is, in general, unwise, as well as difficult, to attempt to give either a comprehensive or a restrictive definition of words and phrases used in legislative enactments. Such an attempt is especially hazardous in answer to a legislative question, for the reason that such definitions may embarrass the courts and prejudice the rights of parties in litigated cases then pending, or thereafter arising. Hence, it is, that upon the question now presented we do not feel at liberty to say more than that 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 prop

erty; and, furthermore, must be such improvements as are designed and intended for the benefit of the public.

"From the foregoing it results that appropriations of the internal improvement fund in question must be confined to permanent improvements of real property, within the state, and for the benefit of the public; appropriations for transient objects, as for personalty, as well as appropriations to promote private or individual enterprises, would be contrary to the intention of the general government, as donor of the fund."

In re Internal Improvements, 18 Colo., 319.

The Colorado Supreme Court has held that the construction of a public reservoir and canal system, under the control of the state, for irrigation and domestic purposes, and with due deference to the rights of prior appropriators, is a legitimate and valid use of said Internal Improvement Fund.

In re Internal Improvement Fund, 12 Colo., 285 and 287.

The Colorado Supreme Court has further held that the erection by the state of public buildings, such as asylums, universities, etc., in the exercise of its sovereign powers, is not the making of an "internal improvement," within the meaning of the grants creating said Internal Improvement Fund, and therefore said fund cannot be appropriated for such a purpose.

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

The legislative history of Colorado shows numerous appropriations from said Internal Improvement Fund for the construction of bridges and roads throughout the state, and I call attention to the following acts of the General Assembly whereby said Internal Improvement Fund has been used to construct bridges located in different cities or towns in Colorado, to-wit:

Laws of 1889, page 349, bridge at Gleenwood Springs.
Laws of 1889, page 353, bridge at Del Norte.
Laws of 1891, page 329, bridge at Aspen.
Laws of 1903, page 33, bridge at Empire.
Laws of 1903, page 45, bridge at Fairplay.
Laws of 1903, page 48, bridge at Steamboat Springs.
Laws of 1905, page 37, bridge at Empire.
Laws of 1905, page 44, bridge at Alamosa.
Laws of 1905, page 47, bridge at Pagosa Springs.
Laws of 1907, page 49, bridge at Castle Rock.
Laws of 1907, page 68, bridge at Julesburg.
Laws of 1907, page 77, bridge at Alamosa.
Laws of 1907, page 83, bridge at Greeley.
Laws of 1909, page 57, bridge at Granite.

In the light of the foregoing decisions, it would seem that said viaduct being within the state, a permanent improvement of realty, and an improvement designed and intended for the

benefit of the public, would come within the meaning of "internal improvements" as defined by the Colorado Supreme Court; further, that the use of said Internal Improvement Fund, in aiding in the construction of said viaduct, would clearly not be in conflict with the decision prohibiting the state from using said fund in the construction of public buildings.

In view of the continued legislative acts making appropriations from said Internal Improvement Fund to build bridges located in cities and towns within the state, I would be inclined to the opinion that the fact that said viaduct is located in Denver is not sufficient in itself to defeat said appropriation. In this connection I deem it advisable to call attention to the fact that Denver is both a city and a county of Colorado.

Section 3 of said bill clearly indicates that said viaduct is to be used as a roadway for the benefit of the whole public, but I would advise that section 4 be amended to read as follows, to-wit:

"Section 4. When constructed, it shall be the duty of the city and county of Denver to keep such viaduct in repair and to maintain the same forever at its own expense."

Since the courts have been exceedingly reluctant in giving "internal improvements" a definition of general applicability, and in view of the that I have been unable to find any decision in point as to "internal improvements" located entirely within a municipal corporation, and also owing to the large amount of this intended appropriation, I desire to call your attention to the fact that opinions of the Supreme Court construing proposed appropriations from this fund have been heretofore secured by the General Assembly, and, if deemed advisable, you could secure such an opinion on the proposed appropriation of the present bill before its final passage.

Very respectfully yours,

BENJAMIN GRIFFITH,
Attorney General.

By T. M. STUART, JR.,
Assistant.

(Opinion Book 4, p. 225.)
March 21, 1911.
To the Board of Capitol Managers.
By Mr. Griffith.
In re: Claim of F. E. Edbrooke for services as supervising architect of the Capitol building.

Under the general powers of the board, an architect may be employed, and his account paid after being properly approved and allowed.

The Board of Capitol Managers,
State Capitol,
Denver, Colorado.

Gentlemen: There has been presented to me by Governor Shafroth, for approval, a bill of F. E. Edbrooke for services as supervising architect of the Capitol building during the month of February, 1911, amounting to $100.

As I understand it, the Governor asks for my approval of this bill, in view of an opinion which I wrote to your board, of date February 16, which related to the authority of the board to hire an expert accountant to examine the books of the board. In the course of that opinion I called attention to the changes in the law in regard to the Board of Capitol Managers, and, among other things, that in the early days, when the Capitol was in the course of construction, the law specifically provided for the employment of an architect, while recent laws did not mention architect specifically. My idea in calling attention to this change was to show that the law had been changed from time to time to meet existing conditions, and it did not occur to me that there was any need of an architect at his time; but I am informed by the secretary of the board that the services of an architect are constantly required about the building, in supervising and managing changes in the arrangement of the building, in the repairs of the building, etc. If the services of an architect are required in these particulars, then I am of the opinion that, under the general powers given to the board by law, wherein it is stated that they shall have full power to appoint or employ and discharge at their discretion a superintendent, and all other employes whose duties shall be prescribed by the said board, and such other artisans and laborers as may be required in the prosecution of the work of completing said building and maintaining the grounds of said Capitol, and shall allow such compensation as they shall deem reasonable and just, the account of Mr. Edbrooke, when properly approved and allowed by the board, should be paid.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 227.)
March 21, 1911.
To Colorado State Board of Examiners of Barbers.
By Mr. Griffith.
In re: Right of apprentice, who is registered by the board, to run a barber-shop or work at the trade.

An apprentice has no right to practice barbering without a licensed barber as an instructor.

The Colorado State Board of Examiners of Barbers,
Capitol Building,
Denver, Colorado.

Gentlemen: I have your favor of February 7, in which you ask: "Has an apprentice, who is registered with this board, a legal right to run a barber-shop or work at the trade without a licensed barber as an instructor?"

The present act regulating the practice of barbering was approved May 5, 1909, and provided for the licensing of barbers in this state.

Section 7 thereof provided for the licensing of barbers engaged in that business at the time of the passage of the act, and gave to such persons ninety days after the approval of the act to file an affidavit for a license and pay the license fee.

Section 8 provides for the licensing of barbers thereafter, and gives your board the power to license barbers on certain conditions; among others, that a person applying for a license must either—

(a) Study the trade for three years as apprentice under a qualified and practicing barber; or—

(b) Study the trade in a properly conducted and licensed barber school, for a period of three years; or—

(c) Practice the trade in another state for a period of three years.

In short, it seems that by the terms of the act the barbers who were not licensed as such at the time the act took effect must have studied three years as apprentices, or studied three years in a school, or practiced three years in another state, in order to be qualified to practice the trade in this state.

The only exception to these requirements is that mentioned in section 9, wherein it is stated that nothing in the act shall prohibit any person from serving as an apprentice under a barber authorized to practice under the act; and, also, that such apprentice shall display his registration certificate with the board; and that no more than one apprentice shall practice in one barber-shop.

Under these provisions it seems to me that an apprentice who may be registered with the board as such, but who is not a licensed barber, has no right to practice barbering without a licensed barber as an instructor.

Section 15 provides a penalty by a fine of not less than ten dollars nor more than one hundred dollars, and by imprisonment in the county jail for not less than ten days nor more than ninety days, for practicing the occupation of barbering without having obtained a certificate of registration, which we understand to be the barber's license. A penalty is also provided for any person who falsely pretends to be qualified to practice such occupation.

I do not understand that the law provides that an apprentice can practice barbering, except as provided by section 9, which

states that he may serve as an apprentice under a barber authorized to practice, as stated above.

Trusting that this answers your query, I remain,

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 240.)
April 1, 1911.
To the State Treasurer.
By Mr. Stuart.
In re: Mailing of a check as payment of taxes.

Neither the mailing nor the receipt of a check constitutes the payment of taxes. Taxes can be paid only in money. (See Board of County Commissioners of El Paso County vs. Colorado Springs Co., 15 Colo. App., 274.)

Hon. Roady Kenehan,
State Treasurer,
Capitol Building, Denver, Colorado.

Dear Sir: We herewith return letter of F. J. Bawden, county treasurer of San Juan County, dated March 6, together with his inheritance tax report of said date.

Your inquiry, based on said letter, we understand is as follows: "Does the mailing of a check sent for the payment of taxes constitute payment of the tax?"

We must answer this in the negative. The receipt and acceptance of a check is only a conditional payment in individual transactions. In official transactions the rule is more stringent, and especially in the matter of the payment of taxes. It has been held in Colorado that taxes can be paid only in money, and that the receipt by the county treasurer of a check sent to pay a tax, and even the marking of the tax paid and the issuance by the treasurer of a tax receipt, is not a payment of the tax, and not conclusive against the county in a subsequent controversy with the taxpayer. We refer you to the Board of County Commissioners of El Paso County vs. The Colorado Springs Company, 15 Colo. App., 274.

In view of such a holding, it could not be held that the simple mailing of a check to the county treasurer alone would constitute a payment of the tax.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STUART, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 247.)
April 5, 1911.
To the State Inspector of Boilers.
By Mr. O'Connor.
In re: Inspection of steam boilers used for heating purposes.

The act of 1889 requires the inspection of steam boilers regardless of whether the same are used to generate steam for power or heating purposes.

Hon. George V. Cosseboom,
State Inspector of Boilers,
Denver, Colorado.

Dear Sir: Your inquiry of recent date, to-wit:

"Does the act of 1889, establishing the office of State Boiler inspector, make it the duty of that officer to inspect steam boilers used for heating purposes?"

has received our attention, and in reply we beg to advise that, in our opinion, the intention of the legislature was to make it the duty of the State Boiler Inspector to inspect all steam boilers and to collect the inspection fee therefor.

Section 1 of the act, in fixing the qualifications of the officer, uses the following language:

"* * * shall be well qualified * * * in the use and construction of boilers, generators, super-heaters and other appurtenances used for the generating of steam for power, steaming or heating purposes. * * * The duty of said inspector shall be to inspect steam boilers throughout the State as hereinafter specified and directed."

In section 2 the specification is as follows:

"He shall carefully inspect and test every stationary boiler and steam generating apparatus under pressure used for stationary power, as provided by this act, including all attachments and connections."

It may be contended that the legislature used the words "stationary power" in a narrow and limited sense; that is, as applying only to power as used for motor purposes.

It is our judgment that the legislature intended to protect life and property from the accidents growing out of the use of steam boilers which are defective, and this regardless of whether the same are being used to generate steam power to heat a building, or steam power to run an elevator or some other machinery.

The language of the statute in fixing the qualifications of the party who is to perform these duties would not have required the Boiler Inspector to be a person "*well qualified in the use and construction of boilers used for steaming or heating purposes*," unless the party required to possess these qualifications were expected to exercise the same in the performance of the duties of his office.

The statute makes it the duty of the district attorney to institute proceedings to collect all of these fees and penalties which are provided by the act referred to.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
Assistant Attorney General.

(Opinion Book 4, p. 257.)
April 6, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Fee for hunting license.

1. Twenty-five cents of the fee for issuing a hunting license is the personal and private compensation of the county clerk for filing the application, issuing the license, and all other services connected therewith.
2. This is not in conflict with section 7, Article XIV, or section 15, Article XIV, of the Constitution, which sections must be considered in connection with section 8 of Article XIV, an amendment adopted in 1902, which, considered with these sections, means that fees, perquisites, and emoluments in excess of the compensation provided by law shall be paid into the county treasury. The provision of the statute specifically adds this additional fee to the salary theretofore provided by law.

(See, also, on this same subject:
Opinion Book 4, p. 805;
To County Attorney, El Paso County;
Calling attention to Session Laws of 1909, page 391, and Session Laws of 1911, page 416, where the legislative intent is plainly expressed that the fee mentioned "shall be in addition to any other salary or compensation."
The word "compensation" applies not only to salaries, but to compensation by fees for specific purposes, and the legislature is authorized to fix the "compensation.")

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: Under date of March 27, you asked for the opinion of this office as to the construction of section 2838, found at page 782 of the Revised Statutes of Colorado, 1908, providing that, when a hunting license is issued by a county clerk, "the fee therefor shall be one dollar, one-fourth of which shall be for his personal and private compensation, for filing the application, issuing the license, keeping the record thereof, making a report as hereinafter provided, and all other services connected therewith;"

when considered in connection with section 2573, found at page 731 of the Revised Statutes, 1908, providing that—

"The county clerks of the several counties in the state shall receive as their compensation for their services an annual compensation, to be paid quarterly out of the fees and emoluments of their respective offices, actually collected, and not otherwise, to-wit: in counties of the first class, forty-six hundred dollars," etc.

The latter section was passed in 1899, while the former, as it now stands, was passed in 1907, and consequently controls in the absence of any constitutional provision to the contrary. The only constitutional provisions having any connection therewith are the following:

Article XIV, section 7:

"The compensation of all county and precinct officers shall be as provided by law."

Article XIV, section 15:

"For the purpose of providing for and regulating the compensation of county and precinct officers, the general assembly shall, by law, classify the several counties of the state according to population and shall grade and fix the compensation of the officers within the respective classes according to the population thereof. Such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein, for services to be performed by them, respectively, and where salaries are provided, the same shall be payable only out of the fees actually collected, in all cases where fees are prescribed. All fees, perquisites and emoluments above the amount of such salaries shall be paid into the county treasury."

Long after the adoption of the foregoing sections as part of Article XIV of the Constitution, the present section 8 of said article was adopted by way of amendment, in 1902, providing for the election of various county officers, and concluding as follows:

"* * * and such officers shall be paid such salary *or compensation*, either from the fees, perquisites or emoluments of their respective offices, or from the general county fund, as may be provided by law. The term of office of all such officers as expire in January, 1904, is hereby extended to the second Tuesday in January, A. D. 1905.

"This section shall govern except as hereafter otherwise directed and permitted by constitutional enactment."

These three sections, construed together, can only be held to mean that the compensation of all county officers shall be as provided by law, and that all fees, perquisites, and emoluments in excess of such compensation provided by law shall be paid into the county treasury.

The only known construction of this statute was by the District Court of Las Animas County, which passed upon the act of 1903, which did not contain the words "personal and private com-

pensation"—holding that under that act the county clerk could not retain this proportion of the fee as a part of his personal and private compensation.

The amendment of 1907 referred exclusively to this section of the law of 1903, and inserts the words "for his personal and private compensation." Section 2 thereof provides that "all acts and parts of acts in conflict herewith are hereby repealed."

This clearly distinguishes the present situation from that existing when the opinion of the District Court, above referred to, was rendered.

The last word of the legislature upon the subject of compensation of county clerks provides that one-fourth of the fee herein referred to shall become a part of the personal and private compensation of the county clerk. No language could be more explicit.

It is, therefore, our opinion that the specified proportion of such fee may be retained by the county clerk as a part of his compensation provided by law.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 265.)
April 10, 1911.
To Emil W. Pfeiffer, State Bank Commissioner.
By Mr. Griffith.
In re: Appointment of receiver for bank that fails to make up any impairment of its capital upon sixty days' notice.

Upon such failure the Bank Commissioner shall take charge and institute proceedings for a receiver, but on such facts alone the court is not given express power to appoint a receiver.

In re: False bank statement filed.

If the Bank Commissioner is satisfied a false statement has been filed, he may take charge, and shall institute proceedings for the appointment of a receiver, and if the court is satisfied the report is false, it shall appoint a receiver.

(Opinion Book 4, p. 269.)
April 12, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Compensation of county judges.

1. There is no minimum salary for county judges, but instead a maximum salary for a county judge of a county of the fifth class, to be paid out of the fees and emoluments of the office and not otherwise.

2. Section 2569, Revised Statutes of 1908, and Chapter 201, Laws of 1909, control the compensation of county judges in the matter under consideration, and county commissioners are no longer authorized to make the payment provided for in section 1496 of the Revised Statutes.

(Opinion Book 4, p. 274.)
April 19, 1911.
To Fred Latcham.
By Mr. Mothersill.
In re: Release of surety on bond of notary public.

1. Notary public is county officer.
2. Surety on bond of notary public may be released (sec. 544p, 3 Mills' Ann. Stat.).

(Opinion Book 4, p. 276)
April 13, 1911.
To W. V. Olin, Erie, Colorado.
By Mr. O'Connor.
In re: Various acts concerning high schools reviewed and applied.

1. The act of 1889 is only authority for establishing a union high school in a county of the second class.
2. When such union high school is established, it can be legally maintained only under the provisions of the law of 1889 (sec. 5966 of the School Law).
3. The various provisions regarding mill levies and maintenance of high schools, contained in acts other than the act of 1889, have no application to union high schools in counties of the second class established after the act of 1909.
4. The board of a district, voting in favor of a union high school, are bound to contribute their proportion of the total expense, under section 5966.
5. Union high schools established *after* the act of 1909 are governed as to maintenance by the terms of the act of 1889.

(Opinion Book 4, p. 286.)
April 18, 1911.
To the Secretary of State.
By Mr. O'Connor.
In re: Employment agencies.

An agency securing talent for theatrical performances and securing positions for theatrical performers, and charging a fee or commission for such service, is within the terms of the Employment Agency Act of 1909, and such agency is required to secure a license, as provided by the terms of said act.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: Replying to your inquiry as to whether or not an agency securing talent for theatrical performances and securing positions for theatrical performers comes within the Employment Agency Act of 1909, so as to require a license, we beg to advise that, in our opinion, it does. Section 1 is in part as follows:

"No person, firm or corporation in this State shall open, operate or maintain a private employment agency for hire or where a fee is charged to either applicant for employment or for help, without first obtaining a license."

Section 2 in part has to do with limiting the fees chargeable, and in that respect is as follows:

"Where a fee is charged for receiving or filing applications for employment or for help, said fee shall in no case exceed the sum of one dollar for any person applying for work as a day laborer, mechanic, artisan or household or domestic servant, and in no case shall the fee charged exceed the sum of two dollars for professional positions."

In our opinion, the obvious intention of the legislature was to include all occupations, whether the employer is seeking help or the employe is seeking employment.

The contract submitted by your letter is a plain violation of the law, in that it charges a commission of 5 per cent for the services rendered, and makes the party or agency liable to the penalty for violation of the act.

The State of Connecticut in 1901 (Session Laws of 1901, Chapter 100) enacted a State Employment Bureau Law. The provisions of the wording of the act, in so far as requirement of license is concerned, is, so far as material, identical with our own. The Connecticut legislature in said act defined the term "employment agency" in the following language:

"The term employment agency shall include the business of keeping an intelligence office, employment bureau or other agency for procuring work or employment for persons seeking employment or for acting as agent, for procuring such work or employment where a fee or other valuable thing is exacted, charged or received for registration or for procuring or assisting to procure employment, work or a situation of any kind, or for procuring or providing help for any person."

Conn. Session Laws 1901, Chapter 100, sec. 2.

General Statutes of Conn. Rev. 1902, sec. 4610.

"Employment agency" as defined by the Connecticut statute has been quoted by Cyc. without modification or comment.

15 Cyc., 1042.

The contract of employment has been defined as—

"A contract by which one who is called the employer engages another who is called the employe *to do something for the benefit of the employer or a third person.*"

Civ. Code Cal., 1903, sec. 1965.

Rev. Code N. D., 1899, sec. 4094.

Civ. Code Mont., 1895, sec. 2650.

Civ. Code S. D., 1903, sec. 1447.

Under a statute giving a board of health authority to assign certain districts as a place for carrying on a trade or employment which is a nuisance, it was held that keeping a large number of swine within the limits of a town was an employment.

Comonwealth vs. Young, 135 Mass., 526-529.

One of the definitions given by Webster of the word "employment" is "occupation, business, that which engages the head or hands."

It is true that in the particular contract under advisement, being a vaudeville agency, it may not be the intention to employ so much the head and hands as the feet and the lower extremities, but the definition of Webster is broad enough to cover such an employment. Worcester in his dictionary defines "employment" as follows:

"Employment means business, occupation, object of industry, engagement, avocation, calling or profession."

Section 3 of the act defines what is meant by "private employment agency" in the following language:

"A private employment agency is defined to be any person, firm, co-partnership or corporation furnishing employment or help, or giving information as to where employment or help may be secured, or who shall display any employment sign or bulletin, or through the medium of any card, circular, pamphlet or newspaper offer employment or help; and all such persons are subject to the provisions of this act, whether a fee or commission is charged or not."

We would say, therefore, that the character of the service or employment is, under the statute, immaterial so long as the function of the agency is to bring together the person seeking help and the person seeking employment, with an idea that the one obtain employment and the other help, for which both or either are charged by the go-between.

Respectfully submitted.

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 4, p. 293.)
April 24, 1911
To State Board of Stock Inspection Commissioners
By Mr. Mothersill.
In re: Authority to quarantine.

1. Assuming the statutes to be constitutional, the State Board of Stock Inspection Commissioners has authority to quarantine live-stock infected with any contagious disease, and cause such stock to be slaughtered.
2. The board has authority to test for tuberculosis cattle brought in from Texas without certificate as required by the board.

Hon. Charles G. Lamb,
State Veterinary Surgeon,
State House, Denver, Colorado.

Dear Sir:—Under date of April 20, 1911, you write us asking an opinion from this office relative to your authority and duty to quarantine, brand, and slaughter certain dairy animals that react to the tuberculin test for tuberculosis.

From your letter it appears that about April 4, last, certain cows of the dairy herd at Colorado Springs were found to react to the tuberculin test; that the animals so found to react were immediately sold by the owner and shipped to Denver; that you discovered such animals near Denver and caused them to be quarantined, and notified the owner that, if the animals reacted to the test, they would be slaughtered in accordance with the regulations of the State Board of Stock Inspection Commissioners; and you inquire whether you have authority to so act, in that and similar cases. You also inquire relative to your authority to test for tuberculosis certain cows brought into Trinidad in this state from Texas, which are being offered for sale as dairy cows, and which were not accompanied, upon the shipment into this state, by the records of the tuberculin test required by the regulation of the State Board of Stock Inspection Commissioners.

Section 6397 of the Revised Statutes of Colorado of 1908 provides, among other things, as follows:

"The State Board of Stock Inspection Commissioners may make and adopt such quarantine and sanitary regulations affecting the movement of live stock into and out of the State of Colorado and within the borders of said state as may from time to time be necessary to prevent the introduction into the state or the spread within the state of any contagious or infectious disease * * * and whenever the State Board of Stock Inspection Commissioners shall know or have good reason to believe that any contagious or infectious disease exists in any locality in any other state, territory or country, or that there are conditions which render domestic animals from such infected districts liable to bring such disease into this state, they may report the same to the governor of the state of Colorado. Whereupon, he shall by proclamation prohibit the importation of any such live stock into this state unless accompanied by a certificate of health given by the veterinary surgeon or sanitary inspectors appointed by the State Board of Stock Inspection Commissioners, which surgeon or sanitary inspectors shall carefully examine all such live stock previous to the giving of such certificate."

You inform us that under date of June 20, 1907, the State Board of Stock Inspection Commission adopted the following order, being Sanitary Order No. 12:

"It is hereby ordered that whenever any bovine animal shall be tested by any licensed veterinary surgeon and pro-

nounced by said veterinary surgeon to be affected with tuberculosis, the owner or person in charge of such animal shall brand or cause to be branded said animal with a perpendicular line not less than three inches long between the eyes, which branding shall be done in the presence of said veterinary surgeon. In case said owner or person in charge of such diseased animal shall refuse or neglect to brand or cause to be branded such animal as herein provided, then said veterinary surgeon shall notify the state veterinary surgeon giving the owner's name and address and a full description of such animal or animals, upon receipt of which the state veterinary surgeon shall make an investigation of the matter, and if he finds said animal or animals so diseased, he shall place said animal or animals under quarantine, in such manner as will prevent the further spread of the disease, and said owner or person in charge shall be arrested and prosecuted according to law."

Also, section 6401, Revised Statutes of 1908, provides as follows:

"Whenever it shall become known to the State Board of Stock Inspection Commissioners that a disease known as mange, itch or scabies or any other infectious or contagious disease exists among the cattle, sheep, horses or other domestic animals of any county, district or section of the state, it shall be the duty of the said State Board of Stock Inspection Commissioners to take such steps as will prevent the spread of said disease within the state, and said board shall have the power as a sanitary measure to inspect and compel the dipping, spraying or other sanitary treatment as may be determined by said board of all such animals in the state of Colorado, or in any county, district or section of said state under such rules and regulations as the said board may adopt, and said board may order the owner or owners or persons in charge of such animals to dip, spray or otherwise treat all or any part of such animals as said board may find to be infected with or to have been exposed to mange, scabies, or other infectious or contagious disease."

Section 6403 provides:

"That said Board of Stock Inspection Commissioners may condemn diseased stock and cause the same to be killed, for which no compensation shall be paid."

Section 6404, Revised Statutes of 1908, provides:

"Any person or corporation who shall violate or disregard any brand, quarantine or sanitary provision of this act, or any brand, sanitary or quarantine rule, regulation or order of the board made in pursuance of its official duties, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not more than five hundred dollars or imprison-

ment in the county jail for a period not to exceed one year or by both such fine and imprisonment."

Assuming, but not deciding as to, the constitutionality of these various provisions of the statute and of the orders of the State Board of Stock Inspection Commissioners, we are of the opinion that you have authority to quarantine live-stock found to be infected with any contagious disease, and to cause such stock to be slaughtered; also, that persons moving stock con trary to quarantine regulations may be prosecuted under the provisions of section 6404 of the Revised Statutes of 1908.

We have refrained from mentioning section 6400 of the Revised Statutes, and the rights you might have thereunder, for the reason that we have very grave doubts as to the constitutionality of that section, for the reason that it is an amendment to a section and is contained in an act which has no reference to such amendment in the title; and we would suggest that action under such section be avoided, so far as possible.

We are also of the opinion that, under the provisions of section 6397 above quoted, and the proclamation of the Governor issued July 26, 1909, you have authority to test for tuberculosis the cattle brought in from Texas without certificates, as required by the regulations of the State Stock Board promulgated in pursuance of such proclamation, and that, if you find such animals to be affected with tuberculosis, you may take such measures to prevent the spread of disease as your rules and regulations provide.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 304.)
April 27, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Compensation of sheriffs.

A board of county commissioners is without authority to make payments to a sheriff for serving as jailer, and he is entitled to no special or extra compensation for such services, inasmuch as they are not named by statute as fees, perquisites, or emoluments pertaining to the sheriff's office.

Larimer County vs. Branson, 4 Colo. App., 274, 278.
Sargent vs. La Plata County, 21 Colo., 158, 169.

(Opinion Book 4, p. 307.)
January 26, 1911.
To Commissioner, Soldiers' and Sailors' Home.
By Mr. Lee.
In re: Admission of Confederate soldiers to Soldiers' and Sailors' Home.

1. The act for admission of Confederate soldiers to the Soldiers' and Sailors' Home will not affect allowance from United States government for care of Union soldiers and sailors.
2. The phrase, "Provided such disability was not incurred in service against the United States," in the act of August 27, 1888, refers to the individual soldier or sailor for whose support the aid is given, and does not prevent the reception of Confederate soldiers in the same home where Union soldiers are cared for by the state.

Mr. W. W. Ferguson,
Commissioner Soldiers' and Sailors' Home.
State Capitol, Denver, Colorado.

Dear Sir: In accordance with the request of your letter of January 24, inquiring as to the effect of House Bill No. 6, upon the payment of the money now provided annually by the United States government in aid of the Soldiers' and Sailors' Home, I have examined said bill, and also the act of August 27, 1888, which provides for this payment by the United States government.

The act is entitled: "An Act to provide aid to State or Territorial homes for the support of disabled soldiers and sailors of the United States;" and the part important to this question is as follows:

"Section 1. That all states or territories which have established or which shall hereafter establish State homes for disabled soldiers or sailors of the United States who served in the war of the rebellion or any previous war, who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living, provided such inability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of $100.00 per annum.

"The number of such persons for whose care any State or Territory shall receive the said payment under this Act, shall be ascertained by the Board of Managers of the National Home for disabled volunteer soldiers, under such regulations as it may prescribe, but the said State or Territorial homes shall be exclusively under the control of the respective State or Territorial authorities."

The only clause in this act which could be interpreted as preventing the payment provided for, in the event this bill should become a law, is: "provided such disability was not incurred in service against the United States."

The manifest purpose of this act is to provide aid for states which are supporting the disabled soldiers and sailors of the United States. There is nothing in the act excluding other par-

ties from such homes, and the clause above quoted may very reasonably be read, in connection with the following clause, to mean that if the disability of any particular soldier were incurred in service against the United States, no payment should be made for his support. It might perhaps be held that this proviso would prevent the admission of Confederate soldiers, or any parties other than the disabled soldiers and sailors of the United States, to the particular institution in which such soldiers and sailors were housed; but this would seem to require a strained construction of the language used, and it is my opinion that the effect of the enactment of this bill into law would not be to cut off the entire allowance from the United States government, but, in my judgment, no allowance would be made by the United States government for any Confederate soldiers who might be admitted to the home.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General,

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 315.)
May 1, 1911.
To the Register, State Land Board.
By Mr. Mothersill.
In re: State Land Board—public school funds.

1. Public school funds may not be used for any purpose except schools.
2. Salaries of members of State Land Board must be paid out of "income" of board, according to section 9, Article IX, of Constitution as amended (Laws of 1909, p. 322).
3. Salaries of officers and employes of State Land Board other than commissioners may be paid out of general funds of the state, or Land Commissioners' Cash Fund, but not out of public-school funds.

B. L. Jefferson,
Register State Board of Land Commissioners,
Denver, Colorado.

Dear Sir:—Your letter of the 1st inst., enclosing Senate Bill No. 545, relating to the control and disposition of the public lands of the state, fixing the compensation of the members of the State Land Board and its employes, and repealing certain acts now in force, is received.

This proposed act provides in section 11 that the salaries of the commissioners of the State Land Board, and certain officers and employes of the board, shall be paid out of the general fund of the State of Colorado. You inquire, in substance, whether or not the salaries of the commissioners, offi-

cers, and employes of the board can be by law directed to be paid out of the public school funds, and whether or not the salaries of the commissioners can be paid out of the general fund of the state.

In reply will say that section 5 of Article IX of the Constitution of this state provides:

"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 devices that may be made to this state for educational purposes."

Also, section 3 of the same article of the Constitution provides:

"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."

Under these provisions, it is our opinion that the public school funds may not be used for any purpose whatever, except school purposes. However, by constitutional amendment to section 9 of Article IX of the Constitution of Colorado, adopted at the last November election (Session Laws of 1909, pp. 322-323), it was provided as follows:

"The members of the board shall each receive a salary of three thousand dollars ($3,000) per annum until otherwise provided by law; but the salary of each member of this board is to be paid out of the income of the said State Board of Land Commissioners."

As to what the word "income" in the above-quoted clause of the amendment to the Constitution includes, we are not prepared to say at this time; but we are of opinion that, in view of this constitutional amendment, the legislature cannot pass a statute, which would be constitutional, authorizing the payment of the salaries of the commissioners of the State Land Board out of the general fund of the state.

The Constitution of the state relative to the public school funds having been amended, if at all, only by the above-quoted amendments, we are of opinion that the salaries of officers and employes of the State Land Board, other than the commissioners themselves, may be paid out of the general funds of the state, or out of the funds known as the "Land Commissioners' Cash Fund," so far as the same is sufficient, which fund, as we understand, arises from fees received by the board, and does

not include moneys arising from the sale of school lands or the leasing of such land, and does not affect the funds known as "Public School Funds;" but such salaries cannot be paid out of the public school funds. We are,

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 322.)
May 3, 1911.
To the Governor.
By Mr. Lee.
In re: Taxation of public lands belonging to the United States.

1. To the public lands belonging to the United States within the State of Colorado, or acquired from various foreign governments and owned by the United States when Colorado was made a state, this state has never had title, except as they may have been granted to the state by the United States.
2. The enabling act provided that the Constitutional Convention should provide by ordinance, irrevocable without the consent of the United States and the people of the state, that no taxes should be imposed by the state on lands or property therein belonging to, or which might thereafter be purchased by, the United States; and such an irrevocable ordinance was adopted by the Constitutional Convention on the 20th day of December, 1875.
3. There are two obstacles in the way of taxation of the lands of the United States situated within the state: (1) an act of Congress; (2) an ordinance of the Constitutional Convention, irrevocable without the consent of the United States and of the people of the State of Colorado.
4. Congress has full power, under the Constitution, "to make all needful rules and regulations respecting the territory or property of the United States."
5. The enforcement of any tax against such lands would necessitate the passing of title from the United States to the state under procedure defined by the state legislature, the result of which would be the divesting of the title of the United States without their consent and contrary to the provisions of the act of Congress.
6. If the land held by the United States as forest reserves or otherwise, as herein referred to, is not legally and properly held by them, such illegal or improper act of Congress does not affect or divest the title of the United States to the property in question.
7. If these lands are not employed as an instrumentality of government, the act of Congress would seem to be broad enough to prohibit the taxation of any lands the title whereof is in the United States.
8. No question can be raised as to the right of the state to tax the interest of any individual in the land, arising by reason of lease, or contract with the United States. The right to tax such interest of individuals has been clearly established.

Hon. John F. Shafroth,
Governor of Colorado,
Denver, Colorado.

IN THE MATTER OF THE TAXATION BY THE STATE OF COLORADO OF LANDS BELONGING TO THE UNITED STATES AND NOW OR HEREAFTER WITHDRAWN FROM ENTRY, LEASED, RENTED, OR CONTRACTED OUT BY THE UNITED STATES FOR FOREST RESERVES, WATER-POWER PURPOSES, OIL OR COAL-MINING, OR ANY PURPOSE OTHER THAN PUBLIC GOVERNMENTAL PURPOSES.

The right of the State of Colorado to tax the lands of the United States is controlled by the following facts and rules of law:

"Taxation" is defined as follows:

"Taxes are the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty for the support of government and for all public needs. The state demands and receives them from the subjects of taxation within its jurisdiction that it may be enabled to carry into effect its mandates and perform its manifold functions; and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society. The justification of the demand is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority; and the *exclusive sovereignty and jurisdiction of the state* over all persons and property within its limits for governmental purposes."

1 Cooley on Taxation (3rd ed.), p. 1.

When the thirteen original states established their independence, each became the owner of the vacant and unappropriated lands within its borders. When new states were formed out of the territory of such original states, they, in turn, became entitled to the vacant and unappropriated lands within their borders, and the ownership of the United States of lands within the limits of the original states is based upon cessions from the states, in which reservation of various powers were frequently made.

This, however, is not true of the public lands belonging to the United States government within the State of Colorado. Such lands were acquired by the United States from various foreign governments, were owned by them when Colorado was made a state, and this state has never had title to any such lands except as they have been granted to the state by the United States.

The organization of the State of Colorado was provided for by the Enabling Act, approved March 3, 1875, which, among other things, provided that all persons qualified to vote for representatives to the General Assembly of the territory should

choose representatives to form a convention, which should, after organization, declare on behalf of the people of the territory that they adopt the Constitution of the United States—

" * * * Whereupon, the said convention shall be and is, hereby, authorized to form a constitution and state government for said territory; provided, * * * that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said State * * * ; Secondly, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposal of the United States; * * * and that no taxes shall be imposed by the state on lands or property therein belonging to or which may hereafter be purchased by the United States."

In said Enabling Act it was further provided that, if a majority of the legal votes should be cast for said Constitution, the acting governor of the territory should certify the returns to the President of the United States, together with a copy of the Constitution and ordinances referred to, and, thereupon, it was the duty of the President of the United States to issue his proclamation declaring the state admitted into the Union on an equal footing with the original states.

As prescribed by the Enabling Act, the convention adopted, on the 20th day of December, 1875, an ordinance providing—

"That the people inhabiting the Territory of Colorado, by their representatives in said convention assembled, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposal of the United States; * * * and that no taxes shall be imposed by the state on lands or, property therein belonging to, or which may hereafter be purchased by the United States.

"Third: That this ordinance shall be irrevocable without the consent of the United States and the people of the State of Colorado."

Thereafter, and on the first day of August, 1876, the President of the United States, by a proclamation reciting the provisions and conditions of the act of Congress, and that a duly authenticated copy of the Constitution, and of the declaration and ordinance required by the Enabling Act, had been received, declared that the admission of the State of Colorado into the Union was then complete.

From the foregoing, there appear to be two obstacles in the way of the proposed taxation of the lands of the United States:

1 An act of Congress;

2. An ordinance of the Constitutional Convention, declared by said convention to be irrevocable without the consent of the United States and of the people of the State of Colorado; both

providing that no taxes shall be imposed by the state on lands or property belonging to the United States.

It has been argued that such Enabling Act and the adoption thereof by the state constitute a contract or agreement between the United States and the people of the state. But as to this there may be some doubt; for it has been said by the Supreme Court of the United States that such a provision—

"* * * can not operate as a contract between the parties, but is binding as a law."

And the same opinion goes on to say:

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale and to protect them from taxation.

"And all constitutional laws are binding upon the people in the new states and the old ones, whether they consent to be bound by them or not.

"Every constitutional act of congress is passed by the whole of the people of the United States, expressed through their representatives, on the subject matter of the enactment; and when so passed, it becomes the supreme law of the land, in whatever state or territory it may happen to be."

Pollard vs. Hagan, 3 How., 212, 224.

The powers of Congress in this respect are defined by the second paragraph of section 3 of Article IV of the Constitution of the United States, as follows:

"The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Should the State of Colorado, by appropriate procedure, if it be possible, do away with the so-called irrevocable ordinance of the Constitutional Convention and provide by legislation for the taxation of the lands of the United States, the propriety and legality of such action would be a matter to be determined by the United States courts.

Enforcement of any tax against such lands would necessitate a passing of title from the United States to the state under procedure defined by the state legislature. Such right to legislate concerning the transmission of title to property of the United States, the Supreme Court of the United States has expressly denied.

"The authority and effect of the territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that Territorial Government, no person it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interests which come, not within the scope of that

authority, but which are created by the constitution and laws of the United States, imposes a duty as sacred as any which enjoins upon a state or territory, the obligation to protect and maintain whatever power may justly belong to it. And it can not, without extravagance, be supposed, that to secure these proper and necessary ends, the Territory should assume the power to control the acquisition and transmission of property never belonging to nor acquired from herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interests of the citizens of every State, and of every State collectively in the Confederacy, and even of the United States, and render utterly worthless and incapable of being disposed of, subjects in which the Territory has no legal right or property whatsoever. It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new states, and has heretofore been recognized and scrupulously respected by sovereign states within which large portions of the public lands have been comprised, and within which much of those lands is still remaining."

Irvine vs. Marshall, 20 How., 558, 561.

If the tax under discussion should be levied and not paid, its collection could only be enforced under the statute providing for tax sales, and the United States would be divested of their title without their consent, not in accordance with any act of Congress, but expressly contrary to the provisions of an act of Congress.

A statute of the State of Illinois was invoked in an early case before the United States Supreme Court to aid in the perfection of a title claimed from the United States. The court said:

"That state has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States; congress is invested by the constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that, in such a case as this, a patent is necessary to complete the title. But, in this case, no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed but remains in the United States. Now, if it were competent for a state legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that congress had

the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of congress, in relation to a subject confided by the constitution to congress only. And the practical result in this very case would be, by force of state legislation, to take from the United States their own land against their own will and against their own laws. We hold the true principle to be this, that, whenever the question in any court, state or federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that, whenever according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Wilcox vs. Jackson, 13 Pet., 497, 516.

The State of Tennessee sought to enforce by sale a lien for state, county, and city taxes assessed on certain lots in a suburb of the city of Memphis, belonging to the United States, for the years from 1864 to 1877, inclusive. For reasons which will be mentioned hereafter, the decision of the Supreme Court of the United States as to the rights of the state may perhaps be said to be not strictly in point. The court, however, went fully into the authority of states to tax the property of the government, and the opinion is at least enlightening as to the attitude of the Supreme Court of the United States upon the question before us.

Early in its discussion of the question the court refers to the opinion of Chief Justice Marshall in the leading case of McCulloch vs. Maryland, 4 Wheat., 316, 425-431, and gives the following as the gist of the opinion of the famous chief justice on the point with which we are concerned:

"The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control.

"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

On page 158 the court says:

"The United States do not and cannot hold property as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defence and gen-

eral welfare of the United States.' Constitution, art. 1, sect. 8, cl. 1."

Van Brocklin v. State of Tennessee, 117 U. S., 151, 155, 158.

If the land held by the United States as forest reserves is not legally and porperly held by them "to pay the debts and provide for the common defence and general welfare of the United States," it is, perhaps, not a lawful or proper holding; but such illegal or improper act of Congress does not affect nor divest the title of the United States to the property in question.

In the Debate in the United States Senate in 1850, on the act for the admission of California, a motion to amend the act by requiring California, before her admission, to pass in convention an ordinance providing that she relinquish all title or claim to tax or dispose of the public domain of the United States, was opposed by Mr. Douglas and Mr. Webster as unnecessary, and was defeated by a vote of thirty-six to nineteen. In the course of the debate, Mr. Douglas, after showing that the United States acquired title to the public lands by deeds of cession from the old states, or by treaty of cession from France, Spain, or Mexico, referred to the provision of the Constitution authorizing Congress "to dispose of and make all needful rules and regulations concerning the territory or other property of the United States," and said:

"This provision authorizes the United States to be and become a land owner, and prescribes the mode in which the lands may be disposed of and the title conveyed to the purchaser. Congress is to make the needful rules and regulations upon this subject. The title of the United States can be divested by no other power, by no other means, in no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or legislature of a Territory or State."

Mr. Webster said that the precedents demonstrated—

" * * * that the general idea has been, in the creation of a State, that its admission as a State has no effect at all on the property of the United States lying within its limits."

Van Brocklin vs. State of Tennessee, 117 U. S., 165.

The following excerpts from the opinion of the United States Supreme Court, above referred to, indicate forcefully the attitude of that tribunal upon the right of the state to tax the property of the United States:

"In Gibson v. Choteau, 13 Wall. 92, 99, Mr. Justice Field, delivering the opinion of this Court, said:

'With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the con-

ditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislature can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.'

"Upon the admission of a State into the Union, the State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State and not in the United States. New Orleans v. United States, 10 How. 662, 737; Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Doe v. Beebee, 13 How. 25; Barney v. Keokuk, 94 U. S. 324. But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, Congress under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to the other property of the United States; and no State can interfere with this right or embarrass its exercise. United States v. Gratiot, 14 Pet. 526; Pollard v. Hagan, 3 How. 212; Irvine v. Marshall, 20 How. 558, 563; Gibson v. Choteau, above cited.

"In McGoon v. Scales, 9 Wall. 23, part of the public lands in Wisconsin being claimed under a sale for State taxes, this court, speaking by Mr. Justice Miller, said: 'The answer to this is, that the land was then owned by the United States, and was not subject to State taxation.' 9 Wall. 27. No reference was made to any act of Congress or compact with the State; but the fact that the land was then owned by the United States was given as the only and conclusive reason why it could not be taxed by the State."

"In three States only, namely Pennsylvania, Virginia and Colorado, is no exemption of property of the United States expressly declared. But it may be remembered that the act of Congress for the admission of Colorado provided in the most sweeping terms that the State should impose no tax on lands or property then belonging to, or thereafter purchased by, the United States."

117 U. S., 173.

"In short, under a republican form of government, the whole property of the State is owned and held by the State for public

uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent."

117 U. S., 174-175.

"The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfuly assessed. But all the assessments were unlawful, because made while the land was owned by the United States. The assessments being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, even since the plaintiffs in error have redeemed or purchased the land from the United States.

"Whether the Supreme Court of Tennessee rightly construed the provisions of the Constitution and statutes of the State as not exempting from taxation land belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial, because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the legislature of Tennessee had power by constitution or statute, to tax the land in question, so long as the title remained in the United States."

Van Brocklin vs. State, 117 U. S., 180.

To the same general effect are the cases of:

The People vs. United States, 93 Ill., 30.

Blue Jacket vs. Johnson County Commrs., 3 Kan., 299, 348.

United States vs. Rickert, 188 U. S., 432.

These cases may perhaps be said to be distinguishable from the taxation here proposed, because the tax levied in each case had to do directly with an instrumentality or agency of the United States government. It is a well-established rule of law in this country that neither any of the states nor the United States can tax an instrumentality or agency of the other. This would be true in the absence of a constitutional or statutory provision.

McCulloch vs. Maryland, 4 Wheat., 316, and numerous cases.

In this state, however, it has been expressly provided by the Congress of the United States—

" * * * * that no taxes shall be imposed by the State on lands or property therein belonging to * * * the United States."

So that, even if it might be held that lands withdrawn from entry, leased, rented, or contracted out by the United States, were not employed as an instrumentality of the government, the act of Congress would seem to be broad enough to prohibit the taxation of any lands the title whereof is in the United States.

This opinion, of course, does not deal with the desirability of taxing lands withdrawn from entry, leased, rented, or contracted out by the United States, which will probably be conceded by every citizen of the states within which such lands are found. Such tax can unquestionably be imposed by the consent of Congress. Careful search has not revealed a ruling of any court explicitly denying the right to tax the exact property here involved; but the foregoing authorities are cited as giving a lucid and comprehensive exposition of the position heretofore taken, particularly by the courts of the United States, on matters involving the taxation of federal property in any of the states.

These indications of the probable view of the Supreme Court of the United States upon this question might be strengthened, were it possible to consider the decision just rendered by the Supreme Court in the case of Fred Light vs. United States, decided on Monday last. The exact question raised here, however, was not considered in that case.

The questions before the court in all of the cases referred to, and in all the cases decided along these lines, have been matters of such moment that they have been considered with the utmost care, and it is probable that the court has gone so far in laying down general principles—which perhaps might be called *obiter dicta*, so far as the case under discussion in each instance was concerned—that it is doubtful if the views expressed would be modified in any future examination of the questions herein considered.

As an illustration of the attitude with which the Supreme Court has approached these questions, Chief Justice Marshall indicated in McCulloch vs. Maryland, *supra*, the importance attributed by the court to the questions involved in that decision, in the following language:

"The constitution of our country, in its most interesting and vital parts is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature."

No question can be raised, and it is not understood that any has been raised, as to the right of the state to tax the interests of any individual in the public lands, arising by reason of lease, renting, or contract with the United States. The right to tax such interests of individuals has been clearly established.

Forbes vs. Gracey, 94 U. S., 762.

Garland County vs. Bates, 56 Ark., 227.

State vs. Moore, 12 Cal., 56.

Respectfully submitted,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 356.)
May 11, 1911.
To the State Auditor.
By Mr. Griffith.
In re: Salaries of employes of State Land Board not provided for by General Appropriation Bill.

Such salaries may be paid out of the Land Commissioners' Cash Fund, if vouchers have been audited and allowed by the Land Board and certified by the Governor and the register of the Land Board.

(Opinion Book, p. 379.)
May 17, 1911.
To the State Treasurer.
By Mr. Talbot.
In re: Local Option Law—construction of H. B. No. 256.

House Bill No. 256—which is an act amending section 18 of an act approved March 2, 1902—is an act to raise revenue, and not to regulate the liquor traffic, and a state license of $25 is recoverable in all cases where liquor is sold, in addition to any other license fee exacted by law or ordinance.

(Opinion Book 4, p. 383.)
May 17, 1911.
To the Bank Commissioner.
By Mr. Lee.
In re: Term and salary.

Hon. E. W. Pfeiffer,
State Bank Commissioner,
Denver, Colorado.

Dear Sir: I have your letter of May 9, inquiring as to when your term of office as State Bank Commissioner begins and ends, and what your salary will be during that term.

Section 315 of the Revised Statutes of 1908, referred to in your letter, is section 1 of an act approved April 13, 1907, found at page 222 of the Laws of 1907. Section 317 is the third section of the same act, and it has the effect of so limiting the term of the first State Bank Commissioner that it shall end upon the first Wednesday of April, 1911, at which time his successor in office shall enter upon the four-year term provided by the act.

By the provisions of section 102 of Senate Bill No. 374, referred to in your letter, sections 1-81 and 99-102, inclusive, thereof, do not take effect until ninety days after the approval of the act by the Governor, and, consequently, are not at the present time effective.

Your appointment is, therefore, under the old act; your term of office extends to the first Wednesday in April, 1915, and your salary during that term will be three thousand six hundred dollars per annum.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 384.)
May 17, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Right of county treasurer to assess a percentage for the collection of state taxes.

1. The county treasurer cannot charge or receive any fees or commissions from the state for the collection of state taxes. Each county is responsible for the amount of the tax levied.
2. The county treasurer is performing a public duty in the collection of state taxes, and the county, as a subdivision of the state, is liable to him in the percentage specified by law for the collection of such taxes —not, however, in excess of the amount of his salary.

(Opinion Book 4, p. 393.)
May 22, 1911.
To County Treasurer, Routt County.
By Mr. O'Connor.
In re: Application of statute of limitations to action of county to collect taxes.

The statute of limitations does not run against the county, nor bar suit brought to enforce the collection of taxes, brought under section 5677 of the Revised Statutes of 1908.

(Opinion Book 4, p. 399.)
May 23, 1911.
To the Insurance Commissioner.
By Mr. Mothersill.
In re: Insurance companies—investment of capital and surplus.

1. Section 3113 of the Revised Statutes of Colorado, 1908, makes distinction between investment of its capital and its surplus.
2. The capital of a domestic insurance company may not be invested in bonds of irrigation companies or other corporations.
3. Surplus moneys over and above the capital stock may be invested or loaned on bonds of "solvent, dividend-paying" domestic corporations, other than mining corporations.

Hon. W. L. Clayton,
Commissioner of Insurance,
State Capitol, Denver, Colorado.

Dear Sir: Under date of May 13, 1911, you requested through your deputy, Alex W. Grant, an opinion as to whether a domestic insurance company can legally invest its capital in the bonds of an irrigation company. The question arises, as you state, upon the application of the German-American Indemnity Company for permission to invest its capital in the bonds of the Mountain Supply Ditch Company, of Fort Collins.

Section 3113 of the Revised Statutes of Colorado, 1908, provides for the investment of insurance companies, as follows:

"It shall be lawful for any domestic insurance company to invest its capital and funds accumulated in the course of its business, or any part thereof, in loans on the security of its own policies, not exceeding the reserve thereon, in bonds and mortgages on real estate worth fifty per cent. more than the sum loaned thereon, over and above all incumbrances, exclusive of buildings, unless such buildings are insured and the policy transferred to said company; and also in the bonds of this state, or bonds or treasury notes of the United States; and also in the bonds of any school district or incorporated city in this state, authorized to be issued by the legislature; and to lend the same, or any part thereof, on the security of such bonds, or treasury notes, or upon bonds or mortgages as aforesaid, and to change and reinvest the same as occasion may from time to time require; but any surplus money over and above the capital stock of any such insurance company may be invested in or loaned upon the pledges of the public bond of the United States, or any one of the states, on the bonds or other evidences of indebtedness of any solvent dividend-paying institutions, other than mining corporations, incorporated under the laws of any state or of the United States; Provided, always that the current market value of such bonds or other evidence of indebtedness shall be at all times, during

the continuance of such laws, at least twenty per cent. more than the sum loaned."

The above section of the statutes apparently makes a distinction between the investment of the capital of a domestic insurance company and surplus money over and above its capital stock. You will notice that the section specifically provides that "any surplus over and above the capital stock of any such insurance companies may be invested in * * * the bonds * * * of any *solvent dividend paying* institution, other than mining companies, incorporated under the laws of any state."

Because the bonds of corporations of this state are specifically mentioned as the subject of investment in this latter clause of the above quoted section, we take it that the words "in bonds and mortgages on real estate worth fifty per cent more than the sum loaned thereon," in the first clause of the section, do not include the bonds and real estate of such corporations, and for that reason it is our opinion that the capital stock of domestic insurance companies may not be invested in the bonds of irrigation companies and other state corporations, but that only surplus money over and above the capital stock of insurance companies may be so invested or loaned, and such loans are under the further restriction contained in the proviso to the above section, which is:

"That the current market value of such bonds, or other evidences of indebtedness, shall be at all times, during the continuance of such loans, at least twenty per cent. more than the sum loaned thereon."

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 402.)
May 22, 1911.
To the State Treasurer.
By Mr. Griffith.
In re: $50,000 appropriation for West Colfax viaduct (Session Laws 1909, Chap. 133).

1. Warrants should not be drawn until the Governor, the Mayor, and the Engineer of the Board of Public Works of Denver make appropriate showing that the viaduct can be built with this appropriation and other donations, subscriptions, or assessments made or hereafter to be made.
2. Warrants should not be drawn until construction on the viaduct has actually begun, and that fact certified to the State Auditor by the Governor, the Mayor, and the Engineer.

3. If the board in charge of construction decides that the viaduct cannot be constructed with moneys available, then only expense of survey and examination should be paid.

Opinion Book 4, p. 407.)
May 25, 1911.
To Mr. J. R. Schermerhorn.
By Mr. Stuart.
In re: Expenses of a member of the Board of Control of the State Industrial School for Boys while outside of the state attending a national convention and visiting other institutions.

The state is not liable for such expenses.

(Opinion Book 4, p. 416.)
May 31, 1911.
To the Governor.
By Mr. Griffith.
In re: Act of General Assembly reclassifying counties as to salaries of county officers, raising salaries of some county officers, and the payment out of the general county fund instead of from fees collected.

Under Article XIV, section 8, and Article VI, section 22, the county officers mentioned may be paid out of fees or from the general county fund, as the legislature may prescribe.

(Opinion Book 4, p. 419.)
May 31, 1911.
To the State Treasurer.
By Mr. Mothersill.
In re: State Land Board—fees.

1. All fees received by the State Land Board to be kept in Land Commissioners' cash fund.

Hon. Roady Kenehan,
State Treasurer,
Denver, Colorado.

Dear Sir: We respectfully acknowledge receipt of your letter asking the opinion of this office as to whether all the fees received by the State Land Board can be kept by you in one fund, known as "The Land Commissioners' Cash Fund;" also asking an opinion as to the fund out of which you shall pay the salaries of the commissioners in the State Land Board, in view of the constitutional amendment adopted at the last election, which provides that such salaries should be paid out of the "income of the board."

Section 5168, Revised Statutes of Colorado, 1908, provides that—

"The State Board of Land Commissioners shall provide by rule for the amount to be paid for the appraisement of land included in each application for purchase."

Section 5172 also provides that—

"All applications for purchase must be accompanied by an appraisement fee of $10.00."

We understand that heretofore there has been kept an appraisement fund separate from the Land Commissioners' Cash Fund, but we do not understand that this is necessary or proper, for the reason that section 5172 also provides that—

"Aforesaid fees shall be paid in advance to the deputy register and be transmitted and accounted for by said deputy to the register of the board, as in case of other funds, and the said register shall turn the same to the State Treasury, as in the case of moneys collected for rent and partial payments on certificates of purchase. And it shall be the duty of the State Treasurer to receive said funds and credit the same to the Land Commissioners Cash Fund to be paid out by him on warrants drawn by the Auditor of the State."

Sections 5168 and 5172, above mentioned, are respectively sections 8 and 11, Chapter 134, Session Laws of 1905, and it is our opinion that the words "all aforesaid fees," which are to be credited "to the Land Commissioners' Cash Fund," as provided in section 5172, include the appraisement fees provided for in section 5168, so that the said appraisement fee may be credited to and kept in the Land Commissioners' Cash Fund, the same as other fees.

We have not satisfied ourselves, as yet, as to the funds out of which the salaries of the commissioners of the Land Board should be paid, except that they may be paid out of the Land Commissioners' Cash Fund; but as to whether they may be paid out of the income fund arising from rentals of school lands and interest upon the proceeds of sales of school lands, we are not in a position to give an opinion at this time, and we therefore request further time for consideration of the matter.

Very respectfully,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 422.)
May 25, 1911.
To the Secretary of State.
By Mr. Lee.
In re: Effect of increased salary appropriation on salary for months of biennial period prior to appropriation:

1. The Secretary of State is not authorized to draw vouchers to employes for the amount of increase in monthly salary contained in the long appropriation bill for the months of December, January, February, March, and April past, when the long appropriation bill passes. This is prohibited by section 28 of Article V of the State Constitution.
2. The entire amount appropriated for the salary of each employe for the year, less the amounts paid under the short appropriation bill, is available for the payment of such salary for the remainder of the fiscal year.
3. Either the total amount appropriated for the salary of a specified clerk, or "so much thereof as may be necessary" in the judgment of the head of the department, may be used.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: I have your letter of May 18, referring to section 3 of House Bill 561, enacted by the Eighteenth General Assembly, commonly called the "long appropriation bill," and note your inquiry as to the effect of the increased appropriations for the services of certain employes of your office; viz., whether you are authorized to draw vouchers to such employes for the months of December, 1910, and January, February, March, and April, 1911, for the amount of this increase.

Section 1 of the act in question is as follows:

"Section 1. That the following sums, or so much thereof as may be necessary, are hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the payment of the expenses of the executive, legislative and judicial departments of the State of Colorado for the fiscal years 1911, 1912, less amounts already paid from the short appropriation bill (House Bill No. 108) of the Eighteenth General Assembly, approved February 2nd, 1911."

Then follow, among other items:

"Secretary of State's Office—	1911	1912	Total
Bookkeeper, salary	$1,800	$1,800	$3,600
Index clerk, salary	1,800	1,800	3,600
Clerk and cashier, salary	1,500	1,500	3,000
Utility clerk, salary	1,500	1,500	3,000"

Section 50 of said act is in part as follows:

"All moneys appropriated under this act for the fiscal year 1911 shall be paid out only for expenses of the fiscal year 1911, and all moneys appropriated under this act for the fiscal year 1912 shall be paid out only for expenses of the fiscal year 1912."

The parties mentioned in your letter not being public officers, section 30 of Article V of the Constitution is not applicable to prevent the payments suggested in your letter; but they are subject to the provisions of section 28 of the same article, which reads as follows:

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

This section, therefore, prohibits the drawing of vouchers for the months of December, 1910, and January, February, March, and April, 1911, as suggested in your letter.

It is the expressed purpose of the long appropriation bill to appropriate the specified sums, "or so much thereof as may be necessary, * * * for the payment of the expenses of the executive, legislative and judicial departments of the State of Colorado for the fiscal years 1911 and 1912, less amounts already paid from the short appropriation bill."

The entire amount in the case of each employe appropriated for the salary of such employe for the year 1911, less the amounts paid under the provisions of the short appropriation bill, is, therefore, available to your department for the payment of such salary for the remainder of the fiscal year 1911; and either the total amount appropriated to pay the salary of a specified clerk or employe in your office may be used, by you, or "so much thereof as may be necessary." The head of a department determines the amount "necessary," as a part of the business policy of his department.

This opinion is one that has been consistently maintained by the Attorney General's department.

See: Letter of Attorney General Barnett to the Secretary of the State Board of Health (Report of Attorney General, 1909-1910, p. 139).

Also: Report of Attorney General Campbell, 1899-1900 (p. 200).

The latter states in his opinion (p. 206) as follows:

" * * * 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."

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General,

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 425.)
June 2, 1911.
To the Governor.
By Mr. O'Connor.
In re: Correction of an enrolled bill and the Colorado School of Mines appropriation.

Hon. John F. Shafroth,
Governor of the State of Colorado,
Denver, Colorado.

Dear Sir: We beg to advise you that we have examined the House and Senate journals relative to Senate Bill No. 81. We find from said journals that the bill was passed by both the House and the Senate in conformity with the requirements of the Constitution, and signed as required by the Constitution, and that said bill appropriated the sum of $50,000 for the purpose designated in the title of the act.

The enrolled bill, which you have handed us, shows that a clerical error was made in transcribing the same, by some stenographer or assistant of the enrolling committee, the error being the use of the words and figures "seventy-five thousand ($75,000) dollars" instead of the words and figures "fifty thousand ($50,000) dollars." This clerical error seems not to have been noticed by the enrolling committee. Had said committee or any of its members noticed the error, it would have been their duty to have rectified the same, so that the enrolled bill would truly state the act as passed by the legislative bodies. The enrolled bill is only *prima facie* evidence of the action taken by the legislative bodies. When it conflicts with the journals, then the journals govern. The Governor, acting as chief executive of the state in signing bills enacted by the legislature, exercises a legislative function. It is within his power, and it is entirely proper for him, to ascertain from the journals whether the enrolled bill presented to him was enacted in the manner prescribed by the Constitution, and also that the enrolled bill correctly states the action by the legislature, as the same appears from the journals. Where the journal is silent, the presumption is that the constitutional method of procedure has been complied with. On matters expressly appearing from the journal, the journals are conclusive. It is within your power, and you have authority if you wish to sign Senate Bill No. 81, to first correct said error by striking out the words and figures "seventy-five thousand ($75,000) dollars" and writing in the words and figures "fifty thousand ($50,000) dollars." You might do this yourself, or request M. A. Skinner, the chairman of the enrolling committee, to make said change. When said change is made, the enrolled bill will then correctly show and truly state the act as passed by the Assembly, as the same appears from the journals. The mere fact that the House amended on one occasion this bill, changing the $50,000 to read $75,000, in no way affects the status of the bill as finally passed. With said amendment so enacted by the House the Senate refused to concur. This appears on the Senate journal. It later appears in the House journal that the House receded from said amendments. The bill, therefore, was in the same condition as if no such amendment had ever been proposed. It may be said that said amendment explains the making of the clerical error; but even if it does so explain, it in

no wise changes the character of the error. Senate Bill No. 81 is the bill which in truth and in fact is shown to have passed the legislative assemblies, as shown by the journals, and said act, as so shown, cannot be altered, defeated, or changed by what some stenographer thought was done, even though said thought was expressed in the enrolled bill.

If the enrolled bill used the words "Missouri School of Mines at Golden," or "Colorado School of Mines at Boulder," or "75,000 cents," or "seventy-five million dollars," it would be no more a clerical error than the one at present, the clerical error depending not on degree but on character of the error; and in any of the instances named the error would clearly appear in comparison of the enrolled act with the journal. The commission of clerical errors is natural, is to be expected, and cannot be guarded against, and it is not the spirit or purpose of the Constitution to thwart the legislature and executive in their law-making power by placing over them a clerk's error, by putting beyond their control the rectifying of a mere clerical act of some subordinate or assistant.

Respectfully submitted,

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 4, p. 431.)
June 3, 1911.
To the Secretary of State Auditing Board.
By Mr. Griffith.
In re: Expenses of a member of the Board of Charities and Corrections while outside of the state on an investigation trip.

If a member or the secretary of the board is authorized by the Governor to make such a trip, the expenses may be paid out of the traveling expense fund of the board.

In re: Payment for the bonds of the State Bank Commissioner and his deputy.

The fees for such bonds may be charged as an expense of the office.

(Opinion Book 4, p. 434.)
June 7, 1911.
To Messrs. Vaile, McAllister & Vaile.
By Mr. Griffith.

Messrs. Vaile, McAllister & Vaile,
Attorneys at Law,
Denver, Colorado.

Gentlemen: With reference to citation of authorities in regard to the effect of our referendum constitutional provision, and

as to when acts of the legislature take effect thereunder, in accordance with my conversation with your Mr. William M. Vaile, I beg leave to say that I have been able to find the following cases, which I hope may be of use to you in this matter:

Sears vs. Multnomah County, 49 Ore., 42; 88 Pac., 522.
Cadderly vs. Portland, 44 Ore., 118; 74 Pac., 720.
State vs. Bacon, 14 S. D., 403; 85 N. W., 605.
Norris vs. Cross, 250 Okla., 287; 105 Pac., 1000.

It has seemed to me, from the investigation I have made thus far, that the doctrine announced in the Oregon cases is the better doctrine, and should be the construction placed upon our constitutional provision.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 435.)
June 7, 1911.
To the Secretary of Chamber of Commerce, Clifton, Colorado.
By Mr. O'Connor.
In re: Union High School.

1. Where a union high school district is formed adjacent to a city or incorporated town in counties of the fourth class, the district in which the building is located is required to provide the building at its own expense (sec. 5272, R. S. 1908).
2. Under the Consolidation Act of 1909 (p. 492, Session Laws), three separate school districts cannot consolidate for high-school purposes and maintain their separate identities as districts, and as such conduct three separate grade schools.

Mr. Louis Meyer,
Secretary Chamber of Commerce,
Clifton, Colorado.

Dear Sirs: Replying to your esteemed inquiry of the 1st inst, we beg to advise as follows:

1. Your county is a county of the fourth class, and in such class counties school districts adjacent to an incorporated town or city may form a union high school district (Laws of 1903, p. 425; Revised Statutes, 1908, sec. 5072). The law requires that, when such union high school district is formed, the school district in which the building is located shall provide the same at its own expense (Laws of 1903, p. 425; Revised Statutes, 1908, sec. 5973). Therefore, under the terms of this act, Clifton would be obliged to furnish the building at its own expense. The maintenance, however, would be borne by the union high school district.

2. The act of 1909, page 492, providing for the consolidation of school districts, does not authorize you to consolidate your districts for the purpose of a union high school, and maintain your identity as three separate districts, each one of which would be conducting a grade school. The clearly expressed intent of the Consolidation Act is to consolidate several districts, and have the consolidated district maintain one school where they may conduct both high school and grade work.

The act requiring the school board to furnish transportation to all children residing more than a specified distance from the building purely shows the intent that children from all parts of the new district shall attend the newly established school.

The original act of 1889, providing for the establishment of union high schools, was not limited as to any particular class of counties, but the enactment of the law of 1903 specifically applied to counties of the fourth and fifth classes, and concerning such counties has worked a repeal of the law of 1889.

Trusting that this will be of some assistance to you, and regretting that the condition of the law is such that you cannot accomplish a result which we appreciate would be highly desirable, I remain,

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 4, p. 437.)
June 6, 1911.
To the State Treasurer.
By Mr. Mothersill.
In re: State Board of Land Commissioners—salaries, public school funds.

1. The Constitution, section 9, Article IX, as amended (Laws of 1909, p. 322), provides salaries of commissioners to be paid out of the "income" of the board.
2. The fees of the board to be credited to "Land Commissioners' cash fund."
3. The State Land Board has never had the benefit of public school funds in payment of its expenses.
4. Fees credited to Land Commissioners' cash fund make up the "income" of the board; not public school funds.

(Opinion Book 4, p. 454.)
June 7, 1911.
To the State Treasurer.
By Mr. Griffith.
In re: Salary of Commissioner of Printing, whose appointment the Senate refused to confirm, and whose salary was not provided for in the long appropriation bill.

Although the reappointment of the Commissioner of Printing was not confirmed by the Senate, he is performing the duties of the office as a holdover; he is a public officer under the Constitution and statutes, with a salary fixed by law, which cannot be affected by the long appropriation bill, and is entitled to his salary until his successor is duly appointed and qualified.

(Opinion Book 4, p. 460.)
June 9, 1911.
To Colorado State Board of Health.
By Mr. Griffith.
In re: Construction and use of a certain school building at East Fourteenth Avenue and Colorado Boulevard, in the City and County of Denver.

1. The State Board of Health has no power to enjoin the construction of said building.
2. After the construction of said building, and assuming that the gasometer or hospital adjoining would be held a public nuisance, then, upon the failure or refusal of the local board of health to act, the State Board of Health might have the gasometer or hospital abated as a public nuisance through a proper proceeding in court.
3. If attending school in said school building causes introduction or spread of contagious or infectious diseases, and the local board of health fails or refuses to act, then the State Board of Health might lawfully prevent attendance until such conditions were remedied.

(Opinion Book 4, p. 469.)
June 12, 1911.
To Secretary of Civil Service Commission.
By Mr. Griffith.
In re: Salary of Secretary of Civil Service Commission, under section 616, Revised Statutes of Colorado, 1908.

The statute fixes the salaries, but does not fix the time nor method of payment, which, under the decisions, is necessary to constitute a continuing appropriation, so that the Auditor will be advised not to issue a warrant.

(Opinion Book 4, p. 474.)
June 13, 1911.
To Mrs. Helen M. Wixson, State Superintendent of Public Instruction.
By Mr. Griffith.
In re: House Bill No. 91, relating to examinations for teachers' certificates.
In re: House Bill No. 85, establishing Teachers' Summer Normal School Districts, etc.

The above two bills do not become effective until ninety days after the adjournment of the legislature, and all provisions of law which these bills seek to amend or repeal will remain in force until ninety days after the adjournment of the legislature.

Mrs. Helen M. Wixson,
State Superintendent of Public Instruction,
Denver, Colorado.

My Dear Mrs. Wixson: Your favor of June 6, referring to House Bills No. 91 and No. 85, received.

As I understand it, you ask when these bills go into effect.

H. B. No. 91 is "A Bill for an Act to amend sections 5991 and 5994 of the Revised Statutes of Colorado, 1908, relating to the holding of examinations for teachers' certificates, and qualification of teachers."

House Bill No. 85 is "A Bill for an Act to establish Teachers' Summer Normal School Districts and for the organization, control, management and maintenance of Teachers' Summer Normal Schools in said districts in the State of Colorado, and making appropriation therefor."

Under the recent constitutional amendment adopted by the people, relating to the initiative and referendum, all laws may be referred to the people, except laws relating to the public health, safety, or peace, and appropriations for departments of state and state institutions; and ninety days from the date of the adjournment of the legislature is given in which to refer laws.

I do not see how either of the bills mentioned comes under the exceptions referred to in the constitutional amendment, and it seems to me, therefore, that they do not become effective until ninety days after the legislature adjourned; and, of course, it follows that all provisions of law which these acts seek to amend or repeal are now in force and will remain in force until ninety days after the adojurnment of the legislature, which is the date when the new acts or the acts repealing old acts, take effect.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 482.)

June 16, 1911.
To the Public Examiner.
By Mr. Griffith.

1. The fees of a public trustee are put into a separate fund out of which the salary of the public trustee is paid.
2. The pay received by the county clerk as clerk of the board of county commissioners is part of the fees of the office of county clerk and goes into the fee fund as other fees.
3. The salary of the clerk of the District Court in counties of the third class is $1,800 per annum, payable quarterly out of the fees of the office and *not* otherwise.
4. The salary of a county judge is payable for each year out of the fees of the office, and any deficiency cannot be made up from any other year.
5. If a sheriff fails or refuses to pay over to the county treasurer any fees of his office, he is guilty of a misdemeanor.

6. Payments to justices of the peace and constables for services in criminal cases are payable only from the fees and emoluments of their offices, earned in criminal cases.

(Opinion Book 4, p. 493.)
June 17, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Duties and compensation of county commissioners, sheriffs, county clerks, county treasurers, and county superintendents of schools.

1. Auditing accounts is not one of the duties of county commissioners, and an allowance of compensation therefor is not improper, if the statutory limits of compensation are not exceeded.
2. There is no autnority of law for allowing a sheriff compensation for attendance at meetings of the board of county commissioners.
3. If clerical work required by a board of county commissioners is of the character described in the statutory provisions defining the duties of the county clerk, it should be performed by him and the compensation determined in accordance with the provisions of law for his compensation. It is possible that the county commissioners under their general powers might legitimately require other clerical work for which special clerks might be employed and paid. The legality of such proceedings would be determined upon full knowledge of the facts.
4. The county commissioners have no authority to allow fees to county officers in excess of those provided by statute.
5. If check given in payment of taxes is bad, tax receipts are properly canceled by the county treasurer. If acceptance of check occasions loss to the county, the treasurer is liable therefor.
6. There is no authority for paying the deputy treasurer any compensation for auditing the books of the treasurer.
7. The county superintendent of schools may not employ a deputy except in counties of the first class.
8. The county superintendent of schools in Costilla County is entitled to a salary of only $500 and mileage not to exceed $300 per annum.
9. The county treasurer is required to collect the penalty on each description of lands advertised in delinquent tax lists. It would appear that he would be entitled to a commission of 1 per cent on the penalties thus collected, under the provisions of law entitling him to 1 per cent of all moneys received other than taxes.
10. The county clerk is liable on his official bond for the acts of his deputy. The county clerk's deputy, or the county treasurer, or the county commissioners could be held criminally liable for paying or authorizing payment of sums known to them to be unlawful.

(Opinion Book 4, p. 501.)
June 19, 1911.
To Warden State Penitentiary.
By Mr. O'Connor.
In re: Computation of allowance of time.

The correct rule for the computation of the allowance of time to convicts in the penitentiary for good behavior is stated in the case of In re Packer, 18 Colo., 525.

(Opinion Book 4, p. 503.)
June 19, 1911.
To the Public Examiner.
By Mr. Griffith.
In re: Suits to recover shortages in county offices.

The name in which a county shall sue or be sued is "The Board of County Commissioners of the County of....."

The district attorney shall appear for the county, and his fixed salary covers this duty. The county attorney may also appear, or the board of county commissioners may employ one or more attorneys. The commissioners may pay out of county funds the costs of suit.

(Opinion Book 4. p. 514.)
June 20, 1911.
To Warden State Penitentiary.
By Mr. O'Connor.
In re: Computation of convicts' time allowance for good behavior.

The trial court has power to impose separate sentences. Separate sentences so imposed are treated as one continuous sentence, and allowance of time for good behavior is computed accordingly. See In re Packer, 18 Colo., 525.

(Opinion Book 4, p. 532.)
June 26, 1911.
To the State Treasurer.
By Mr. Griffith.
In re: House Bill No. 192, appropriation for the State Geological Survey.

This appropriation is one of the first class.

The act is not subject to the referendum, and went into effect June 5, 1911.

The act is constitutional with reference to the title thereof.

The appropriation should not be used to pay salaries or expenses incurred before the act went into effect.

The salary of the secretary to the State Geologist would date from June 5, 1911.

(Opinion Book 4, p. 541.)
June 28, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Collection of state tax from county where county treasurer has defaulted or lost funds.

1. Each county is responsible to the state for the full amount of tax levied for state purposes, except such taxes as are unavailable, double or erroneous assessments.
2. "Unavailable taxes" means only those which are uncollected and uncollectible.
3. The county being the agency designated by law for the collection of the state tax, its employes, agents, or officers' failure in the performance of their duty is no ground for excusing the county, which is nevertheless liable to the state for the full amount collected.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your letter of May 19, inquiring if the state should insist upon the payment of the sum of $4,460.53 from Lake County, which indebtedness accrued prior to 1900, arising, as I understand, from defalcations of certain county treasurers, after the taxes had actually been collected.

I understand further from your letter that the banks in which the deposits of these moneys were made have failed, and the treasurers' bondsmen have either died or left the state.

The answer to your inquiry is to be found in the following provisions of the statutes in force at the time this indebtedness accrued:

"Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act."

2 M. A. S., sec. 3778, p. 2013.

"If any county treasurer prove to be a defaulter to any amount, of the state revenue, such amount shall be made up to the state within the next three years by additional assessments and levies in such manner, as to amount, as the board of county commissioners may direct. In such case the county shall have recourse to the official bond of the treasurer for indemnity. * * * Provided, further, that this section shall be construed to mean that the county may maintain an action, in any court of competent jurisdiction, on the official bond of the county treasurer, in the name of the people of this state, for the recovery of such state revenue, and all other sums due the county from such treasurer, at any time after such defalcation, either before or after levying or collecting the same, as provided in this section."

2 M. A. S., sec. 3868, p. 2048.

In addition to the foregoing, section 3779 provides that taxes delinquent six years may be canceled; and section 3780 provides that it shall be the duty of the county commissioners to report such canceled taxes to the Auditor of State, who shall give the county credit for the amount of said tax so canceled.

The effect of the legislation upon this subject is to make each county responsible to the state for the full amount of tax levied for state purposes, except such taxes as are unavailable, double or erroneous assessments.

The answer to your inquiry, therefore, in view of the facts in this case, as stated above, turns upon the meaning of the word "unavailable" as used in section 3778, *supra;* and it would seem to have been used there, when we consider the provisions of section 3868, as meaning only uncollected and uncollectible taxes.

This construction is borne out by the language in Gartley vs. People, 24 Colo., 155, which was a case against a county treasurer and his sureties upon his official bond. The court denied him the right to interpose, as a defense, the fact that he had deposited the county moneys in a supposedly safe and solvent bank which had subsequently failed.

Referring to this section, the court said, at page 165:

"Aside from the instances therein especially excepted, this makes the liability of the county to the state absolute; so that in this case, should the treasurer's special defense be held good, the county would not, for that reason, be discharged from its obligation to pay over the amount of tax collected for state purposes, although it would have no recourse upon the county treasurer for reimbursement."

It has been held, in construing similar statutes, that the state, by such legislation, elects to deal with the county which is constituted a debtor for the aggregate state tax required to be levied within it; that losses in collections are bound to occur, which losses the legislature has deemed it wise to cast upon the counties.

In the absence of the word "unavailable," which exists in our statute, it has been held that the county is liable for the amount of the levy, though the taxes be not collected.

State vs. Laramie County, 8 Wyo., 104, 120, et seq.

The county, and not the state, is responsible for the proper performance by its treasurer of the duties imposed upon him in the collection of the state tax, for reasons well stated in the charge to the jury in a Pennsylvania case, affirmed by the Supreme Court of that state:

"The people of the county alone have authority to select the individual who shall perform that duty, and when selected none other can be employed. They must take care who they choose for that purpose. To our mind there is not even the semblance of hardship in making the same persons who select the agent responsible for his acts. It is no new duty thrown on the officer after his election; the people choose him with full knowledge that he must receive the state as well as the county funds. The liability of the county is not, however, put on that position, but on the positive words of the act of the assembly, which holds the county responsible for the tax until paid into the state treasury."

County of Schuylkill vs. Commonwealth, 36 Pa. St., 524, 529.

The county being the agency designated by law for the collection of the state tax, its employes', agents', or officers' failure in the performance of their duty is no ground for excusing the county; and you should, therefore, insist upon the collection from

Lake County of the amount due the state, as appears in your letter.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By A. A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 547.)
June 29, 1911.
To Editor "The Divide Farmer."
By Mr. Stuart.
In re: Colorado range law and the effect of the Fred Light case on grazing stock.

In Colorado the burden is on the settler or landowner to fence his land to keep out stock.
There is an implied license that the public land is open to all persons to use it for grazing purposes.
The Fred Light case holds that the right to graze stock upon the forest reserves is subject to regulation, control or termination by the national government, and further holds that the owner must not turn his stock to graze upon a forest range under such circumstances that he expects or intends the stock to wander or stray upon public land that is controlled by regulations restricting grazing.

Mr. A. J. Henbest,
Editor, "The Divide Farmer,"
Calhan, Colorado.

Dear Sir: Your letter of the 14th instant requests a statement of the Colorado range law, and also asks what effect the decision of the United States Supreme Court in the Fred Light case will have upon the rights of owners to graze their stock upon public land.

This office has received many inquiries on this question from the eastern part of the state, and as it is a matter of growing public importance, we are glad to furnish you this opinion for publication.

The use of the word "stock" in this opinion must be understood to be limited to cattle, as the Colorado statutes prescribe certain specific restrictions regarding the keeping, restraining, and herding of sheep, hogs, inferior rams, bulls, and stallions that are not covered by the present discussion.

A brief mention of the history of the law governing range stock discloses the reason for the enactment of its present provisions. The Common Law of England, which is the basic foundation of our laws, compelled the owner of stock to confine and restrain it from trespassing upon the land of others. Upon the opening of the western sections of the United States, with its thousands of acres of grazing land and its vast regions of public

domain to be settled, it was readily found that the application of this principle of law was not practicable, by reason of the fact that it would seriously retard the growth and development of the country. Therefore the western states abrogated it by enacting fence laws.

The Colorado fence law, after defining a "lawful fence," and providing that a trespass occasioned by stock breaking through such a fence, maintained in good repair, rendered the stock-owner liable for the damage, states:

"No person or persons shall be allowed to recover damages for any injury to any crops or grass or garden products, or other vegetable products, unless the same, at the time of such trespass or injury, was enclosed by a legal and sufficient fence, as before described."

Sec. 2589, Revised Statutes of Colorado, 1908.

The necessary implication of this act, passed in 1885, was to release the stock-owner from the duty of confining his stock by fencing. This fact was recognized by the decision of the Colorado Supreme Court in the case of Richards vs. Sanderson, 39 Colo. Rep., 270, decided in 1907, which case announces the doctrine of unrestrained grazing rights when lawfully exercised.

Concurrent with the establisment of this principle of law, the use of the public domain for grazing purposes became a matter of necessity, both on account of its vast extent and geographical location. Therefore, with the tacit consent of the national government, its public lands throughout this territory have been opened to the use of stock-raisers for a long period of years. In a measure this use may be said to have been affirmatively recognized by Congress in the act of 1885, the purpose of which was to prevent the monopolizing of any part of the public domain. By virtue of such continued use, there became established an implied license that the public lands of the United States are free to all persons who seek to graze their stock thereon, so long as the national government does not forbid the same.

The power of the national government to forbid, regulate, or restrict grazing rights on its public land, or any part thereof, is announced by the decision in the Fred Light case. That case arose from the following facts:

The national government adopted certain regulations restricting grazing rights within the Holy Cross Forest Reserve, located in central Colorado. The general effect of these restrictions was to forbid an owner from grazing his stock therein, unless he first secured a proper permit.

Light, who owned a ranch of five hundred and forty acres about seven miles from the said reserve, turned his herd of five hundred cattle upon the range in the spring, in order to cultivate hay on his ranch. Between the ranch and the reserve lies unoccupied public land, across which said stock grazed, and a part of them entered the reserve. Light did not secure a permit and, re-

lying upon the Colorado fence law, denied the right of the national government to hold him liable for the trespass, or restrain him from turning his stock upon unoccupied public land. The trial court ruled against him, and, holding that the national government was empowered to adopt and enforce such grazing regulations, issued an injunction enjoining Light from in any manner causing or permitting his stock to go, stray upon, or remain within said forest, or any portion thereof. The United States Supreme Court affirmed this decree on May 1, 1911. The opinion, which is written by Justice Lamar, recognizes the existence of the implied license of pasturage on the public domain, but holds that the failure of the national government to object did not create any vested rights by virtue of such use, nor deprive the national government of the power to recall any implied license under which the public land had been used for private purposes. In other words, the right to graze stock upon the public domain is always subject to regulation, control, or termination by the national government. The decision fails to pass upon the question as to whether the national government is required to fence its property, in compliance with the Colorado fence law.

The Light decision further announces the law that if an owner turns his stock to graze upon a range under such circumstances that he expects and intends the cattle to wander upon and within a national forest reserve, in violation of its grazing restrictions, his action in turning loose said stock is equivalent to driving it upon the reserve, and, therefore, he may be enjoined from causing or permitting said stock to go or stray therein. This particular holding creates an important distinction between unenclosed public land upon which Congress has passed grazing regulations, and the unenclosed land of an individual owner under the Colorado law announced in the Richards case above.

The decision in the Richards case, after announcing the doctrine of unrestrained grazing rights within its legal limitations, and also the implied license to graze stock on the public domain subject to the will of the national government, states:

"One who turns his cattle out to graze, unrestrained, upon lands where he has a right to turn them, knowing that they will probably wander on the unenclosed premises of another, is under no obligation to prevent them entering upon such premises, and if they do so enter through following their natural instincts, he is not responsible for the damages occasioned thereby. * * * This proposition is clearly applicable to the case of one who does no more than turn his cattle upon the public domain to graze, even though he knows that, following their natural instincts, they may wander upon the unenclosed lands of his neighbor."

In view of the Light decision, this principle of Colorado law must be construed as not governing cases where the stock, under such circumstances, trespasses upon public land having grazing regulations and in violation thereof. Cases involving such facts are to be governed by the Light decision.

At this point we may compare with the above quotation from the Richards case, the following views of the United States Supreme Court, expressed in the Light decision:

"* * * nor do they [fence laws] afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another."

If the above quotations are reconcilable, it must be upon the theory that under the Colorado law the turning loose of stock to graze upon the unenclosed land of the owner, or upon the unenclosed public land that is open to unrestricted grazing, is not an act "in disregard of property rights" within the jurisdiction of Colorado courts.

Construing the two cases together, we must arrive at the conclusion that an owner may lawfully turn his stock either upon his own unenclosed land or upon that part of the public domain not governed by grazing regulations, even though he knows that they will wander upon the unenclosed land of another individual owner; but he may not legally turn his stock to graze upon public land open to unrestricted grazing, if he expects and intends that they will wander or stray upon other public land that is controlled by regulations restricting grazing.

The Richards case is applicable to the unenclosed lands of all individual owners, and also public lands that remain open to free grazing. At any time, however, Congress may authorize the adoption of any reasonable grazing regulations on the public domain, or any part thereof, which, when put into operation, bring the public land affected within the ruling of the Light case. It is thus important to understand that the individual owners of unenclosed land hold it subject to lawful trespasses of range stock, but that the restricted public land is protected by federal law, and any trespass in violation of its grazing regulations is illegal.

We now come to the limitations on the right of unrestained grazing upon unenclosed range land mentioned above. These limitations are very important, and are announced by the United States Supreme Court in the Light case substantially as follows:

No owner of stock is ever warranted in wilfully driving it upon the unenclosed land of another against his will for the purpose of grazing. Fence laws do not give the stock-raiser permission to use his neighbor's land as a pasture, nor do they authorize wanton and wilful trespass. They are intended to condone trespasses of straying cattle, and have no application in cases where stock is purposely driven upon the unfenced land of another to graze. Recognizing the same rule of law, the Colorado Supreme Court in the Richards case mentions the doctrine that where stock is driven intentionally and persistently upon the unenclosed lands of another against his will, a trespass occurs for which the stock-owner is liable.

It thus becomes evident that the rights of unrestrained grazing allowed by the Colorado fence law have well-defined limita-

tions, and the stock-owner is not protected when his acts amount to a wilful driving of his stock upon the unenclosed lands of another without his consent. For such a wilful trespass the law holds the stock-owner liable for the full amount of damage occasioned by the trespass.

The present range law gives to both homesteader and stock-owner certain definite rights and requires of each specific duties.

The homesteader, or owner, or lessee of unenclosed land, may drive trespassing stock to the edge of his land, but no farther, and in so doing care must be taken to prevent injury thereto. He must use reasonable and prudent means to prevent stock from entering upon his land, as long as his operations are confined to his own land and do not in any way interfere with grazing rights upon adjoining land over which he has no control. He must remember that the law has afforded him ample insurance against trespassing stock by directing him to enclose his land with a lawful fence maintained in good repair; and, failing to do this, his land may be subjected to legal trespasses of grazing stock, for which the law does not award him an action for damages.

The stock-owner has the right to turn his stock loose to graze upon his own unenclosed land, or upon unenclosed public land; but (1) he should advise himself of the character and ownershop of the land over which his cattle will naturally graze, and (2) he must act in good faith. If any of said natural range is public land, he must satisfy himself that it is open to free and unrestricted grazing. It may be part of a grazing district on which the government will allow only a limited number of cattle; or it may be withdrawn from grazing entirely. The law enjoins upon him the duty of learning what rules and regulations govern pasturage of the public land within the natural range of his stock, and he must strictly comply with the same, if any there are. Failing to do this, his act of turning loose his stock, under circumstances showing that he expected and intended them to graze over restricted public land, is a violation of the national law, in case the stock enter the restricted territory.

Again, the stock-owner in turning his stock loose must act reasonably and in good faith. He must avoid all acts that amount to a wilful and persitent driving of his stock upon the unenclosed land of another. A large herd of stock wilfully driven upon the unenclosed crop of the ordinary homesteader will totally destroy the same in a short time, and the wilful driving of stock upon the unenclosed land of another is an act so palpably lacking in good faith that it establishes an affirmative intent and purpose to commit a trespass, and therefore the stock-owner is liable for the full amount of the damage done.

If the homesteader and stock-owner will remain within their lawful rights and co-operate in the performance of their several duties, all controversies can be amicably settled without resort to judicial action. The purpose of the present range law was to promote the development of this country through a population of use-

ful citizens. It is in force today because it is the expression of the public will, and the state officials bespeak of each homesteader and stock-owner a full and strict compliance with its provisions. Should the future disclose the fact that it no longer fulfills the purpose for which it was inaugurated, then the public welfare will demand that it be changed by legislative action to meet the changed conditions.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STUART, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 577.)
July 5, 1911.
To the Public Examiner.
By Mr. Griffith.
In re: Payment of attorney for legal services to the board of county commissioners.

The board of county commissioners may employ an attorney and may fix his compensation.

(Opinion Book 4, p. 584.)
July 6, 1911.
To the State Board of Pardons.
By Mr. O'Connor.
In re: Maximum and minimum sentences.

Where the trial court sentences a convict to the State Penitentiary for a definite term of years, the term named will be construed as being the maximum sentence imposed. The minimum, where no minimum term is specified, will be the minimum provided for by the statute.

(Opinion Book 4, p. 590.)
July 8, 1911.
To the State Board of Health.
By Mr. O'Connor.
In re: Public drinking-cup.

1. A public drinking-cup or vessel, as defined in Chapter 125 (Session Laws, 1911), does not include glasses at a soda fountain nor at the bar in a saloon, nor knives, forks, and dishes in restaurants and public dining-rooms.
2. A public drinking-cup is a cup in a public place to which more than one person may have access, or the common, indiscriminate, and promiscuous use, for the purpose of drinking therefrom.

Colorado State Board of Health,
Denver, Colorado.

Gentlemen: Replying to your inquiry of the 7th, in re: Senate Bill 289, in which you ask the following questions:

"First—Does this law apply to drug stores where glasses are used at soda fountains?

"Second—Does it apply to drinking-glasses in saloons and bars?

"Third—Does it apply to other utensils, such as plates, knives, and forks in restaurants?

"Fourth—Has the State Board of Health authority to define what constitutes proper sterilization in these cases?"

Section 1 of the act provides that:

"It shall be unlawful after June 1, 1911, for any person, Board of Managers or Trustees, Company or Corporation, having charge or control of any hotel, restaurant, theater, store, hall, schoolhouse, church, station, railroad train, steam or electric car, or other institution or conveyance, frequented by the public, or which may be used for the purpose of a public assembly, or as a place of employment, to furnish any cup, vessel, or other receptacle to be used promiscuously as a common drinking cup, or permit any cup, vessel, or other receptacle to remain in any public place to which more than one person may have access, for the common, indiscriminate, or promiscuous use or purpose of drinking therefrom; Provided that nothing in this Act shall prohibit the use of a common drinking vessel, in case proper and adequate provision be furnished for sterilizing the same, and such cup be thoroughly sterilized after each use thereof."

We believe it is the plain and manifest intention of the legislature to limit the application of this act to *"any cup, vessel or other receptacle to be used promiscuously as a common drinking cup,* or permit any cup * * * to remain in any public place to which *more than one person may have access, for the common, indiscriminate or promiscuous use or purpose of drinking therefrom."*

It would be a simple matter, had the legislature so intended, to require that no keeper of a restaurant, soda fountain, or bar should serve his customers with glasses or utensils previously used by other customers until after the same had first been thoroughly sterilized.

The act applies to all drinking-cups in public places to which the public have access and drink from promiscuously and indiscriminately. That makes it a common drinking-cup.

The act does not specify what shall constitute proper and adequate provision for sterilizing, or when the cup may be deemed to have been thoroughly sterilized. It requires, however, that this should be done. It leaves the person furnishing the public drinking-cup to determine these matters at his own peril.

I would think, however, that any rule or decision by your board, determining these matters, if complied with would be a good defense for any alleged violation of the act, and would be a helpful guide to persons wishing to comply with the law. I do not believe, however, that you would have authority to limit sterilization to any particular process.

The limit, however—that the cup be sterilized thoroughly after each use thereof—is the condition which the law will seek to enforce, and for which prosecution may be had in event the condition is not complied with.

Very truly yours,
BENJAMIN GRIFFITH,
Attorney General.
By CHARLES O'CONNOR,
Assistant Attorney General.

(Opinion Book 4, p. 602.)
July 14, 1911.
To the Public Examiner,
By Mr. Lee.
In re: Application of interest on delinquent taxes in hands of county treasurer to claim of county against state for care of insane.

1. The county treasurer should pay into the state treasurer, on or before the first of each month, all money due the state then remaining in his hands.
2. A claim of a county for care of insane persons is payable only out of the specified fund, and general moneys of the state in the possession of the county treasurer are not chargeable with a claim against such fund.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your letter of July 11, enclosing communications from the county treasurers of Larimer and Boulder Counties, respectively, and inquiring as to the best manner of procedure for the collection of the interest on delinquent taxes, therein mentioned, which is due from said counties.

As I undertand it, the excuse offered for non-payment of the amounts due is that each of these counties respectively has a claim against the state for the care of insane persons.

If so, such claim is to be paid in accordance with the provisions of sections 4134 and 4135, page 1046, of the Revised Statutes, 1908, out of the funds for the support of the insane.

The law provides that the county treasurer shall pay into the state treasury, on or before the first day of each month, all money due the state remaining in his hands on the first day of that month, transmitting the same by draft or otherwise to the State Treasurer, at the expense of the county. (Secs. 5693 and 5694, Revised Statutes, 1908.)

The claim of these counties for the care of insane persons is payable only out of the specified fund above referred to, and the general moneys of the state in the possession of the county treasurer are not chargeable with a claim against such fund. The law provides the manner in which such claim shall be paid,

and, all conditions being complied with, it also provides the remedy for an improper refusal to pay the same. If there is no money in the fund, the county can collect nothing, and it would be manifestly improper to permit it to hold the moneys of the state and apply them on such a claim.

The liability of the county may accordingly be enforced by law; or it might be sufficient to collect these taxes, if the attention of the county treasurer were directed to the character of the provisions of law herein referred to, and also to the provisions of section 5695, page 1342, of the Revised Statutes, 1908.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 604.)
July 14, 1911.
To the State Board of Health.
By Mr. O'Connor.
In re: Lying-in hospitals and maternity homes.

1. Under Chapter 166, Session Laws of 1911, the State Board of Health and the State Bureau of Child and Animal Protection, acting together, are given full power over the subject of regulating the supervision and licensing of lying-in hospitals and maternity homes.
2. Under the statute it is the duty of the boards to make and enforce rules concerning such institutions.

(Opinion Book 4, p. 609.)
July 18, 1911.
To the Public Examiner,
By Mr. Griffith.
In re: Compensation of the chairmen of the boards of county commissioners with reference to their duties as superintendents of the poor in counties of the fourth class, Division B.

In counties of less than 100,000 inhabitants the chairman of the board of county commissioners is ex-officio superintendent of the poor, and shall receive such compensation for his services as such superintendent as fixed by the board.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: Your favor of June 19, in which you inquire as to the compensation of the chairman of boards of county commissioners, with reference to their duties as superintendents of the poor, in counties of the fourth class, Division B.

You call attention to an apparent contradiction in the following sections of the Revised Statutes, 1908: 2576, 1193, and 1200, all of which relate to the compensation of chairmen of boards of county commissioners who are made by law ex-officio superintendents of the poor.

Section 1193, referred to by you, was adopted in 1907 (see Chapter 145 of the Session Laws of 1907). This section, however, need not be taken into consideration, because examination of this chapter discloses that it relates only to county commissioners in counties having a population of 100,000 or more inhabitants.

Section 2576 provides that the chairman shall be ex-officio superintendent of the poor, and shall receive as compensation five dollars per day, provided that in counties of the fourth class he shall not receive over two hundred dollars per year. This section was adopted in 1891.

Section 1200 provides as follows:

"The board of county commissioners shall choose a chairman from its own membership, who shall also be ex-officio superintendent of the poor, and shall receive such compensation for his services as such superintendent as provided by the board of county commissioners of such county."

This section was adopted in 1901, or ten years later than the 1891 statute, and, it seems to me, by implication repeals the law of 1891, since its provisions are directly conflicting with the 1891 statute, and there is nothing to show that this section 1200 was not intended to apply to all counties except counties of one hundred thousand or more inhabitants, which are provided for by section 1193.

I am of the opinion that section 1200 states the law at this time with reference to the county you mention.

You also ask whether the $500 per annum, which the chairman would be entitled to as a member of the board, has any bearing upon his remuneration as superintendent of the poor.

I am of the opinion that the salary as superintendent of the poor is in addition to his ordinary salary as a member of the board.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 611.
July 18, 1911.
To the County Attorney of Cedar County, Nebraska.
By Mr. Talbot.
In re: Marriages void in this state.

Hon. P. F. O'Gara,
County Attorney,
Cedar County, Hartington, Neb.,

My Dear Sir: In answer to yours of July 15, I will say that our statute prohibits—

"all marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as whole blood, and between uncles and nieces, aunts and nephews."

Said marriages are declared to be incestuous and absolutely void, and all marriages between negroes and mulattoes of either sex and white persons are also declared to be absolutely void.

There is, however, no prohibition in our state against the intermarriage of first cousins.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By GEORGE TALBOT,
Special Counsel.

(Opinion Book 4, p. 629.)
July 22, 1911.
To Attorney State Land Board.
By Mr. Mothersill.
In re: School lands—irrigation ditches and reservoirs.

1. School lands may not be devoted to purposes of building ditches or reservoirs, without compensation to the state.

Hon. George H. Thorne,
Attorney, State Board of Land Commissioners,
State House, Denver, Colorado.

Dear Sir: Your letter was duly received, asking for an opinion relative to the constitutionality of that portion of section 3465 of the Revised Statutes of Colorado, of 1908, relative to the construction of canals and reservoirs in the irrigation district of this state, which reads as follows:

"The right of way is hereby given, dedicated and set apart to locate, construct and maintain said works, or reservoirs over, through and upon any of the lands which are now, or may be property of the state."

You say that, in your judgment, school lands are property held in trust for a specific purpose, and that no branch of the state government has any power to divert the trust fund or property from the purposes of the trust.

We entirely agree with you that school lands may not be devoted to the purpose of building ditches or reservoirs in irriga-

tion districts without compensation to the state, secured in the manner provided by law, for the disposition of school land.

Section 5, Article IX, of the Constitution provides:

"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."

And section 3 of the same article provides:

"The public school fund of the state shall forever remain inviolate and intact; * * * no part of this fund, principal or interest shall ever be transferred to any other fund, or used or appropriated except as herein provided."

It was decided by the Supreme Court in re Canal Certificates, 19 Colo., 63, that school lands could not be used for the purpose of building a state canal. In that case a law was passed authorizing the payment for school lands with certificates of indebtedness issued in payment of the construction of the state canal.

In the course of opinion the court said:

"No argument is required to show that the payment for lands purchased from the state by certificates issued for the construction of this ditch, as provided by the Act before us, would necessarily divert these lands and the proceeds thereof from the use and benefit of the respective objects for which the grants were made. We therefore agree with the Attorney General and Mr. Riddell that the Act under consideration is unconstitutional and void, insofar as it authorizes the state to accept the certificates issued in payment for the land."

It would seem that there could be no question that, if school lands may not be devoted to the building of a state canal, they could not be devoted to the building of canals and reservoirs in some particular district within the state, and that using school lands for ditches and reservoirs of an irrigation ditch would be a diversion of such lands from the use of the respective objects for which the grants were made by Congress, for which purposes the state is under a trust obligation to perform.

There are many other decisions of the Supreme Court which confirm the position that school lands cannot be used for the purposes indicated in section 3465, above quoted, but we believe the matter is so clear as not to need any further argument.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 4, p. 632.)
July 20, 1911.
To the State Treasurer.
By Mr. Griffith.
In re: Appropriations by the Eighteenth General Assembly to the State Bureau of Child and Animal Protection and to the State Historical and Natural History Society.

These appropriations are valid and should be paid.

Hon. Roady Kenehan,
State Treasurer,
Capitol Building, Denver, Colorado.

Dear Sir: On June 1 you addressed a communication to this office, calling attention to a protest made by Hon. Ben B. Lindsey, judge of the Juvenile Court of Denver, against the appropriation of $15,400 made by the Eighteenth General Assembly for the payment of certain salaries and expenses of the State Bureau of Child and Animal Protection. With this communication you enclosed certain letters addressed to you by Judge Lindsey, and you asked the advice of this office as to whether or not this appropriation was a valid and constitutional one.

I have also received statements and briefs from Judge Lindsey, and from Messrs. Pershing and Titsworth, representing the Bureau of Child and Animal Protection, with reference to the validity of this appropriation, and have considered the same.

In 1901 the Colorado Humane Society, a corporation organized under the laws of Colorado, was by act of the legislature constituted a State Bureau of Child and Animal Protection, for the purposes set forth in the act, which provided that the Humane Society should accept and carry out the provisions of the act. This act of 1901, being Chapter 84 of the Session Laws of 1901, among other things provided that the Governor, Superintendent of Public Instruction, and Attorney General should be ex-officio members of the board of directors of the bureau; that it should be the duty of the bureau to secure the enforcement of the laws for the prevention of wrongs to children and dumb animals; to assist in organizing societies and appointing agents for the enforcement of laws for the prevention of such wrongs, and to promote the growth of education and sentiment favorable to the protection of children and dumb animals. It also provided that the bureau should hold annual meetings at the State Capitol for the transaction of its business and the election of its officers, and for the consideration of questions relating to child and animal protection, and that the bureau should make annual reports to the Secretary of State in regard to its work, which the Secretary of State should publish in pamphlet form and distribute to certain of the state and county officers, newspapers, state and educational institutions. It also provided that if the Humane Society should accept the provisions of the act, they should certify their acceptance to the Secretary of State and the State

Auditor, which, we assume, has been done immediately after the passage of the act. By subsequent legislation (see secs. 554 and 558, Revised Statutes of 1908) this bureau was further recognized by the legislature in having certain additional powers granted to them, and as long ago as 1891 (see secs. 604 and 606, Revised Statutes of 1908) the Colorado Humane Society was recognized by the legislature, since it was provided by section 604 that certain fines should be paid to this society in aid of the benevolent objects for which it was incorporated, and by section 606 the County Court might appoint the society as guardian for an abandoned child; and even farther back in the history of the state—namely, in 1889—it was provided that the officers of the Colorado Humane Society should have certain powers with reference to the administration of the laws relating to cruelty to animals (see Chap. 35, subdiv. 13, p. 568, Revised Statutes of 1908). In 1901, 1903, and 1905 appropriations were made to the State Bureau of Child and Animal Protection by the respective legislatures for the purpose of carrying out the provisions of the act of 1901, and said appropriations were made in each instance by a separate bill. In 1907, 1909, and 1911 appropriations were made by the legislature to this bureau, and all of these appropriations were made in the general appropriation bills and not by separate bills. The appropriation for 1911 and 1912 in the general appropriation bill of the Eighteenth General Assembly reads as follows:

"Section 21. Office of State Bureau of Child and Animal Protection.—

	1911	1912	Total
Secretary, salary	$1,800	$1,800	$3,600
Clerk and Stenographer, salary	1,200	1,200	2,400
Three State Officers, salaries	3,600	3,600	7,200
Traveling expenses of State Officers	1,200	1,200	2,400

So far as I have been advised up to this time, all of these appropriations since 1901 have been uniformly paid without protest, except that in 1908 former State Auditor Statler refused to pay certain moneys appropriated to the bureau, and was by the bureau mandamused in the District Court of the City and County of Denver and compelled to pay upon the order of the court. I shall refer to this litigation further on in this communication.

Judge Lindsey cites the following sections of the Constitution, which, he claims, have been violated by virtue of the appropriation made and the powers given to the Colorado Humane Society as the State Bureau of Child and Animal Protection, to-wit:

Article V, section 25;
Article V, section 34;
Article XI, section 2;
Article XV, section 2;
Article V, section 32.

However, in the statements and briefs which he has submitted he has based his arguments mainly on Article V, section 34, and Article V, section 32, and analogous sections; and a consideration of these two sections, therefore, in my opinion will determine the questions submitted as to this appropriation.

Judge Lindsey also sets forth that the bureau through its officers have been exceeding their powers under the law, and through its monthly publication, "Child and Animal Protection," attacks have been made upon public men in the nation and the state which had nothing to do with the work of the bureau; also, that this publication has been used to libel certain people unjustly, and to influence sentiment in certain ways entirely foreign to the purposes and objects of the publication; and Judge Lindsey asks for a hearing with reference to these charges. If these charges are true, it is not only reprehensible on the part of those committing the acts complained of, but entirely unfair to the state officers who are in the minority on the board of directors of the bureau, and whose names are used as ex-officio members of the bureau in its monthly publication; and any such conduct should be discontinued. However, the fact that the bureau or any of its officers has abused its powers, or has committed acts which it should not have committed, is not of itself sufficient to deprive it of any appropriations which have been properly and lawfully made to it, and the question of payment or non-payment of this appropriation should rest on the consideration of its validity and constitutionality under the laws of the state, without respect to the efficiency or the discretion of its officers in administering the law.

As stated before, the legal objections raised against this appropriation are based mainly on two sections of the Constitution, one of these being section 34, Article V, thereof, which provides as follows:

"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."

It is contended that, inasmuch as the majority of the board of directors of this bureau or society are elected by the society without interference on the part of the state, and inasmuch as the ex-officio members of the board—namely, the Governor, Attorney General, and Superintendent of Public Instruction—are in the minority on the board, and therefore unable to control the policy, that the society or bureau is not under the absolute control of the state, and therefore no appropriation can be, under the Constitution, made to it.

This question is not one of first impression in this state, but has already been passed upon, in my opinion, by our Supreme Court and by our District Court.

In the case of The People ex rel. Richardson vs. Spruance, 8 Colo., 530, it appears that the Colorado State Horticultural

Society, a private corporation incorporated under the laws of this state, was in 1883, by an act of the legislature, established as a Bureau of Horticulture. (See Session Laws of 1883, p. 210.) An examination of this act constituting this society as the Bureau of Horticulture discloses that the act constituting the Colorado Humane Society the State Bureau of Child and Animal Protection follows it very closely, with this difference, that while in the case of the Bureau of Horticulture the state had absolutely no representation on the board, in the case of the Bureau of Child and Animal Protection the state has three of the executive officers as ex-officio members of the board. The act of 1883 with reference to the Bureau of Horticulture also appropriated $1,000 annually to enable the bureau to carry out the provisions of the act. The Auditor refused to pay this sum of money to the bureau, and the bureau sought to mandamus him with reference to this appropriation. One of the grounds of demurrer to the petition in the mandamus was as follows:

"That the Society is not of that character which would authorize an appropriation of the moneys of the State in its support, in that it is not shown to be a society or institution under the absolute control of the State."

This ground of demurrer expressly rested upon section 34 of Article V of the Constitution, and the court, in disposing of the same, uses the following language, on page 533:

"The act of March 1883, relating to this society, constitutes it a 'bureau of horticulture,' a 'state bureau,' and subjects it to certain requirements, so as to clearly indicate an intention to make it a bureau or institution of the state, for the obvious benefit to be derived by the state therefrom. By said act and its acceptance as aforesaid, it is brought under the control of the state, so far as the legislature has chosen to enact, and if not under its 'absolute' control in respect to the choice of officers and the detail of proceedings within the scope of its purposes, it certainly may be subjected to such absolute control whenever the legislature so chooses. The said society is therefore, in our opinion, not within the constitutional inhibition referred to, and is constitutionally capable of receiving the benefits of such appropriation. We find nothing in the published reports of the society submitted for our inspection inconsistent with the legitimate purposes of the organization, the legislation relating thereto, or opposed to the views above expressed."

In 1908 George D. Statler, State Auditor, refused to honor the voucher of the State Bureau of Child and Animal Protection, whereupon the bureau sought to mandamus him to issue a warrant in payment of its appropriation. The mandamus suit was brought in the District Court of the City and County of Denver, before Hon. Carlton M. Bliss, judge of the District Court, and in that case again the Attorney General, who represented the State Auditor, questioned the authority of the bureau to receive its appropriation, claiming that it was not constitutionally capable

of receiving the benefits thereof, and the Attorney General in that case, in his brief, expressly argues that, inasmuch as the bureau was not under the absolute control of the state, no appropriation could be made to it. Judge Bliss in his decision used this language with reference to this contention:

"Under the authority of People v. Spruance, 8 Colo. 530-533, there can be no doubt that the relator is constitutionally capable of receiving the benefits of the appropriation, unless that case is considered wholly overruled by In re Continuing Appropriations 192. I am of the opinion that the authority of the Spruance case so far as it relates to the constitutional capacity of the relator to receive the appropriation, is unaffected by the latter case. No such question was involved in the continuing appropriation case."

In view of these two decisions, I am of the opinion that this office would not be authorized to do anything other than to follow the same until the Supreme Court in some other cases announces a different doctrine.

Section 32, Article V, reads as follows:

"The general appropriation bill 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. All other appropriations shall be made by separate bills, each embracing but one subject."

As stated before, appropriations to the bureau of 1901, 1903, and 1905 were made by separate act, while in 1907, 1909, and 1911 appropriations to the bureau were made in the long appropriation bill, and it is now contended that any appropriation to the bureau contained in the long appropriation bill is invalid, since it contravenes the section last above quoted. It is contended that the bureau is not a part of the legislative, judicial, or executive department of the state government; also, that it was ruled in People vs. Spruance, *supra,* that an appropriation to a bureau of this nature must be made by a separate bill, and could not be included in the general appropriation bill. It will be noticied that in that case the appropriation was not attempted to be made in the general appropriation bill, and the language of the court that it could not be so included might be subject to the criticism that it was *obiter dictum.* In one comparatively recent case, and in one case much later than the Spruance case, the Supreme Court of this state has seen fit to define what is and what is not a part of the executive branch of the government. In Parks vs. The Soldiers' and Sailors' Home, 22 Colo., 86-96, the Supreme Court says:

"We shall not extend this opinion beyond the case presented, and for the purposes of this case it is sufficient to say that every officer of this state who holds his position by election or appointment, and not by contract, and whose duties are defined by statute, and are in their nature continuous, and relate to the administration of the affairs of the state government, and

whose salary is paid out of the public funds, is a public officer of either the legislative, executive or judicial department of the government, and may in the discretion of the legislature properly have his salary included in the general appropriation bill, and have the appropriation therefor take rank accordingly, and as the priority attaches not to the form of the act making the appropriation, but to the office, the priority of a particular appropriation will not be jeopardized if made by a separate act. Moreover, as the officers established by the constitution and those created by authorized legislative authority are usually required to keep offices, records, papers, etc., it is evident that expenses for these and like items may also be provided for as a part of the ordinary expenses of the legislative, executive and judicial departments of the government."

In The People ex rel. Alexander vs. The District Court, 29 Colo., 182, Mr. Justice Steele, in delivering the opinion of the court, on page 192, says:

"It will be conceded that the state board of assessors is one part of the executive department, as defined by the constitution, but it cannot be seriously contended that it is not part of the executive branch of the state government, in the comprehensive sense in which executive is used when government is divided into three distinct branches. It was conceded in argument that the judicial department should not interfere by injunction with the governor, who is the head of the executive department, but it was contended that the state board of assessors is not part of the executive department within the meaning of our constitution, and that the section of our constitution which provides for non-interference by one department with another does not apply to the case at bar. Under the law of 1901 the duties of the state board of assessors are defined, and it is a most important part of the machinery of the state for the assessment of property. In the comprehensive sense of the term, the state board of assessors is a part of the executive branch of the government, because it is not part of the judiciary, which construes the laws, nor a part of the legislative department, which makes the laws, and because it is charged with the detail of carrying the laws into effect and securing their due observance."

It can at least be argued in favor of the bureau that it is charged with the detail of carrying the laws into effect and securing their due observance; therefore, that it is part of the executive branch of the government, and from the two decisions cited last above, there is ground for the argument that the bureau is a part of the executive branch of the government.

Under these circumstances, and in view of the fact that the bureau has been provided for with appropriations from the state for the last ten years, all of which have been paid up to this time, and inasmuch as the last three legislatures have made appropriations in the general appropriation bill, those of 1907 and 1909 having been paid without question, I am of the opinion that

anyone seeking to question the validity of this appropriation should do so by an action in court, and until so raised you are authorized to continue the payment of this appropriation.

In your letter you have also asked for advice with reference to the appropriation made to the State Historical and Natural History Society. This society was first recognized by our legislature in 1879, and an appropriation was made in that year for its benefit, and since said time appropriations have been made by the various legislatures and have been uniformly paid, so far as I have been able to determine.

Under these circumstances, this society having been recognized by the state and appropriations made to it for over thirty years, and the points of law being identical with those already discussed, I am of the opinion that you are authorized to continue the payment of this appropriation until your right to do so is questioned in a court of competent jurisdiction.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 651.)
July 22, 1911.
To the Public Examiner.
By Mr. Stuart.
In re: Duty of county officers to pay over fees to county treasurer.

All county officers whose salaries are paid out of the fees collected may retain the fees until their salary is paid before they are required to turn over the excess to the county treasurer.

Deputies' salaries can be paid only out of the fees, but whether they are to receive their salary through the county treasurer, or may take it out of the fees in excess of the principal officer's salary, is not decided.

There is no penalty for the failure of the board of county commissioners to make monthly reports, but they may be mandamused to do so.

Mr. H. J. Leddy,
Public Examiner,
State House, Denver, Colorado.

Dear Sir: Your inquiry of the 7th has been given careful consideration.

You asked for our construction of section 2554 of the Revised Statutes of 1908, as bearing upon the duty of county officers to pay over to the county treasurer the fees collected by their respective offices.

This provision was enacted as section 32 of the Salary Act passed by the General Assembly in 1891. In 1895 the Supreme Court, in the case of Airy vs. The People, 21 Colo., 144, in construing this section held that, in order to reconcile it with section

15 of Article XIV of the Constitution, it must be interpreted as requiring each county officer to turn over to the county treasurer only those fees of his office that are above and in excess of the amount of his salary. In other words, the fees collected up to the amount of said officer's statutory salary were the property of the officer, and under the provisions of section 15 of Article XIV of the Constitution the General Assembly was without power to compel such officers to pay the same into the county treasury; but all sums in excess of the amount of the officers' salaries were subject to legislative control, as expressed in said section 22. This holding has been approved in the following cases:

Adams vs. The People, 25 Colo., 535.

Cooper vs. The People, 28 Colo., 87.

Jefferson County Bank vs. Lanius, 11 Colo. App., 344.

Blanchard vs. County Commissioners, 15 Colo. App., 412.

Attorney General's Report, 1907-8, p. 76.

We therefore conclude that it is the law today that each county officer, whose salary is paid by statute out of the fees, perquisites, and emoluments of his office, may retain the same as his property until his salary is paid thereby; that section 2554 of said Revised Statutes does not operate upon said fees until the same exceed the amount of the salary of the county officer collecting the same.

Your second question asks if said officers may also retain said fees in an additional amount sufficient to pay the salaries of their deputies.

We have to advise you that this is an undecided question. The Airy case does not cover it, nor has our attention been called to its determination by the Supreme Court. Section 17 of said Salary Act of 1891 provides for the payment of deputies and assistants to county officers. This section now appears as section 2580, Revised Statutes. We understand that it has been customary to pay said deputies out of the fees of their respective offices before making any transfer of the funds to the county treasury. To a certain extent the wording of said sections 2554 and 2580 may be said to justify such a procedure. Section 2580 provides that the deputies therein specified shall be paid out of the fees of the office where they are employed, excepting employes of the assessor and of the county superintendent, which two officers are paid directly from the county treasury and not from the fees of their respective offices. (See sections 2574 and 2575, Revised Statutes.)

It seems to be the theory of the law that, in those cases where county officers are paid from the fees of their office, their deputies are also paid from such fees. But whether the deputy has to receive his salary through the county treasury, or may

take it direct from the amount of said fees in excess of the principal officer's salary, will have to await determination by a court of review.

We are of the opinion, however, that all those deputies enumerated in section 2554, according to the provision thereof which specifies that they "shall be paid out of said funds and no others" (which is not attacked in the Airy case), can be paid only from the fees collected by their respective offices, whether said fund remains in their office or is in the hands of the county treasurer, designated as the "fee fund" of their particular office.

You next ask in regard to the monthly reports to the chairman of the board of county commissioners by county officers required by section 2552 of said Revised Statutes, and inquire what redress the county commissioners have on the failure of the county officers to make such reports.

This provision was enacted as section 20 of said Salary Act of 1891, and is discussed in the Airy case. That opinion clearly announced that its determination in regard to the amounts of money required to be turned over to the county treasurer must not be understood as having any effect upon the monthly reports required from the county officers. It is our opinion that the law today requires such monthly reports from each county officer enumerated in said section 2552, but, as is stated in the Airy case, the said section fails to provide a penalty for the violation of said section, and the act does not make such failure to report a crime or misdemeanor. However, we believe that, under a proper set of facts, the county commissioners can compel said county officers by mandamus to make said reports.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STUART, JR.,
Assistant Attorney General.

(Opinion Book 4, p. 695.)
August 11, 1911.
To the State Auditor.
By Mr. Griffith.
In re: Expenses of state officers outside of the state.

The state is not liable for such expenditures, unless expressly authorized by the laws relating to each particular department.

Hon. M. A. Leddy,
Auditor of State,
Denver, Colorado.

Dear Sir: A day or so ago you called my attention, by letter and otherwise, to several questions pending in your office

which relate to the authority of different state officers to attend conventions and gatherings in the interest of their departments, held outside of this state, and to be reimbursed for their expenses on such trips from funds appropriated to their departments by the legislature.

I have in mind, in this connection, the following instances:

The Commissioner of Mines, Mr. Henahan, who desires to attend the First Annual Mine Safety Demonstration, which is to be held at Pittsburg in October;

Also, the inquiry as to whether a member of the Insurance Department may attend the convention to be held at Milwaukee;

Also, as to whether the State Coal Mine Inspector may attend a convention at Duluth;

Also, as to whether a member of the State Board of Health may attend some gathering in regard to that department outside of the state;

Also, whether the State Dairy Commissioner may attend a meeting of the National Pure Food and Dairy Convention in Duluth, on the 21st of ths month.

It may be stated generally that there is no statute applying to all officers of the state, whereby they may attend conventions and gatherings outside of the state at the expense of the state, and the authority for any such expenditures must be found in the laws relating specifically to the different departments.

I have in mind instances where such authority is expressly given; and other instances have come to the attention of this office where no such authority was given in the laws relating to their departments.

It was decided in Carlile vs. Hurd, 3 Colo. App., 11, that authority for such expenditures must be expressly conferred, and cannot rest on presumptions and arguments *ab inconvenienti*.

I have not before me the laws of the Eighteenth General Assembly affecting these different departments; but after an examination of the statutes relating to these departments prior to the Eighteenth General Assembly, I am unable to find specific authority for the officers of these departments to attend conventions and like gatherings in other states.

I appreciate the importance to the state of permitting its officers to attend these gatherings, where they may gain much valuable information with reference to their departments; but, as stated before, in the event of the statutes not expressly conferring authority to travel outside of the state, I am of the opinion that the case of Carlile vs. Hurd, above cited, is controlling, and should be your guide until other statutes are enacted, or until the courts shall order you to issue a warrant for such expenses.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 698.)
August 11, 1911.
To the State Auditor.
By Mr. Griffith.
In re: House Bill No. 386, relating to game and fish.

This act went into effect at midnight, August 4, 1911.
The present commissioner is not entitled to the increase in salary under this act.
The salaries of the deputy commissioner and the deputy game wardens are not changed by the act.
The salaries of the clerk, the superintendent of the state fish hatcheries, and the assistants are not within the inhibition of the Constitution relating to increase of salaries, and so are governed by this act and the long appropriation bill.

(Opinion Book 4, p. 710.)
August 16, 1911.
To the Warden of the State Penitentiary.
By Mr. Griffith.
In re: The removal and trial in another jurisdiction for another offense of one serving a sentence in the penitentiary, and the procedure therefor.

A person can be removed from the penitentiary and tried in another jurisdiction upon a writ of habeas corpus or an analogous writ directed to the warden.

Mr. Thomas J. Tynan,
Warden of the State Penitentiary,
Canon City, Colorado.

Dear Sir: I have your favor of August 14, in which you ask for advice from this office with reference to the case of Angelina Garramone, who is now serving a sentence in the penitentiary on a charge of forgery and uttering. She was convicted in the District Court of the City and County of Denver on or about January, 1911. An original information has just been filed in the District Court of the County of Jefferson charging her with murder, and the District Court of that county has ordered a capias to issue to the sheriff of Jefferson County, commanding him to take the body of Mrs. Garramone and produce her forthwith in court. There was also filed in the District Court of Jefferson County a petition of the district attorney, showing the circumstances of Mrs. Garramone's custody, and asking that the court enter an order directing the warden of the State Penitentiary to deliver the prisoner to the sheriff, and the District Court has entered that order, which order, together with the capias, is now in the hands of the sheriff of Jefferson County.

You desire to know whether you are authorized upon this order to turn over the body of this woman to the Jefferson County officers. The sheriff has been in this office the greater part of the day with papers, ready to start for Canon City, and inasmuch as

your letter was just received this morning, we have not had as much time as we should like to look into this matter, but, on account of the urgency of the situation, we deem it wise to take the matter up and write you at his time.

Two questions are presented: first, whether one serving a term in the penitentiary can be legally removed therefrom and tried in another jurisdiction than that in which he was sentenced, and for another offense; second, if the first question is answered in the affirmative, what is the proper procedure to pursue to get the defendant into court for trial?

In answer to the first question we will say that, after an examination of the authorities, it seems clear that a person can be removed from the penitentiary and tried in another jurisdiction than that in which he was committed, and for another offense. The trend of all the modern decisions is to this effect, and we believe it is the law in this state today. The leading case in this proposition is that of Rigor vs. The State, 101 Md., 466; also, State vs. Keefe, a Wyoming case reported in 98 Pac., 122.

The difficulty in this matter is in answering the second question; that is to say, as to just the proper procedure to pursue in order to present the defendant to the court for trial. Under the method now pursued by the District Court of Jefferson County, the sheriff has a capias for the defendant, and the order directs that he take her body, and that you deliver her body to him until the conclusion of the present proceedings, by trial or otherwise, when she is to be returned to you to serve out her present term. The authorities are not as clear as they might be with reference to the proper procedure, but we believe the weight of authority to be that the procedure should be that the District Court of Jefferson County, by writ of habeas corpus or some analogous writ, should direct and command you to appear in court with the defendant for an arraignment or trial, as the case may be. If, after she was arraigned, it would be impossible to try her immediately, then she would still remain in your custody, and you would take her back to the penitentiary, when you would again return with her for trial in pursuance of another writ, if necessary, and after the trial you would again take her to the penitentiary. In this way it seems to us that she would remain in your custody, instead of being turned over absolutely to the Jefferson County authorities, and, as stated before, we believe that the better practice is this way. In fact, a statute of the State of Colorado (sec. 2938, Revised Statutes, 1908) provides, among other things, as follows:

"Any person if committed to any prison or in custody of any officer, sheriff, jailer, keeper or other person or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from the said prison or custody into any other prison or custody unless it be by habeas corpus *or some other legal writ*."

It seems to us that this emphasizes the advisability of some writ in this matter in the nature of a writ of habeas corpus or

analogous thereto, which would command you to bring the defendant to Golden, and by which you would be subject to the orders of the court as to her appearance there, at the same time permitting the custody of the defendant to remain with you.

In this connection we note that the case of Rigor vs. State, above cited, was one in which the defendant was brought into court in the custody of the warden of the penitentiary, upon a writ of habeas corpus issued at the instance of the State's Attorney. A preliminary motion was filed objecting to the party being brought from the penitentiary for trial for another offense, the court overruling the motion, and then a writ of habeas corpus was again issued directing the warden of the penitentiary to produce the defendant before the court for trial on the indictment which was pending against him.

In the case of State vs. Keefe, cited above, it is said:

"Except for the purpose of testifying, habeas corpus or some similar legal proceeding is necessary to compel a convict's attendance in court and where his presence is sought to try him upon another charge, the writ or order will be analogous to, or serve the same purpose as the common law writ of habeas corpus ad prosequendum."

In State vs. James Wilson, 38 Conn., 126, it is held that the proper process for obtaining jurisdiction of the person of the prisoner who is confined in prison under sentence, in order to try him for another offense, is the writ of habeas corpus directed to the keeper of the prison, specifying the purpose for which he is wanted, and commanding the keeper to have him before the court.

We have noticed other cases in which a writ analogous to that of habeas corpus was used, but in which no particular discussion was made on the point, and still other cases where the method of procedure is not particularly discussed. It merely appears that the defendant was brought into court from the penitentiary, and while we are not prepared to say that the method employed by the District Court of Jefferson County is vitally objectionable, yet, from an examination of the cases, we think that the method outlined by us as above would be the better one to follow, and particularly in view of the fact that this method will permit the custody of the defendant to remain with you, rather than to have her custody turned over absolutely for any given time to other authorities.

We have taken the liberty of forwarding a copy of this letter to Judge McCall for his advice and suggestions, and if, after looking into the authorities, he is of the opinion that the procedure as outlined above would be more advisable, and some writ is delivered to the sheriff in accordance therewith for service

upon you, we will be willing to advise you to obey the writ and produce Mrs. Garramone to the court.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 742.)
August 21, 1911.
To the State Game and Fish Commissioner.
By Mr. Griffith.
In re: House Bill No. 386, relating to increase of traveling expenses.

The commissioner and the deptuy are entitled to the increased traveling expenses provided in the act, as they do not come within the inhibition as to increase or decrease of salaries during a term of office.
The salaries and expenses of deputy game wardens may be paid out of the game cash fund.
The salaries of chief game wardens are governed by this act and the long appropriation bill.

(Opinion Book 4, p. 746.)
August 25, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Right of county to compel treasurer to issue one certificate for several tracts bid in at tax sales.

1. The county would seem to have the same right as any other purchaser at a tax sale to demand that the county treasurer issue but one certificate for various parcels of property sold to it.
2. The county treasurer may not advertise for sale tax certificates held by the county.
3. Fees for such advertising wrongfully exacted by him should be refunded.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your letter of recent date, inquiring whether the county can compel the treasurer to issue one certificate for several traits of land which it bids in at tax sales.

I can see no reason why the provisions of section 5723 of the Revised Statutes of Colorado, 1908, would not apply to the county as well as to any other purchaser at such sale. Under that section is found the following:

"If any purchaser shall become the purchaser of more than one parcel of property, the whole shall, at his request, be included in one certificate."

The county would, therefore, seem to have the right to demand that the treasurer issue but one certificate for the several tracts sold.

Your letter also contains the following further inquiry:

"After the county holds tax certificates, can the treasurer advertise them every year, and each year charge the county for issuing new certificates and advertising these certificates for sale?"

I know of no provision of law under which the treasurer can advertise for sale tax certificates held by the county. If the treasurer has done this, a demand upon him for advertising fees wrongfully exacted by reason thereof ought to cause him to return the amount so collected, upon its being demonstrated to him that he had no authority for his action.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By ARCHIBALD A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 759.)
September 1, 1911.
To the Commissioner of Insurance.
By Mr. Lee.
In re: Soliciting insurance by mail.

1. Soliciting insurance by mail in states wherein an insurance company incorporated in Colorado is not licensed does not require the revocation of its authority to do business in Colorado, under the provisions of Section 3115, Revised Statute of 1908.
2. The construction ordinarily given to statutes restricting the right of foreign corporations to "do business" is that those words mean the establishing of a branch or agency within the state, and the actual and continued transaction of business there.
3. It has been repeatedly held that the negotiation of insurance by mail was not a transaction of business within the state where the company is not resident.
4. Any policies issued as a result of such soliciting by mail by a Colorado company would be considered as made in Colorado, and the policies and business of the company are subject to the supervision of the Insurance Department, through which the interests of Colorado can be protected.

(Opinion Book 4, p. 769.)
September 2, 1911.
To County Superintendent of Schools, E. M. Freeman.
By Mr. Lee.
In re: Status of school district divided by creation of new county.

1. A school district is a body corporate. Where there is no provision in the act creating a county, for the division of a school district or the formation of a new district therefrom, and no such intention may be gathered from the act, the district must be held to retain its identity.
2. It must be regarded as a joint district, and its business handled in the manner provided for conducting the affairs of joint districts, by section 5911, Revised Statutes of 1908.

(Opinion Book 4, p. 774.)
September 7, 1911.
To the State Meat Inspector.
By Mr. Talbot.
In re: Authority of inspector to destroy unwholesome meat.

It is the duty of the State Veterinary Surgeon and the State Meat and Slaughterhouse Inspector to destroy all unwholesome meat, dangerous to public health, even if the same has been O. K.'d by another inspector.

(Opinion Book 4, p. 794.)
September 6, 1911.
To Mr. W. G. Haning.
By Mr. Stuart.
In re: Fishing license.

No person not a citizen of the United States and a bona-fide resident of Colorado shall engage in fishing in this state without a non-resident hunting and fishing license.

(Opinion Book 4, p. 819.)
September 16, 1911.
To the Commissioner of Insurance.
By Mr. Lee.
In re: Right of insurance company to invest in stock of private corporations.

1. The statute provides that the surplus moneys of insurance companies may be invested in or loaned upon the pledge of the bonds or other "evidences of indebtedness" of solvent, dividend-paying corporations other than mining corporations, provided that the current market value thereof during the continuance of such "loans" shall be at least 20 per cent more than the sum "loaned" thereon.
2. The connection in which the language of the statute is used would seem to indicate a legislative intent that the investment of surplus as well as capital and other funds should be by way of loans amply secured, rather than by way of investment—always more or less speculative—in the capital stock of any corporation.
3. Corporate stock is but an evidence of the interest in a particular corporation, and a right to a proportionate share of such dividends as may be declared, and in any division of the assets of the company at the winding up or dissolution thereof. There is no pledge or liability upon the part of anyone to absolutely and unconditionally pay to the holder of the corporate stock any sum of money or any property whatever.
4. A share of stock is in no sense a debt or an evidence of indebtedness. Insurance companies are not authorized to invest their surplus in the stock of private corporations.

(Opinion Book 4, p. 827.)
September 19, 1911.
To the State Auditor.
By Mr. Griffith.
In re: Appropriation of $6,000 for the John Elsner mineral collection.

This appropriation should be paid out of the Capitol Building Fund before the transfer of $150,000 from said fund is made to the Internal Improvement Permanent Fund.

(Opinion Book 4, p. 834.)
September 22, 1911.
To the State Treasurer.
By Mr. Griffith.
In re: Internal Improvement Permanent Fund, and House Bill No. 425, Senate Bill No. 561, Senate Bill No. 54, and Senate Bill No. 427.

The above bills all make appropriations for internal improvements, such as roads, bridges, viaducts, etc., but as they do not specify any particular fund, they must be paid out of the general or ordinary fund, and not out of the Internal Improvement Permanent Fund.

Hon. Roady Kenehan,
State Treasurer,
Denver, Colorado.

Dear Sir: I have your letter of September 18, in which you make inquiries as to whether certain appropriations made by the Eighteenth General Assembly may be paid out of the Internal Imrovement Permanent Fund.

The bills in question are House Bill No. 425, Senate Bill No. 561, Senate Bill No. 54, and Senate Bill No. 427, all of which make appropriations for internal improvements, such as roads, bridges, viaducts, etc.

An examination of these bills discloses that the money is appropriated out of any money or funds in the treasury not otherwise appropriated. The language making the appropriation does not specify any particular fund out of which the moneys are to come, and you ask whether, under these circumstances, the money can be taken from the Internal Improvement Permanent Fund.

An examination of the acts of the Eighteenth General Assembly, as well as of previous assemblies, will show that a great many of the appropriations are made in language identical with the above, without specifying any particular fund, and, inasmuch as I understand that the practice has always been to consider such language as making an appropriation out of the general or ordinary fund of the state—that is to say, a fund which may be drawn upon for any lawful purpose, and which is not confined to particular purposes such as the Internal Improvement Fund, which must be expended only for internal improvements; the School Fund, which can be expended only for the support of common schools, and the Capitol Building Fund, which is ordi-

narily applied to the maintenance of the Capitol building—it would seem to me that, such general language being used by the legislature, it must be presumed, in the absence of any showing to the contrary, that it was not their intention to divert moneys from a particular or specific fund; for in that case the fund should be designated in definite and certain language, so there would be no ambiguity as to what fund is meant.

I have found no decision of the courts which would sustain the position that, under such general language as is used in the bills named, the money could be drawn from the Internal Improvement Fund, on the theory that the improvements contemplated were internal improvements. On the contrary, I believe that where no particular fund is designated, the general or ordinary fund of the state is meant.

Under the circumstances, therefore, I am unable to advise you that the moneys appropriated by the bills mentioned can be paid out of the Internal Improvement Permanent Fund.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 839.)
September 25, 1911.
To the County Clerk, Denver.
By Mr. Lee.
In re: Issuance of hunting license.

1. The purpose of the statute requiring hunting licenses is to provide a check upon and a record of persons who may be entitled to engage in hunting or fishing within the state. This would be impossible if unofficial, irresponsible persons were permitted to issue licenses indiscriminately. The statutes make no reference to the issuance of hunting licenses or the performance of other duties by any persons other than the State Game and Fish Commissioner and the various county recorders, and no other persons are authorized to issue such license.

(Opinion Book 4, p. 847.)
September 26, 1911.
To Secretary State Board of Stock Inspection Commissioners.
By Mr. Griffith.
In re: Senate Bill No. 255, relating to the State Board of Stock Inspection Commissioners.

The act went into effect at midnight, August 4, 1911, but the railroads have until November 30, 1911, to comply with the act.
This act is not at fault with reference to ground on which the 1902 act was held unconstitutional.

(Opinion Book 4, p. 859.)
October 2, 1911.
To the Governor.
By Mr. Talbot.
In re: Requisition—difference between forgery and uttering a forged instrument.

In an application for a requisition for a person charged with the crime of forgery, the facts and circumstances set out must be such as to show that the forgery was committed, and this must be sworn to before a magistrate. A deputy clerk of a criminal court is not a magistrate, nor is a notary public. A magistrate is an officer empowered to issue a warrant.

(Opinion Book 4, p. 874.)
October 6, 1911.
To the Governor.
By Mr. Griffith.
In re: Permanent School Emergency or Call Fund (Session Laws of 1911, Chapter 61).

The act is constitutional, and the appropriation may be used for "school facilities," such as current and running expenses, including teachers' salaries, and rent for a building for a schoolhouse in case of destruction or condemnation of the regular building, but not for the purchase of sites or buildings for school districts.

Hon. John F. Shafroth,
Governor of Colorado,
Denver, Colorado.

Dear Sir: Pursuant to request of the committee consisting of Helen M. Wixson, State Superintendent of Public Instruction, John F. Shafroth, Governor of Colorado, and Benjamin Griffith, Attorney General, having charge of the Permanent School Emergency or Call Fund, as established by Chapter 61 of the Session Laws of 1911, asking for my opinion with reference to the validity of this act, and the proper expenditure of moneys thereunder, in view of our constitutional provision relating to the expenditure of school funds—to-wit, section 3 of Article IX of the Constitution, and in view of the Enabling Act for Colorado, in response thereto, from the limited time that I have had at my disposal in this matter, I beg leave to submit the following:

Section 3 of Article IX of the Constitution is as follows:

"The public school fund of this 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."

The sections of the Enabling Act which are necessary to consider are section 7, which reads as follows:

"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."

Also section 14, which reads as follows:

"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 to be expended in the support of common schools.

From an examination of these provisions it will be seen that by the constitutional provision the interest only on the school fund may be expended in the maintenance of the schools of the state, and that this interest is to be distributed among the several *counties and school districts of the state in such manner as may be prescribed by law*. And by the provisions of the Enabling Act it is provided that the proceeds from the sale of school lands shall constitute a permanent school fund, *the interest of which is to be expended in the support of common schools.*

It will be noticed that the act in question, Chapter 61 of the Session Laws of 1911, provides that $40,000 is appropriated from the General School Income Fund, which we assume is the fund represented by the interest earned on the permanent school funds of the state, and this money is set over by the act into a Permanent School Emergency or Call Fund; and it is provided by sections 4 and 5 of said act as follows:

"Section 4. When on account of unavoidable misfortune or casualty any Public School District in this state is in financial distress and the special school tax and apportionment of the school funds are not sufficient to provide proper and necessary school facilities in such school district, the Superintendent of Public Instruction may with the approval and consent of the Governor and Attorney General order the payment from the 'Permanent School Emergency or Call Fund' to such public school district of such an amount as may be necessary to provide necessary school facilities in said Public School District.

"Section 5. Payments shall be made from the 'Permanent School Emergency or Call Fund' only upon the presentation of sufficient and satisfactory evidence that the School District making application for relief under the provisions hereof is by reason of unavoidable misfortune or casualty, in financial distress

and that the Special School tax and apportionment of School funds are not sufficient to provide proper and necessary school facilities in such Public School District, and that such financial distress will continue for at least one School year unless relieved under the provisions hereof.

Viewed entirely from the constitutional aspect above referred to, I have been unable to find any authority that would indicate that it is violative of the Colorado Constitution. It seems to accord with section 3 of Article IX of the Constitution, which provides that the working school fund shall be distributed among the several counties and school districts in the state, "in such manner as may be prescribed by law." It seems that the effect of this act is to withdraw from the working school fund the amount of the appropriation provided for in the act, so that, when the State Treasurer notifies the State Superintendent of Public Instruction of the amount of working school fund, he should deduct the amount of this emergency fund.

With this exception, the act in question makes no change whatever in the present method of the annual distribution of the school income fund. It seems to be merely a further statute providing for distribution "in such manner as may be prescribed by law."

Further, it does not seem that this act is a violation of section 25 of Article V of the Constitution, forbidding special laws "providing for the management of common schools."

Fuller vs. Heath, 89 Ill., 296 (313).

It does not seem that the act would be condemned as class legislation, because it operates fully upon all school districts that are brought within its provisions.

Referring to the question as to what the moneys appropriated by this act may be expended for, we find that the act itself provides that "school facilities" may be provided from the moneys appropriated. This term has been defined in State vs. Cave, 53 Pac., 300 (203).

As already noted, the Enabling Act provides that the income from the school fund is to be used for the support of the common schools. The state takes its grants of land from the United States government, as an ordinary trustee, and is charged with the full performance of the trust; namely, the application of the funds to the trust purposes. It has been held that "support of schools" does not include the building of a schoolhouse.

Roach vs. Gooding, 11 Idaho, 245.

The building of new schoolhouses and the purchase of schoolhouse sites do not come within the term "support of the common schools."

Sheldon vs. Purdy, 17 Wash., 140.

Board etc. vs. McMillan, 12 N. D., 280.

Under these holdings, it would not seem proper for a school district in financial distress to use this emergency fund for the building of a schoolhouse. That, it seems, would have to be provided from tax levies or bond sales.

However, from the foregoing it does not seem that the act is invalid, for the reason that the moneys appropriated cannot be used to build schoolhouses. It seems to us that the appropriation can be used for any purpose not inimical to the trust under which Colorado uses the school income fund and to the Colorado Constitution, and to that extent it may be expended in securing any school facility. It seem to us that it may be used to meet all current and running expenses, including teachers' salaries, and also the rent of a building for a schoolhouse in case of a destruction or condemnation of the regular building; in short, that it may be used to assist a distressed district in operating its school system, in furnishing suitable and proper education to its school population, but that it should not be used in purchasing sites and buildings for school districts.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 896.)
October 6, 1911.
To the State Institutions Committee, Soldiers' and Sailors' Home.
By Mr. Lee.
In re: Admission of Confederate soldier.

It is necessary for any applicant for admission to establish his honorable service in a specified army, which would justify an honorable discharge.
It is not necessary to have discharge papers.

Hon. Alfred Durfee,
Chairman, Committee on State Institutions,
Florence, Colorado.

Dear Sir: Your letter of September 15 to the Governor, concerning the admission of a Confederate soldier to the Soldiers' and Sailors' Home under the provisions of an act to amend section 6037 of Chapter 126 of the Revised Statutes, found at page 600 of the Session Laws of 1911, has been referred to me.

I note that the commander of the Home requires an honorable discharge, and you refer in your letter to discharge papers. I do not know, of course, whether the commander had discharge papers in mind when he wrote his letter, but, in any event, such papers would not seem to be necessary.

"'Discharge' will, in the absence of contrary evidence, be held to be honorable."

Brockton vs. Uxbridge, 138 Mass., 292.

Under the terms of the act, however, it would seem to be necessary for any soldier to establish satisfactorily his service in a particular army, and that the same was honorable, and that the facts as to his service would justify an honorable discharge. Some legal proof of this other than the statement of the individual might very properly be demanded by those in charge of the Home.

In fact, I do not see how anyone could be admitted, under the provisions of the act, unless some proof of honorable service in one of the armies designated, entitling him to an honorable discharge, could be made.

Any opinion on this subject, however, would seem to be unnecessary in view of the statement contained in the last sentence of the letter of the commander of the Home, to the effect that it is now "full up to the limit."

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By A. A. LEE,
Deputy Attorney General.

(Opinion Book, p. 913.)
October 9, 1911.
To the Public Examiner.
By Mr. Lee.
In re: Commission on collections for "Forest Reserve Fund."

The county treasurers are entitled to only 1 per cent for receiving moneys other than taxes, and this provision applies to the payments provided for by Chapter 3 of the Session Laws of 1911, requiring the payment to county treasurers of the moneys to which their counties may become entitled under the so-called "Appropriation Act of Congress."

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your letter of September 20, inquiring as to the proper rate of commission to be allowed to the county treasurer on collections belonging to the "Forest Reserve Fund."

I presume by this fund you mean those payments provided for by Chapter 3 of the Session Laws of 1911, which provides that moneys to which the various counties of the State of Colorado may become entitled under the so-called Agricultural Appropriation Act of Congress shall be paid to the various county treasurers.

If so, I am of the opinion that that clause of section 2537 of the Revised Statutes, 1908, which allows the county treasurer

1 per cent "for receiving all moneys other than taxes in counties of every class" would apply, and his compensation would be limited to 1 per cent upon such moneys.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By A. A. LEE,
Deputy Attorney General.

(Opinion Book 4, p. 924.)
October 14, 1911.
To the State Board of Equalization.
By Mr. Lee.
In re: Corrections of assessment of railroad property.

1. A letter or complaint by the assessor of the City and County of Denver, protesting against the assessments by the board of certain railroad properties, upon the ground that they are erroneous and in some respects illegal, having endorsed upon it the statement that the board of county commissioners concurs therein and asks that it be filed on behalf of such board, signed by the chairman, while not technically sufficient, might be presumed to be the complaint of the board under the provisions of section 5634, Revised Statutes of 1908, in the absence of a showing to the effect that such complaint is not in reality made by the authority of such board of county commissioners.
2. The board meets on the first Monday of October for the purpose of equalizing assessments, and it is also authorized at that time to correct any error or mistake made by it in assessing property.
3. If the board at its October meeting has had called to its attention, in any manner or form, errors or mistakes in its appraisement of the property which the law provides it shall assess, it is authorized to correct such error or mistake.
4. A narrow or restricted meaning should not be given to the authority to correct errors, and it seems in accord with the general purpose and intent of the statute to permit the board to reassess or to assess omitted propety, the clear intention being that all property subject to assessment by the board should be by it assessed as fully and correctly as possible.

(Opinion Book 4, p. 933.)
October 19, 1911.
To the Public Examiner.
By Mr. Griffith.
In re: Assessment of general tax and irrigation district tax on the same land.

The above two taxes are assessed under different laws, and for general taxing purposes each acre of land should be assessed at its actual value, while for irrigation district tax purposes each acre of land in the district must be assessed at the same value per acre, and the assessor may set any value with any tax levy sufficient to furnish revenue for the needs of the district.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your favor of October 18, in which you call attention to the assessor of Sedgwick County, who assesses lands in irrigation districts at a uniform valuation of $40 per acre for irrigation district tax purposes only, while for general tax purposes the land is assessed at $20 or under; and you ask whether an assessor can make a distinction of this kind.

In reply thereto, it is unnecessary to cite any law to the proposition that for general taxing purposes each acre of land is required under the law to be assessed at its actual value. Hence, different parcels of land are assessed at different values, in accordance with the value of each particular tract. When, however, we come to assessing lands in irrigation districts, for the purpose of making the levy against the same for the irrigation district tax only, we find that an entirely different method is provided for by the statute.

The assessor is required, under the law, to assess each acre of land in the district at the same value per acre, for the reason that under the law each acre of land is burdened with the same amount of debt for district purposes as every other acre in the district. In other words, the obligations of the district are distributed equally over all of the acres of the district, and, as stated above, the assessor is required to place the same value for district purposes on each acre of land. Hence, this assessment for irrigation district purposes must necessarily be an arbitrary one, because we know, as a matter of fact, that parcels of land in irrigation districts vary greatly in value, owing to the amount of improvements thereon, the lay and quality of the land, etc.; but, so far as the district itself is concerned, every acre bears the same burden, and, for this reason, it matters not, in making this arbitrary assessment, whether the assessor should assess a particular acre for irrigation district purposes at one dollar or at $100, since, if the assessment is low, a very high tax levy is required in order to make all of the acres of the district furnish revenue equivalent to the needs of the district; while, if a very high value per acre is fixed by the assessor, then a lower tax levy is necessary to furnish the required district revenues.

Under these circumstances, I am of the opinion that it is immaterial what assessment the assessor fixes for irrigation district purposes. The reason for an assessment at all, I take it, is that it is an established rule of law that, in order to collect a tax, there must first of all be an assessment, and, without an assessment, no levy can be made for the collection of the tax. Hence, inasmuch as all of the acres in the district bear uniform burdens, it becomes necessary that the assessment of each acre for irrigation district purposes be the same.

The section of the statutes which controls with reference to assessment for irrigation district purposes is 3458, Revised Statutes of 1908, which reads as follows:

"It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. *All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre.*" (Italics ours.)

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 4, p. 940.)
October 25, 1911.
To the Public Examiner.
By Mr. Anderson.
In re: Salaries of county commissioners.

The salary of county commissioners for counties of the second class is $5 per day for each day spent in the performance of their duties as commissioners, and 10 cents per mile traveled to and from place of meeting.

In counties having 100,000 inhabitants or more the salary is $150 per month.

Hon. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: We have your letter of September 21, 1911, wherein you inquire concerning the salary per annum of county commissioners in counties of the first two classes, and particularly whether the salary of county commissioners in second-class counties is limited to $1,500 or other maximum amount per annum.

In reply, we beg leave to state that the salary of county commissioners for counties of the second class is stated by section 2576 of the Revised Statutes of Colorado, 1908, to be five dollars ($5.00) per diem *for each day spent in the performance of their duties as commissioners*, and ten cents (10c) per mile for distance actually traveled in going to and returning from the place of meeting. We know of no provision limiting the salary in second-class counties to $1,500 per annum, since the amount of salary depends on the number of days spent in the performance of duty.

Section 1192 of the Revised Statutes of Colorado, 1908, is section 1 of Chapter 145, Session Laws of 1907, an act concerning county commissioners in counties having a population of one hundred thousand or more inhabitants (Session Laws, 1907, p. 319), and would, in our opinion, seem to repeal so much of section 2576 as relates to salaries in counties having one hundred thousand inhabitants or more. The result is that the salary in such counties is made $150 per month.

The foregoing is independent of any consideration of compensation for the chairman of the board as superintendent of the poor, or of penalties for absence of any members from meetings of the board.

Very truly yours,

BENJAMIN GRIFFITH.

By FREDERICK D. ANDERSON,
Assistant Attorney General.

(Opinion Book 4, p. 943.)
October 25, 1911.
To the State Land Board.
By Mr. Mothersill.
In re: Investment of school funds in bonds of irrigation districts.

1. School funds must be *securely* and *profitably* invested.
2. The statute provides that school funds may be invested only in bonds of an irrigation district which are a first lien on the district.
3. The State Land Board may be authorized by the legislature to direct the investment of school funds.
4. The State Treasurer is *custodian* of school funds, but such funds may be invested as directed by the legislature.
5. The powers of State Land Board are not changed by amendment of section 9, Article IX, of Constitution (Laws, 1909).

(Opinion Book 4, p. 956.)
October 25, 1911.
To the State Dairy Commissioner.
By Mr. Griffith.
In re: Session Laws of 1911, Chapter 112.

An unexpended balance of an appropriation for a fiscal year may be transferred at the expiration of such fiscal year to the fund from which such appropriation was drawn.

Temporary deputies can be paid only out of the appropriation for the fiscal year.

The fee of $1.00 for a permit should be paid to the State Treasurer.

Wherever dairy products are sold, or are offered for sale, inspection should be made and permit issued upon payment of fee to State Treasurer.

(Opinion Book 4, p. 976.)
October 23, 1911.
To the Public Examiner.
By Mr. Anderson.
In re: Tax sales and certificates of purchase.

A county may purchase at tax sales, when there are no bidders, and may take certificates of purchase; but a county cannot take a tax deed.
A county may sell its certificates of purchase at their face value, or, by order of its board of commissioners, may sell the certificates at less than the face value.
There is no remedy to collect delinquent taxes other than by tax sales.

(Opinion Book 4, p. 984.)
November 2, 1911.
To the Commissioner of Insurance.
By Mr. Lee.
In re: United States Hospital Association—Is contract a policy of insurance?

1. A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value, to the other, upon the destruction or injury of something in which the other party has an insurable interest.
2. There are five essential features of an insurance policy: (1) the subject-matter; (2) the risk insured against; (3) the amount or extent of insurance; (4) the duration of risk; (5) the premium.

In the contract under consideration (1) the subject-matter of the contract is the life or health of the so-called "principal;" (2) the risk insured against is his illness; (3) the amount of the insurance is the payment of hospital, medical and surgical expenses, in accordance with the conditions of the agreement; (4) the duration of the risk corresponds with the period during which the insured shall continue to pay his premiums; (5) the premium is the entrance fee plus the monthly payment. The contract is in all of its essential features an insurance contract, and the company must be regarded as an insurance company.

(Opinion Book 5, p. 3.)
November 3, 1911.
To the Public Examiner.
By Mr. Anderson.
In re: Boards of county commissioners.

1. County commissioners are entitled to actual expenses for viewing roads in performance of their duties, but are not entitled to mileage.
2. The Colorado Constitution, Article XIV, section 6, and the Revised Statutes of 1908, sections 1190, 1191, 1194, and 1195, and People ex rel. Jones vs. Carver, 5 Colo. App., 156, define what constitutes a meeting of a board of county commissioners.
3. County commissioners are not entitled to mileage to and from their home each day during a session which is continuous for several days.

(Opinion Book 5, p. 8.)
November 3, 1911.
To the Public Examiner.
By Mr. Anderson.
In re: Extra compensation of county clerk for making reports.

The fee charged by the county clerk, as clerk of the board of county commissioners, for making the semi-annual reports of such board is a fee of the office of county clerk and not of the clerk personally

The statutes do not provide for any fees to the office of the county treasurer for making any reports.

(Opinion Book 5, p. 10.)
November 2, 1911.
To the Public Examiner.
By Mr. Anderson.

1. The board of county commissioners has implied authority to install a new system of keeping records and accounts in county offices.
2. The county clerk, as clerk of the board of county commissioners, may receive as a fee of his office $5 per day for each day actually employed installing such system.
3. No additional fees or salary is provided for the county treasurer or judge of the County Court for such additional services.

(Opinion Book 5, p. 13.)
November 3, 1911.
To the Public Examiner.
By Mr. Anderson.

A county treasurer cannot appoint himself his own deputy or clerk and draw additional salary as such.

(Opinion Book 5, p. 45.)
November 14, 1911.
To the Board Capitol Managers.
By Mr. Griffith.
In re: House Bill No. 210.

Where an act makes an appropriation of a fixed sum, and then appropriates parts of the total for different purposes, and the sum of the specific appropriations is less than the total, the Auditor and Treasurer are advised to pay out only the specific appropriations.

(Opinion Book 5, p. 55.)
November 15, 1911.
To the State Railroad Commission of Colorado.
By Mr. Griffith.

The State Railroad Commission is authorized under the Session Laws of 1910 to call for an annual report from the railroads.

Sleeping-car companies are not common carriers under the Colorado laws.

(Opinion Book 5, p. 80.)
November 21, 1911.
To the Insurance Commissioner.
By Mr. Lee.
In re: Annual premium contract.

1. A policy of insurance providing that "the premium is.....cents per week," and also that "in part consideration of the issuance of this

policy to the insured and the permission granted to pay for same in installments, the company reserves the option of deducting from the indemnity of any claim the unpaid portion of the annual premium," must be regarded as an annual premium contract, and the reserve should be 50 per cent of the gross premiums to be paid for one full year.

2. A policy providing for a burial benefit in the event of the death of the insured resulting from disease only, makes the same a contract of life insurance, and may not be issued by a company authorized to do only health and accident business.

(Opinion Book 5, p. 85.)
November 15, 1911.
To the State Coal Mine Inspector.
By Mr. Talbot.
In re: Employment of children under age in mines.

It is the duty of the State Inspector of Coal Mines, when he becomes aware that an employe under the age of sixteen years is working in and around coal mines, to request the removal of said employe at once, and to report the facts to the State Factory Inspector and to the district attorney of the proper district.

(Opinion Book 5, p. 114.)
December 6, 1911.
To the State Meat and Slaughter-House Inspector.
By Mr. O'Connor.
In re: Power of the State Meat and Slaughter-House Inspector to make an inspection of plants in cities, over the objection of the city inspector.

1. The charter of the City and County of Denver is authorized by Article XX of the Constitution.
2. Said amendment and said charter were intended to give the city full authority over its government, on matters of *local concern*. The inspection of meat and slaughter-houses is not a matter of purely local concern, but the general public of the entire state is concerned in and affected by such matters.
3. The charter or ordinances of the city cannot and do not divest the state inspector of full and complete jurisdiction to enforce the laws of the state in that regard within the limits of the City and County of Denver.

(Opinion Book 5, p. 137.)
December 7, 1911.
To the State Engineer.
By Mr. Griffith.
In re: Senate Bill No. 531, Session Laws of 1911, Chapter 155, relating to division engineers and their salaries.

Appointees under the old law are not affected as to salaries or terms of office by the new law, which specifically amends the old law and did not take effect until the appointments under the old law were made.

(Opinion Book 5, p. 151.)
December 11, 1911.
To the County Superintendent of Schools.
By Mr. O'Connor.
In re: Reports of school-teachers to county superintendents of schools.

1. Section 5880, Revised Statutes of 1908, makes it the duty of the county superintendent of schools to report to the State Superintendent of Public Instruction, which reports shall contain data; these data to be obtained through the secretary of the school board from the teachers.
2. Under section 5995 the school-teacher is required to keep a daily register, as shall be required by the Superintendent of Public Instruction, and to make certain statistics.
3. Where a teacher fails or refuses to furnish such data, it would be proper for the county treasurer to refuse to pay the warrant, his duty being, under section 5900, Revised Statutes of 1908, to pay legally drawn warrants.
4. It is a part of every teacher's contract that she perform the duties imposed upon her by the statutes of the state, among which is the making of reports and furnishing the statistics required.

(Opinion Book 5, p. 154.)
December 13, 1911.
To the Chairman of the Auditing Board.
By Mr. Griffith.
In re: Contingent and incidental expenses of the office of Civil Service Commission.

The Auditing Board is authorized to appropriate the moneys to the Civil Service Commission from the emergency fund, for the purposes of its contingent and incidental expenses.

(Opinion Book 5, p. 179.)
December 15, 1911.
To the Governor.
By Mr. Talbot.
In re: Changing classification of towns.

When the Secretary of State complies with section 6533, Revised Statutes of 1908, in making a statement showing that certain incorporated towns will be entitled to the election of officers and to be organized into cities of the second class, the proper authorities of such incorporated towns are authorized to make and publish all necessary ordinances for such city of the second class.

(Opinion Book 5, p. 203.)
December 20, 1911.
To the Governor.
By Mr. O'Connor.
In re: Jurisdiction of the city boiler inspector of the city of Denver over the State Capitol Building.

1. The State Board of Capitol Managers has full power and authority over the Capitol Building.
2. The city boiler inspector of the City and County of Denver has no power, authority, or jurisdiction to interfere with the discretion of the State Board of Capitol Managers concerning the kind or condition of steam boilers which said board maintains in the said building.
3. As to what the authority of the city may be over the State Capitol Building, once said building is completed and the completion has been proclaimed by the State Board of Capitol Managers, and that body has been discharged, we express no opinion.

(Opinion Book 5, p. 224.)
December 29, 1911.
To the State Boiler Inspector.
By Mr. O'Connor.
In re: Authority of State Boiler Inspector in cities.

1. The State Boiler Inspector has no authority to inspect boilers in cities which have, by valid ordinance, provided for boiler inspection, and have created a city boiler inspector to make such inspection.
2. The jurisdiction of the State Boiler Inspector over boilers in cities is, by the terms of the statute, section 6317, Revised Statutes of 1908, divested when a city passes an ordinance regulating boiler inspection, and creating the office of boiler inspector to enforce said ordinance.

(Opinion Book 5, p. 232.)
December 29, 1911.
To the Secretary of State.
By Mr. O'Connor.
In re: Authority of Secretary of State to furnish rooms for Court of Appeals.

1. The State Board of Capitol Managers has full power over the State Capitol Building, in the furnishing of furniture, fixtures, and supplies to all offices therein.
2. The act of the legislature creating the Court of Appeals, and making it the duty of the Secretary of State to furnish the rooms for said court, does not divest the Board of Capitol Managers of their general powers and duties in that respect. The act requiring the Secretary of State to furnish said rooms made no appropriation to defray the expense of the same, and the Secretary of State has no fund from which he may legally pay for said furniture.
3. In our opinion, it is the duty of the State Board of Capitol Managers to furnish the court-room and chambers of the Court of Appeals.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: I have before me your esteemed inquiry of the 21st inst., wherein you ask for an interpretation of the language in the act of the Eighteenth General Assembly creating the Court of Appeals, as follows:

"It shall be the duty of the Secretary of State to provide said court and the judges thereof with suitable rooms, stationery and other equipment in like manner as the Supreme Court and judges thereof are provided therewith."

Section 6156, Revised Statutes of 1908, makes the Secretary of State custodian of the property of the state, *when no other provision is made.*

Sections 6163 and 6167, respectively, make it his duty to advertise for bids to provide necessary furniture, stationery, fuel, light, etc., required by the legislative and executive departments of the state, and the Supreme Court, for the ensuing two years; and, further, to procure suitable apartments for the Supreme

Court, legislative and executive apartments, and have the same supplied with furniture and other articles as may be required. Each of these sections was enacted at a time when the state did not have a capitol building, and when the business of the state and offices were maintained in rented property.

Later in our history, when our legislature decided to build a capitol building, a Board of Capitol Commissioners was created, a special tax levy was provided, and a capitol building fund was created. Into this fund this levy was to be paid, and provision was made for paying it out for building and furnishing the capitol.

By Section 451, Revised Statutes of 1908 (Laws of 1897, 132), the present Board of Capitol Managers was created. The following language appears in said section:

"The care and control of the capitol building and grounds shall be with the Board of Capitol Managers."

It was made the duty of the board to report to each General Assembly, making a full statement of all contracts and disbursements.

Section 462 in part provides that—

"All disbursements of the fund known as the Capitol Building Fund for the construction of the capitol building, shall be made by said Board of Managers in regular session, for all labor performed, work done or material furnished."

Section 471 provides for a mill levy annually until the completion and furnishment of the State Capitol Building, for the purpose of aiding the construction and furnishing of the same.

Section 451, Revised Statutes of 1908, also provides:

"Said Board shall continue until the entire completion and furnishing of said capitol building, *and shall announce* by proper proclamation the same as accepted by and through said Board on behalf of the State, and thereafter said Board shall cease to exist."

Is the Capitol Building entirely completed and furnished? We know of no announcement of the board to that effect, which announcement is imposed on the board as a duty, upon the entire completion and furnishing of the building; and if we examine the successive biennial reports of the board, wherein they point out unfinished matters and ask appropriations therefor, and the acts of succeeding legislatures which have granted the requests of the board by making the appropriations recommended, and also providing for the clerical help of the board, and placing appropriations for the maintenance and furniture of the building in charge of the board; and if we take into consideration the continued levy and collection of the special mill levy for the completion and furnishing of the building, it would seem that the legislature and

the executive departments of the state have recognized and do recognize the existence of the board and its authority in caring for and controlling the building.

The Eighteenth General Assembly, which created the Court of Appeals, and in said act used the language which you ask us to interpret, made the following appropriations from the Capitol Building Fund. They are, respectively: Chapter 12, for maintenance for December, 1910, and January, February, and March, 1911, Chapter 13, for plastering and fire-proofing sub-basement, decorative lighting of grounds, and repaving walks and drives; Chapter 14, for maintenance and support of the building and grounds, and for replacing old furniture and carpets, and supplying new furniture in the various departments of the Capitol Building, when required, for the years 1911 and 1912; and Chapter 68, making an appropriation of $200,000 for the completion and furnishing of the State Museum, for the construction of a tunnel between said museum and the Capitol Building, and for the installation of a complete heating, lighting, and power plant, for the service of *both* the *Capitol Building and the museum building.*

We do not think it can be presumed that the use of the language in question in the Court of Appeals act was intended to repeal the law creating the Board of Capitol Managers, or divest them, while they exist under the law, of any of their powers or duties. The language is: "in like manner as the Supreme Court and judges thereof are provided therewith." The legislature is presumed to know that the custom has been and is now for the Board of Capitol Managers to provide rooms and furniture for the Supreme Court, and that this was not done by the Secretary of State, and that the Supreme Court, like other departments, secures its stationery and office incidents through requisitions on the Auditing Board, as provided by this very same legislature, since section 32 of Chapter 17, Session Laws of 1911 ("long appropriation bill"), makes an appropriation of $4,000 to the Supreme Court for stationery, supplies, etc., and by Chapter 76, Session Laws of 1911, this very appropriation is placed directly under the charge of the Auditing Board.

The question also arises, if the Secretary of State is to furnish the chambers of the Court of Appeals at this time, as provided by the Court of Appeals act, has the legislature made an appropriation for this purpose, and empowered the Secretary of State to issue a voucher expending the same? The only appropriations made for the furnishing of the Capitol Building are those above enumerated, which are made out of the Capitol Building Fund, and the appropriation made in Chapter 14 is the only one we find made "for the purpose of replacing old furniture and carpets and supplying new furniture when required in the various departments," and it is provided therein that—

"The auditor of state is hereby authorized and directed to issue certificates of indebtedness for all claims duly audited and certified by the Board of Capitol Managers."

No doubt the language empowering the Secretary of State to furnish the apartments of the Court of Appeals, as provided by the act, is to be given a meaning and its proper effect. The act was unquestionably drawn by able lawyers, who, so far as possible and applicable, used the same provisions of law, with reference to salaries, accommodations for the court, etc., as were used in creating and providing for the Supreme Court. By making the Secretary of State the officer to look after the court's needs in certain respects, it might well have been intended that, if during the existence of the court the Board of Capitol Managers should go out of existence, as provided by law, there would still be an officer whose duty it would be to provide for the needs of the court without further amendment of the law in this respect. In other words, if, as provided by law, the board ceases to exist, then all of the various provisions cited as to the Secretary of State become operative as being the permanent provisions of the law which respect to such matters, the powers of the board being merely temporary as heretofore set out.

We conclude, then, that until the board ceases to exist, as provided by law (and, in view of the present state of legislation, as well as contemporaneous construction thereof by the executive branch of the government, we do not feel authorized or empowered to advise you that it does not exist), we are unable to advise you that there is any fund available, not under the control of the board, upon which any requisition honored by you could be paid.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General;

CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 5, p. 270.)
January 25, 1912.
To the State Board of Health.
By Mr. O'Connor.
In re: Conflict of authority between the State Board of Health and local health officer, in quarantine matters.

1. When the local health officer quarantines parties, the State Board of Health has no authority to remove the quarantine, even though it be convinced that the local health officer has committed an error of judgment.
2. In determining whether a place or persons residing therein are subject to quarantine, the local board of health, or local health officer, has plenary power. The State Board of Health may act only where the local board of health fails or neglects to do so in a proper case.

(Opinion Book 5, p. 288.)
January 30, 1912.
To the State Engineer.
By Mr. Mothersill.
In re: Certificate of investment of school funds in bonds of irrigation district.

1. No official records kept by any state officer showing plans, specifications, contracts, and maps of any irrigation district.
2. State Engineer to examine such contracts, maps, etc., wherever they may be found duly authenticated.
3. State Engineer may give certificate required under section 5198, Revised Statutes of 1908, providing irrigation works of any district substantially fulfill the purposes for which the system was originally designed.

(Opinion Book 5, p. 291.)
To the Public Examiner.
By Mr. Griffith.
In re: Salary of the State Inspector of Oils.

The present Oil Inspector was appointed in 1909, under the law of 1899, and the Senate refused to confirm his reappointment on May 6, 1911, so that he is now holding over under his original term, and is entitled to the fees of the office as provided by the law of 1899, and is not restricted by Chapter 180 of the Session Laws of 1911.

(Opinion Book 5, p. 329.)
February 28, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Legality of stockholders' meeting.

1. The election of directors and all other action taken at a stockholders' meeting where 80 per cent of the stock was voted under proxies not filed as required by the by-laws of the company, are illegal, and a stockholder may sue to set the same aside.
2. Our statute does not expressly provide any regulations for voting by proxy, and while such right cannot be taken away or curtailed by a by-law, nevertheless, the by-laws may prescribe that proxies shall be filed with a particular officer or within a stated time, and such by-law is as binding on stockholders as any public law of the land.

Hon. W. L. Clayton,
Commissioner of Insurance,
Denver, Colo.

Dear Sir: I have your letter of February 26, inquiring as to the legality of a stockholders' meeting of a Colorado insurance company, in which 80 per cent of the stock was voted under proxies held by the president and not filed with the secretary, as provided by a section of the by-laws, reading as follows:

"Stockholders may be represented by proxy, but no vote by proxy shall be cast without the power of attorney authorizing the same, which shall have been filed with the secretary at least ten

days prior to the meeting at which such vote is offered. No one can vote a proxy unless he is a stockholder."

No right to vote by proxy existed at common law. The voting was required to be done in person.

Thompson on Corporations, sec. 875.

Our statute does not expressly provide any regulations for voting by proxy. The provisions regulating the holding of stockholders' meetings mention proxies, as follows:

"Elections of directors or trustees shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy, provided a majority of the stock issued shall be represented, and if a majority of such stock shall not be represented, such meeting may be adjourned by the stockholders present for a period not exceeding sixty days after any one adjournment.

"When it is found that a majority of stock is represented at such meeting or adjourned meeting, the stockholders shall proceed to nominate the number of directors * * * Each stockholder shall have the right to vote in person or by proxy for the number of shares owned by him or her."

Revised Statutes, 1908, sec. 865, p. 365.

It will be seen that the statute merely recognizes the right to vote by proxy, and while it is manifest that such right cannot be taken away or curtailed by any by-law of the corporation, nevertheless, "the corporation may prescribe the manner in which the proxy shall be executed; it may require acknowledgment, or that it shall be filed with a particular officer, or within a stated time preceding the election."

Thompson on Corporations, sec. 878.

This has been done in this case by means of the by-laws above quoted, and such by-law is as binding on stockholders as any public law of the land.

10 Cyc., 351.

Kent vs. Mining Co., 78 N. Y., 159, 179.

Cummings vs. Webster, 43 Me., 192, 197.

Harrington vs. Benevolent Ass'n, 70 Ga., 340.

It appears from your letter that the requirements of the foregoing by-law were not observed, in that the proxies were not filed with the secretary, as therein required. The stockholders themselves, I assume, of course, were not present in person. Consequently, a majority of the stock was not legally represented at the meeting; and inasmuch as the statute authorizes nomination and election of the directors only when a majority of the stock is represented, there could be no legal election.

The voting of proxies not filed in accordance with the provisions of the by-laws was, in my opinion, an illegal, unauthorized

vote, and would authorize a stockholder to sue to set aside the election and enjoin the directors so elected from acting.

3 Clark and Marshall on Corporations, pp. 320, 325, 326.

In the Matter of the Long Island Ry. Co., 19 Wend., 39.

In re Argus Printing Co., 1 N. D., 435.

The election of directors, and all resolutions or actions decided upon through the vote of this stock represented by unfiled proxies, are, therefore, in my opinion, illegal.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General,

By A. A. LEE,
Deputy Attorney General.

(Opinion Book 5, p. 348.)
March 5, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Sample policies.

1. The department may prevent the distribution of a sample policy by a company not authorized to do business in the state.
2. If the insurance company is not authorized to do business in the state, it is not authorized to issue any form of policy, nor to have any form passed upon for the approval of the department.
3. The Commissioner would be warranted in interfering and preventing the representation that such policy is issued by such company.

(Opinion Book 5, p. 353.)
March 6, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Investment of capital in preferred stock of local industrial company.

1. Preferred stock is not an authorized investment for the capital of an insurance company, or the funds accumulated in the course of its business.
2. Nor can the surplus be so invested. A provision in the preferred-stock certificate that such stock should be a charge upon the assets of the corporation prior to the common stock, and that no bonds or additional preferred stock should be issued while the present issue of preferred stock shall remain outstanding, does not make such preferred stock an evidence of indebtedness within the meaning of the statute.
3. The preferred stockholders are, upon a distribution of the assets of the corporation, entitled to nothing until its creditors are first fully paid, and such a clause does not make the preferred stockholders creditors of the corporation.

(Opinion Book 5, p. 358.)
March 7, 1912.
To the Deputy District Attorney, Sterling, Colorado.
By Mr. Stuart.
In re: Sections 2746 and 2833, Revised Statutes of Colorado, 1908, being part of the Fish and Game Law.

Any person hunting or shooting any game, whether protected by law or not, must first secure a license.

S. E. Naugle, Esq.,
Deputy District Attorney,
Sterling, Colorado.

Dear Sir: The letter signed by yourself and W. L. Turman, county attorney of Logan County, asking our interpretation of two sections of the Fish and Game Law, was duly received and has had our attention.

You ask a joint interpretation of sections 2746 and 2833 of the Revised Statutes of Colorado, 1908, bearing upon the question of whether such sections forbid a person hunting rabbits without a license.

Section 2746 of the Revised Statutes of Colorado, 1908, which is a part of the Fish and Game Law passed in 1899, provides:

"As used in this act, and unless otherwise specifically restricted or enlarged, the word game includes all the quadrupeds and birds, and the word fish includes all the fish (except white salmon, suckers, carp and squaw fish) mentioned herein, and now or hereafter within this state and not held by private ownership legally acquired."

Section 2833, as it exists at the present time, is a part of the Game and Fish Law passed in 1909 (p. 390, S. L., 1909), and is now in force, as follows:

"No person shall shoot or engage in hunting game * * * *whether protected by law or not*, or in fishing for any fish protected by law without first having procured a license therefor as hereinafter provided, and having at the same time such license in his possession; nor shall any person lend, sell, give or assign his license or any coupon belonging thereto except when game is disposed of as permitted by law, in which case proper certificate must accompany it."

For the purpose of the present inquiry, it is material to note that said section 2833, as enacted in 1903, and as the same appears in the Revised Statutes of Colorado, 1908, provides: "No person shall shoot or engage in hunting any game *protected by law* without having first procured a license," etc.; and that the section, as amended in 1909, and as now in force, strikes the words "protected by law," above underlined. This change clearly points out the intent of the General Assembly in enact-

ing said amendment of 1909, which intent, we believe, is to prohibit any person from shooting, or engaging in hunting, any game without due license therefor. It is our opinion that the kind of game hunted is not material, but that the General Assembly meant by said amendment that any person engaging in shooting or hunting any game whatsoever must procure and carry a due license therefor.

This construction is strengthened by the further wording of section 2833, as amended, whereby it is necessary for a person engaged in fishing for any fish "protected by law" to have a license.

Thus the General Assembly has been careful to separate the licenses and say that a hunting license is necessary whether the game hunted is protected by law or not, but that a fishing license is necessary only when fishing for those kinds of fish protected by law. Had the General Assembly intended to require a hunting license only from those persons engaged in hunting game protected by law, it would have said so as specifically as it did in referring to fishing licenses.

It is material to note here that neither section 2746, nor section 2833 as amended in 1909, was amended by the Fish and Game Law passed in 1911.

We therefore conclude that the definition of the word "game," as set forth in section 2746, does not control said section 2833, as amended, in determining whether a hunting license is required, and it is our opinion that any person who shall shoot or engage in hunting, any game, whether protected by law or not, must first secure a due license therefor, as provided by law.

We trust that this letter will give you, in a clear manner, our opinion on this question, and if the publication thereof would be of assistance to you in enforcing the Fish and Game Law, we have no objection to such publication.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By THEODORE M. STUART, Jr.,
Assistant Attorney General.

(Opinion Book 5, p. 365.)
March 5, 1912.
To the Governor.
By Mr. Griffith.
In re: Appointment of Oil Inspector and his salary.

The present Oil Inspector is a holdover, and during a recess of the Senate the Governor can appoint only in case of vacancy, and, there being no vacancy, the Governor cannot appoint a new Oil Inspector.

If a vacancy should occur prior to the next session of the Senate, the new appointee would receive the emoluments of the office, as prescribed by the act of 1899.

(Opinion Book 5, p. 387.)
March 7, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: The German-American Indemnity Association.

When the assets and liabilities of the German-American Indemnity Association were assumed by another corporation, with financial standing satisfactory to the Insurance Commissioner's department and in accordance with law, the reason for the existence of the guaranty fund of the association ceased, provided the Insurance Department is satisfied that the class of creditors provided for by section 3146, Revised Statutes of 1908, are fully provided for.

(Opinion Book 5, p. 390.)
March 13, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Renewal of license of company when judgment has been entered against it.

1. Where judgment has been rendered against a surety company in the trial court, and the case has been taken to the Supreme Court by writ of error, the Insurance Commissioner is not authorized to revoke the license of the company, although the Supreme Court has denied a supersedeas.
2. If the company has complied with the law with reference to its organization, the amount and proper investment of its capital, and the various other requirements of section 933, Revised Statutes of 1908, it does not seem that the Commissioner should collect the claims of litigants by refusing the company a license to do business.

(Opinion Book 5, p. 392.)
March 16, 1912.
To the Commissioner of Insurance.
By Mr. Lee.
In re: Expense of examining fraternal benefit societies.

1. Under the provisions of section 26 of the act of 1911, entitled "An Act for the Regulation and Control of Fraternal Benefit Societies," the Commissioner of Insurance may employ assistants to examine any foreign fraternal benefit society, and they shall have access to the books and documents relating to the business of such society. The expenses of such examiners to be paid by the society.
2. The intent of the act seems the same in the case of foreign societies as in that of domestic societies. If, therefore, the examiners were specially employed for such examination as contemplated by section 26, both the compensation of the examiners and their incidental expenses must be borne by the society.

(Opinion Book 5, p. 419.)
March 28, 1912.
To the Secretary of State.
By Mr. O'Connor.
In re: Governor's authority to veto a proposed constitutional amendment.

1. A proposed constitutional amendment need not be submitted to the Governor for his approval or veto.

2. The veto power of the Governor does not extend to constitutional amendments proposed by the General Assembly, and by that body submitted to the vote of the people.
3. When such amendment is so proposed, and the chief executive vetoes the same, his act is an arbitrary assumption of power which has no authority in law.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: In your esteemed inquiry of the 27th inst. you propound the following question:

"Is the chief executive of the State of Colorado, under our Constitution, authorized to exercise the veto on constitutional amendments?"

Section 2 of Article XIX of our Constitution provides the method by which the Constitution may be amended, and states every requirement necessary for the amendment of the Constitution. This section furnishes the sole and only test by which the validity of the submission of a constitutional amendment is to be tested. It is as follows:

"Any amendment or amendments to this constitution may be proposed in either house of the general assembly, and if the same shall be voted for by two-thirds of all the members elected to each house, such proposed amendment or amendments, together with the ayes and noes of each house thereon, shall be entered in full on their respective journals; the proposed amendment or amendments shall be published with the laws of that session of the general assembly, and the secretary of state shall also cause the said amendment or amendments to be published in full in not more than one newspaper of general circulation in each county, for four successive weeks previous to the next general election for members of the general assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this constitution."

Our Supreme Court, in the case of Nesbit vs. The People, 19 Colo., 441, had before it the question of whether or not a proposed amendment to the Constitution had been legally submitted by the legislature, and although it did not have before it the specific question of the power of the Governor to veto a proposed amendment, the court in our mind has as clearly and finally determined that question as if the same had been passed upon in the decision. In the Nesbit case many objections were raised against the proposed amendment, in that it did not comply with various constitutional provisions regarding the *enactment of* legislation. Concerning these objections the court has this to say:

"The power of the general assembly to propose amendments to the constitution is not subject to the provisions of article 5 regulating the introduction and passage of ordinary legislative enactments. A proposed amendment to the constitution need not be restricted, like an ordinary legislative bill, to a single subject; the only restriction is, that 'amendments shall not be proposed to more than one article of this constitution at the same session.' Const. art. 19, sec. 2. It is not essential that the subject of a proposed amendment shall be expressed in its title; a proposed amendment need not have any title except as it designates the article of the constitution to be amended. In changing a proposed amendment to the constitution during its passage through either house, it is not necessary that such change should be printed, nor that the original purpose of the proposed amendment should be strictly adhered to. Koehler v. Hill, 60 Iowa, 543.

"Section 2 of article 19 prescribes the method of proposing amendments to the constitution, and no other rule is prescribed. It is not, therefore, by the 'legislative' article, but by the article entitled 'amendments' that the legality of the action of the general assembly in proposing amendments to the constitution is to be tested. Article 19 is *sui generis;* it provides for revising, altering and amending the fundamental law of the state, and is not in *pari materia* with those provisions of article 5 prescribing the method of enacting ordinary statutory laws. The distinction is obvious. When an ordinary legislative bill, free from constitutional objection, is introduced and passed by both houses of the general assembly, as provided by article 5, it becomes, when approved by the governor (or without his approval when passed by a two-thirds vote of both houses), a valid and binding law; thus, an act of ordinary legislation is fully and finally consummated, and thus a statutory law is brought into existence, by virtue of the power vested in the legislative departments of the government.

"But in proposing an amendment to the constitution, the action of the general assembly is initiatory, not final; a change in the fundamental law cannot be fully and finally consummated by legislative power. Before a proposed amendment can become a part of the constitution, it must receive the approval of a majority of the qualified electors of the state voting thereon at the proper general election. When thus approved it becomes valid as part of the constitution by virtue of the sovereign power of the people constitutionally expressed."

Nesbit vs. The People, 19 Colo., 441, 447, 448.

Section 39 of Article V of our Constitution provides as follows:

"Every order, resolution or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of

the two houses, shall be presented to the governor, and before it shall take effect, be approved by him, or being disapproved, shall be re-passed by two-thirds of both houses, according to the rules and limitations prescribed in cases of a bill."

It may be contended that, under the above constitutional provision, a constitutional amendment proposed by the legislature should be submitted to the Governor for his approval or veto. A somewhat exhaustive search and careful examination of the authorities, however, discloses that in other states, under similar constitutional provisions, it has been held that such a provision does not apply to constitutional amendments, and that concerning a constitutional amendment it need not be submitted to the Governor, and that, when submitted, his approval adds nothing, nor, when vetoed, does his veto take away anything, because neither his approval nor veto is required.

We call your attention first to the case of Warfield vs. Vandiver, 101 Md., 78, which case contains an exhaustive opinion, fully discussing the proposition involved, and from which we quote:

"A proposed amendment to the constitution when formulated by the general assembly in the manner prescribed by and according to the requirements contained in Article 14, * * * does not require the approval of the governor before it can be voted on by the people, and that the governor *has no authority whatever to veto it.*"

Warfield vs. Vandiver, 101 Md., 78, 109-110.

And again, at page 113:

"Upon reading Article 14 it must be conceded that the language is clear, explicit and unambiguous. It does not say that the general assembly *and the governor*, or the general assembly *with the approval* of the governor, but *'the general assembly* may propose amendments to this constitution,' etc. * * * Whatever legislation the governor has a right to sign and does sign, ceases when signed by him to be a *bill* and becomes a law * * * . The right which the governor has to sign or veto is strictly confined to bills, * * * hence the test as to whether a particular measure adopted by the general assembly is one which the governor must sign to give it efficacy is the fact, that when signed it becomes at once and by virtue of being signed a law and thereupon ceases to be a bill * * * . A bill proposing an amendment to the constitution and nothing more, would not become a law if signed by the Governor * * * because it is required to be submitted to the people for their adoption or rejection; and when adopted by them it becomes not a law in the sense in which that word is used in the constitution, *but a part of the constitution.*"

Warfield vs. Vandiver, *supra*, 113-115.

"The people are the source of power. It is they who make and abrogate written constitutions, and when in the organic law which they have chosen for themselves they have designated the general assembly * * * and nothing more, to be the agency for propounding amendments to the Constitution; *no executive has a right to step in between that agency and the people themselves and to say that without his approval they shall not be permitted to express their views on measures amendatory of the organic law.* * * * Whilst the governor is entrusted with power to protect the people against hasty legislation, he is not given a prerogative to guard them against themselves in the matter of amending the organic law. He is not superior to them. It is their will which he must obey—it is not his will which they must subserve."

Warfield vs. Vandiver, *supra,* 115-116.

Such is the language of the Supreme Court of Maryland under a constitutional provision identical with section 39 of Article V. That learned court then quotes, at page 117, from the United States Supreme Court case, being Hollingsworth vs. Virginia, 3 Dallas, 378, as follows:

"In Hollingsworth v. Virginia, 3 Dall. 378, the question arose whether the Eleventh Amendment destroyed the jurisdiction of the Federal Courts in cases to which it applied and which were pending at the time of its adoption. It was contended that the amendment had not been proposed in the form prescribed by the Constitution and was void. It appeared that it had never been submitted to the President for his approval, and it was argued that it was inoperative because the constitution declares that 'every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary * * * shall be presented to the President * * * and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be passed by two-thirds of the Senate and House of Representatives.' The Attorney General, Mr. Lee, was about to reply to this argument when he was interrupted by Mr. Justice Chase with this statement: 'There can surely be no necessity to answer that argument. The negative of the President applies only to ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the constitution.' On the following day the Supreme Court delivered a unanimous judgment that the the amendment had been constitutionally adopted."

The precise question we are now discussing has been decided adversely to the contention of the Governor, not only in the above cases, but also by the Supreme Court of Pennsylvania, in Commonwealth ex rel. Elkins vs. Griest, 196 Pa., 396.

By the Supreme Court of Louisiana, in State ex rel. Morris vs. Mason, 43 La. Ann., 590.

By Nebraska, in 25 Neb., 864.

Green vs. Walker, 32 Miss., 650.

Koehler vs. Hill, 60 Ia., 543.

Hatch vs. Stoneman, 66 Cal., 632.

In the Pennsylvania and Louisiana cases, *supra*, are elaborate, full, and exceedingly able discussions of the subject. In both of those cases the proposed amendments had been submitted to the Governor and had been vetoed by him, and had not been passed over the veto, and in each case a mandamus was ordered to require the publication of the amendment, so as to be submitted to the voters. The Pennsylvania case has said:

"It will be observed that the method of creating amendments to the constitution is fully provided for by Article 18 of the existing constitution. It is a separate and independent article standing alone and entirely unconnected with any other subject, nor does it contain any reference to any other provision of the constitution as being needed or to be used in carrying out the particular work to which the 18th Article is devoted * * * . It is not law making, which is a separate and distinct function. It is constitution making. It is a specific exercise of the power of the people to make their constitution.

"In every jurisdiction where the right of the President of the United States and of the Governor of the State to sign or to veto a proposed constitutional amendment has been drawn in question, the courts have, without a single exception denied the existence of such right."

And the language of section 7 of Article I of the Federal Constitution is identical with section 39 of Article V of our State Constitution. And, in the face of a similar provision in the Maryland Constitution, the Maryland Supreme Court has used the language above quoted, at page 116, in Warfield vs. Vandiver, *supra*.

It is clear, then, from a reading of the constitutional provision, and from the foregoing decisions of our Supreme Court and of the courts of last resort of other jurisdictions, that the following may safely be stated to be the law:

First—That section 2 of Article XIX of the Constitution of the State of Colorado is the sole and only test of the legality of the submission of a proposed amendment to the Constitution.

Second—That the proposal of an amendment to the Constitution by the legislature is not ordinary legislative action, and is not subject to the constitutional requirements governing the method and procedure by which the legislature enacts ordinary legislation.

Third—The submission of a constitutional amendment is not made subject to the veto of the Governor under section 2 of Article XIX, nor can section 11 of Article IV, providing for the veto, or section 39 of Article V, be said to apply to the submission of constitutional amendments. The Governor's signature is not required. When given, it adds nothing. His veto is not permitted, and, when exercised by him, it in no way affects the validity of the bill.

Fourth—That it is the duty of the Secretary of State to determine if the legislature has submitted a proposed constitutional amendment in conformity with section 2, Article XIX; and if he determines that an amendment has been so submitted, then it is his duty to publish the same and submit the amendment to the vote of the people, as required, for their adoption or rejection, and this regardless of whether the Governor has vetoed the proposed amendment or not.

Fifth—In vetoing House Bill No. 10, the constitutional amendment in question, the Governor assumed to exercise an authority which he does not possess. His action therein is a mere nullity and in no wise affects your duty as Secretary of State to submit the proposed amendment to the electorate of the state in the next ensuing election, in the manner required by the bill and by the Constitution.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General;

By CHARLES O'CONNOR.
First Assistant Attorney General.

(Opinion Book 5, p. 441.)
April 2, 1912.
To Justice of the Peace, Crested Butte.
By Mr. Talbot.
In re: Marriage of American woman to foreigner.

An American woman on marrying a foreigner takes the nationality of her husband, is no longer a citizen of the United States, and cannot vote.

Hon. Mike Welch,
Justice of the Peace,
Crested Butte, Colorado.

My Dear Sir: In reply to your letter of March 28, I will say that section 3 of Chapter 2534 of the United States Statutes at Large, Volume 34, page 1228, is as follows:

"Any American woman who marries a foreigner shall take the nationality of her husband; at the termination of the marital relation she may resume her American citizenship, if abroad

by registering as an American citizen within one year, with a consul of the United States or by returning to reside in the United States or if residing in the United States at the termination of the marital relation by continuing to reside therein."

Consequently, a girl marrying a foreigner takes the nationality of her husband, and is no longer a citizen of the United States, and cannot vote.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General;

By GEORGE D. TALBOT,
Special Counsel.

(Opinion Book 5, p. 458.)
April 6, 1912.
To the State Land Board.
By Mr. Mothersill.
In re: Investment of school funds in bonds of irrigation district.

1. Act authorizing State Land Board to direct investment of public school funds in irrigation district bonds not unconstitutional because it authorizes a state officer other than State Treasurer to direct such investment.
2. Act does authorize State Land Board to direct the investment of school funds in bonds of an irrigation district, which bonds have already been sold or disposed of by the district, and at time of intended investment are held and owned directly or indirectly by individual purchasers.

(Opinion Book 5, p. 469.)
April 9, 1912.
To the State Bank Commissioner.
By Mr. Griffith.
In re: Election of directors of a state bank.

1. The cumulative system of voting does not apply to the election of directors of a state bank, but each share is entitled to only one vote.
2. Directors elected by the cumulative system would at least be *de facto* directors. There is no authority under which the State Bank Commissioner can question this manner of election, but it might be questioned by the stockholders in a proper suit.

(Opinion Book 5, p. 483.)
April 10, 1912.
To the Public Examiner.
By Mr. Talbot.

There is no constitutional or statutory provision that forbids a man from holding the offices of both county treasurer and clerk of the District Court.

(Opinion Book 5, p. 487.)
April 12, 1912.
To the State Treasurer.
By Mr. Griffith.
In re: Appropriations for the Fort Lewis School and the School of Horticulture and Forestry.

These appropriations should be paid according to their classification, without respect to the date of the passage of the different appropriation bills, and both are of the third class.

(Opinion Book 5, p. 517.)
May 8, 1912.
To the Secretary of the State Board of Capitol Managers.
By Mr. Griffith.

Moneys appropriated by the legislature for a particular purpose should be used for no other, and should not be transferred from one fund to another.

(Opinion Book 5, p. 535.)
May 10, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Provisions of articles of incorporation of German-American Indemnity Company.

1. The provision that "the private property of the stockholder shall not be subject to the debts of the corporation" is superfluous.
2. The provision of the articles of incorporation reading, "Our said corporation is to exist perpetually," is not a valid provision. Perpetual existence is only permissible for life insurance companies.

(Opinion Book 5, p. 554.)
May 10, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Contract of the Pacific Coast Inter-Insurers.

1. A contract through which, in consideration of a stipulated deposit and the assumption of an agreed liability, the insured receives protection for the property therein specified, against direct loss or damage by fire in the stipulated amount, is a contract of insurance.
2. Where an association or aggregation of individuals by contracts provides that each one of their number is insured by every other, and in turn insures the other subscribers or policy-holders to the extent provided in his contract, they are subject to the supervision of the Insurance Department.
3. If such aggregation of individuals, concern, or company is not authorized to do business in this state, the Insurance Commissioner is warranted in taking such steps as are prescribed by law to prevent the transaction of insurance business in this manner.
4. It is the purpose of the Insurance Act to protect the people of the state against irresponsible foreign insurance companies, and subject all corporations, partnerships, and individuals doing an insurance business to the supervision of the Insurance Department.

5. The transaction of insurance business in this state by such a concern, if unauthorized, would subject any individual procuring applications for insurance for such concern, upon conviction, to a fine of one hundred dollars, or imprisonment for two months in the county jail, or both, in the discretion of the court.
6. If such solicitor had not procured a certificate or license to solicit insurance, it would seem that he would also be subject to the penalty of subdivision 7 of section 21, being section 3107, Revised Statutes of 1908.
7. If such individual is not a regularly appointed agent or solicitor of the company, and for compensation aids in negotiating a contract of insurance, he is regarded under the provisions of subdivision 4, section 21, as an insurance broker, and is required to be licensed.

(Opinion Book 5, p. 565.)
May 13, 1912.
To the Chairman of the Board of County Commissioners, Walden, Colorado.
By Mr. Stuart.

The board of county commissioners, not having made an appropriation for a building fund in their annual appropriation resolution, cannot make such appropriation at any other time within the fiscal year, and cannot use money in the ordinary fund for the purpose of building a courthouse.

(Opinion Book 5, p. 582.)
May 23, 1912.
To the State Auditor.
By Mr. Griffith.

The appropriation for the State Fair at Pueblo is not an appropriation of the third class.

(Opinion Book 5, page 598.)
June 3, 1912.
To the County Clerk, Akron.
By Mr. O'Connor.
In re: Blank ballot boxes at primary elections.

1. The blank ballot boxes required by the Primary Election Law of 1910 to be used at primary elections need not conform to the specifications of the official ballot box, as that is defined by the statute.

Mr. J. D. Barnhart,
County Clerk,
Akron, Colorado.

Dear Sir: Your esteemed inquiry of the 28th ult., wherein you ask whether the blank ballot box for primary elections has to be the same as the other ballot boxes, or whether it would be lawful to use a wooden box, has had our attention.

I beg to advise that the primary law does not require the blank ballot box to be of any particular description. It requires only that it be labeled "blank ballot box." Any box that is

adequate in size and form to hold the blank ballots until the same are destroyed after the votes have been counted, as required by law, is, in our opinion, a sufficient compliance with the statute. The blank ballot box serves only a temporary purpose. It is merely a receptacle to hold the blank ballots until the same are destroyed.

The use and purpose of the official ballot box is quite different, and it is for that reason that the election law specifies and requires a certain box. No such requirement, however, has been made by the primary law for the blank ballot box. In our judgment, it was the intention of the legislature, when they did not so expressly require any particular form of ballot box for the blank ballots, to leave it to the election judges to use any box that was adequate for the purpose of securely containing the same during the time that they are placed therein, and until destroyed as required by law.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General;

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 5, p. 600.)
June 3, 1912.
To County Clerk, Hot Sulphur Springs.
By Mr. O'Connor.
In re: Registration.

1. One who registers as required by law, for the purpose of voting at a primary election, does not need to register again in order to vote at the ensuing general election, and this is true even though he fails to vote at the primary election.

Mr. W. H. Harrison,
County Clerk,
Hot Sulphur Springs, Colorado.

Dear Sir: In reply to your inquiry of the 25th ult., I beg to advise that it is necessary for all parties to be registered according to the law of 1911, if they wish to participate in a primary election. It is not necessary that they again register for the general election, but those who do not register for the primary election should be registered for the general election, as required by law.

Section 39 of the act of 1911 makes the registration requirements for the general election purposes in all precincts outside of towns under 5,000 inhabitants applicable to primary elections. It further makes the registration for a primary election in such precincts sufficient for the general election, but the registration

committee should act for the general election the same as heretofore, to afford an opportunity for all parties who are not properly registered, to register in time for the general election.

I have made no reference in this letter to precincts in towns with a population greater than 5,000, for the reason that there are no such precincts, I take it, in your county.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 5, p. 605.)
June 6, 1912.
To Karl A. Bickel.
By Mr. O'Connor.
In re: Primary Election Law—Time for holding of party assemblies.

Hon. Karl A. Bickel, P. R.,
Grand Junction, Colorado.

My Dear Bickel:

Replying to yours of recent date, addressed to Attorney General Griffith, I beg to advise that the primary law does not fix any particular time for the holding of party assemblies. The act, however, does require and allow certain time to elapse for doing certain things, which requirement necessitates the holding of the assemblies at a time sufficiently prior to the date fixed by law for the holding of the primary, so as not only to permit the accomplishment of the things required to be done, but to afford a reasonable time within which to perform the same.

For instance, the candidate has seven (7) days after the assembly within which to accept the designation of a place on the primary ballot; the county clerk must give ten (10) days' notice of the holding of the primary election, and must, ten days before that time, publish the sample ballot.

It would require time to prepare and print this sample ballot; therefore, in our judgment, it is the intention of the law that the county assembly precede the date of the primary (1) a sufficient length of time to afford seven days *after the adjournment* of the assembly within which the candidate may accept the designation; (2) a reasonable time within which the county clerk may prepare and print the sample ballot; (3) ten days after the sample ballot is printed before the day of the primary election.

The primary election is fixed by law on the second Tuesday of September, 1912. (Sec. 3, p. 16, Session Laws, 1910.)

Trusting this sufficiently advises you on your inquiry, I am,

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General;

CHARLES O'CONNOR,
Assistant Attorney General.

P. S.—Of course, you understand I have not touched upon state assemblies, or the assemblies of the various districts, such as judicial, senatorial, etc. These would have to be held even at earlier dates than the county assemblies, for the reason that the Secretary of State is given more time than the county clerk to perform certain functions required by that office to be performed.

(Opinion Book 5, p. 614.)
June 10, 1912.
To County Clerk, Glenwood Springs.
By Mr. O'Connor.
In re: Primary election—Blank ballot box—Removal of ballots from ballot box.

1. The blank ballot box required by section 11, Chapter 14, Session Laws of 1910 (the Primary Election Law), need not be in conformity with the official ballot box, as that is defined and described by the general election laws, section 2332, Revised Statutes of 1908.
2. The county clerk should by petition secure an order from the County or District Court authorizing the removal of the ballots of the last general election now contained in the official ballot box, so that the same may be available for use at the primary election, and thus prevent the necessity for the county purchasing an additional set of ballot boxes.

(Opinion Book 5, p. 626.)
June 10, 1912.
To the Colorado Tax Commission.
By Mr. Griffith.

The Tax Commission has those powers of original assessment heretofore exercised by the State Board of Equalization.
Quaere as to whether section 40 of Chapter 216, Session Laws of 1911, confers any further powers.

The Colorado Tax Commission,
Denver, Colorado.

Gentlemen: I have your favor of May 31, in which you ask my advice with reference to the powers conferred upon your body in regard to the assessment of public utilities doing business in two or more counties in the state, and in which you call my

attention especially to sections 40 and 41 of the Tax Commission Act, the same being Chapter 216 of the Session Laws of 1911.

As I understand it from your letter, as well as from conversations with members of your board, you wish the advice of this office with reference to your powers of *original assessment* in regard to public utilities as defined by section 41 of the Tax Commission Act.

It is now adjudicated by the recent decision of the Supreme Court of this state that your board has all powers of original assessment heretofore exercised by the State Board of Equalization; and the only question arises over what powers of original assessment you may have with reference to certain public utilities doing business in two or more counties, which have never been subject to original assessment by the State Board, but have always been originally assessed by the local assessors.

I am aware that some of the ablest members of the bar have already differed radically with reference to these matters, some contending that the State Tax Commission has powers of original assessment only over those companies heretofore assessed by the State Board of Equalization, while others contend that it has all powers of original assessment with reference to all public utilities as defined by said section 41.

I also understand that this question, with certain other questions, is now involved in litigation between the Central Colorado Power Company and Boulder County; the Power Company contending that the Tax Commission only has the power of original assessment, while Boulder County contends that the local assessor has full power of original assessment over this company in Boulder County.

Under these circumstances, it is hardly likely that anything short of court action will ultimately settle this question for all parties; and if it is at all feasible, I should advise your commission to endeavor to bring about some plan whereby the assessments might be made both by your body and by the local assessors, and we should then in any event have a valid assessment.

Of course, it will be understood that the Tax Commission Act purports, in the earlier sections of the act, to give to your body certain powers pertaining to the assessment of public utilities, but such sections deal largely with your supervisory powers over the county assessors; and it is not necessary to determine this question at this time—the sole object of this letter being to state the writer's opinion with reference to your powers of original assessment over public utilities not heretofore assessed by the State Board of Equalization.

The answer to your question is one depending entirely upon statutory construction, and we must look to the sections involved and endeavor to ascertain therefrom the intent of the legislature. Sections 40 and 41 of the Tax Commission Act are as follows:

"Section 40. Powers of the State Board of Equalization Conferred on the Commission in Part. All powers of original assessment of public utility corporations with other statutory powers, duties and privileges now exercised by the State Board of Equalization are hereby conferred upon the Colorado Tax Commission, provided that the powers and duties of original assessment so transferred by this Act shall continue to be exercised by the State Board of Equalization until June 15, 1911, after which they shall be exercised by the Commission.

"Section 41. Public Utility Defined. The term 'public utility' as used in this Act means and embraces each corporation, company, firm, individual and association, their lessees, trustees or receivers elected or appointed by any authority whatsoever and in this Act referred to as express company, telephone company, telegraph company, sleeping car company, car line company, railroad company, and also such power companies, pipe line companies, water companies and all other classes of companies, however owned or operated having a continuity of business in two or more counties in the State, and such term 'Public Utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

I am of the opinion that, giving the language of section 40 its ordinary and usual meaning and significance, and without straining the meaning of any of the words and phrases therein used, the Tax Commission has only those powers of original assessment heretofore exercised by the State Board of Equalization; and, analyzing section 40, for the following reasons:

The heading of section 40 reads:

"Powers of the State Board of Equalization conferred on the Commission in part."

There is no suggestion there that the section was designed for any purpose other than to confer upon the commission certain powers of the State Board of Equalization; and, while the heading would not be controlling in the matter of construction, yet it may be referred to in determining a question which is in doubt.

Thus, we read in 2 Lewis' Sutherland Stautory Construction, section 362, as follows:

"In England marginal notes are not regarded as part of the law for the same reason that applies to the title and punctuation. Added to a section in the copy printed by the Queen's printer they form no part of the statute itself and are not binding as an explanation or as a construction of the section. *Headings which were arranged in the bill and adopted with it, it was held might be referred to, to determine the sense of any doubtful expression. The latter is true in this country also.* [Citing cases from Illinois and the federal court.] Headings or

titles inserted by compilers and not enacted by the legislature are not entitled to consideration." (Italics ours.)

In the present instance the heading was in the bill at the time of its introduction, and at the time of its passage by the legislature and its approval by the Governor.

Again, the language of section 40 down to the proviso is as follows:

"All powers of original assessments of public utility corporations with other statutory powers, duties and privileges now exercised by the State Board of Equalization are hereby conferred upon the Colorado Tax Commission."

In view of the fact that there is no punctuation after the word "corporation," and that the word "other" is used in the above connection, it would seem to follow that the words "all powers of original assessment of public utility corporations" should be read in connection with the words "now exercised by the State Board of Equalization."

The word "other," as defined by Webster, means—

"Different from that which or one who has been specified; not the same; not identical; additional; second of two."

So that, adopting this meaning of the word "other," it would appear that the above conferred upon the State Tax Commission the powers of original assessment of the State Board of Equalization, and also all other statutory powers of said board.

Again, taking into consideration the proviso in this case, the conclusion derived from the foregoing language is emphasized. The proviso reads:

"Provided that the powers and duties of original assessment so transferred by this act shall continue to be exercised by the State Board of Equalization until June 15, 1911, after which they shall be exercised by the Commission."

Now, if we adopt the construction that what was conferred upon the Tax Commission was—

(a) Power to assess public utilities heretofore assessed by the State Board of Equalization; and

(b) The power to assess public utilities heretofore assessed by the local assessor;

then we have by section 40 a transfer of these two powers—one from the local assessors and one from the State Board to the Tax Commission. Then, if we give to the proviso its ordinary significance, we find the legislature providing that all of those powers of assessing public utilities heretofore exercised by the local assessors and by the State Board shall be exercised by the State Board until June 15, 1911. Which construction, of course, no one would contend for, since it will be accepted

by everyone that all that was meant by this proviso was that the State Board should continue its usual and ordinary duties until June 15, 1911. This being so, the proviso, which manifestly includes all powers transferred or conferred, only serves to indicate the intention of the legislature to have been a conferring on the Tax Commission of the powers heretofore exercised by the State Board.

From the foregoing it would appear that it was the intention of the legislature by this section to confer on the State Tax Commission all powers exercised by the State Board, save and except the powers of equalization which are conferred upon the State Board by the Constitution and cannot be divested by the legislature.

It may be well to note that express power to assess public utilities heretofore assessed by local assessors was sought to be conferred on the Tax Commision by section 53 of House Bill No. 306, which failed of passage in the last legislature. This bill also provided detailed and elaborate methods which the commission should adopt in ascertaining these values, and, of course, the present act is wanting in these matters.

It will be urged that, inasmuch as section 41 defines "public utilities" so that the term includes certain properties heretofore assessed by the local assessors, that meaning of "public utilities" as given by section 41 must be read in connection with section 40, and section 40 must cover all public utilities as defined by section 41.

The answer to this contention is that the term "public utility" is used in section after section of the Tax Commission Act, and the legislature saw fit to make clear the meaning of that term so that wherever it was used there would be no ambiguity in regard to it. Thus, the term is used in sections 16, 17, 18, 20, 22, 23, 24, 34, 37, 38, and 40 of the Tax Commission Act, and, being a new term in the revenue laws of this state, it was most appropriate that the legislature should define its meaning explicitly. So that section 40 can be read intelligently as follows:

"All powers of original assessment of public-utility corporations * * * now exercised by the State Board of Equalization are hereby conferred," etc.;

thereby conferring upon the Tax Commission all powers of original assessment over such public-utility corporations as have been heretofore assessed by the State Board of Equalization.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 5, p. 639.)
June 18, 1912.
To the Governor.
By Mr. Griffith.
In re: Good Roads Bill.

The moneys in the Internal Improvement Fund may be appropriated by an initiated measure.
The legislature is the law-making power, and the people must be considered as the legislature when acting under the initiative or referendum.

Hon. John F. Shafroth,
Governor of Colorado,
State Capitol.

Dear Sir: I have your favor of June 14th, in which you ask my opinion as to whether the fund in the state treasury known as the "Internal Improvement Fund" can be appropriated under the law by a measure initiated and approved by the people of the state, as provided by the constitutional amendment relating to the initiative and the referendum.

The Internal Improvement Fund is one derived from certain moneys paid by the federal government to the state, which moneys arise from the proceeds of sales of agricultural public lands within the state.

Section 12 of the Enabling Act provides as follows:

"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; Provided, that this section shall not apply to any lands disposed of under the homestead laws of the United States, or to any lands now or hereafter reserved for public or other uses."

For our present purposes we may assume that the provisions of the Enabling Act are binding upon the state and the same should be followed. One of these provisions, as found in section 12, is that the moneys from the fund shall be paid to the state for the purpose of making such internal improvements within the state as the *legislature* thereof may direct.

A question arises as to the meaning of the word "legislature" as used in section 12 of the Enabling Act.

If by this word is meant the General Assembly of the State of Colorado, then it would seem that a measure initiated by the people would not be effective to appropriate these moneys, since the General Assembly consists of the Senate and the House of Representatives.

If, on the other hand, by the word "legislature" is meant the legislative power of the state—that is, the power to make and enact laws—it would appear that the measure initiated by the people could lawfully appropriate moneys from the Internal Improvement Fund, since the people, by the constitutional amendment relating to the initiative and the referendum, is a part of the law-making power, as well as the General Assembly. Thus, the first paragraph of section 1 of Article V of the Constitution of the State of Colorado, as it now exists, provides as follows:

"The legislative power of the State shall be vested in the General Assembly consisting of a Senate and House of Representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the General Assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the General Assembly."

Session Laws 1910, p. 12.

The word "legislature" has been variously defined by the courts, and the different meanings of the word have been arrived at after considering the circumstances and connections in which the term was used. It has often been referred to as meaning the Senate and the House of Representatives. It has also been construed to mean the legislative power of the state wherever vested, and in that connection the word has been broad enough to cover, not only the Senate and the House of Representatives, but also the Governor of the state and the people when acting in their capacity to refer laws.

The determination, then, of the whole matter in issue rests upon the meaning to be given to the word "legislature" as used in the Enabling Act. Even prior to the adoption of the constitutional amendment relating to the initiative and referendum, a construction which would limit the word "legislature" to the House and Senate in this state would be entirely out of accord with the generally recognized practice and custom of legislation in this state ever since its admittance into the Union.

Thus, no bill passed by the General Assembly appropriating moneys from the Internal Improvement Fund, has ever become a law without first being presented to the Governor for his approval or disapproval; and if he has vetoed any such bill, his vote has been given its ordinary effect, as prescribed by section 11 of Article IV of the Constitution, which says, in part:

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the

House in which it originated which House shall enter the objections at large upon its journal and proceed to reconsider the bill. * * * "

The Governor, when using his veto power with reference to bills passed by the General Assembly, appropriating moneys from the Internal Improvement Fund, has, under all of the authorities, acted in a legislative and not in an executive capacity. In other words, he has been exercising legislative power.

Thus, in Lukens vs. Nye, 105 Pacific, 593, it is said, at page 594:

"While engaged in considering bills which have passed both houses of the Legislature, and which are presented to him for approval or disapproval, he is acting in a legislative capacity, and not as an executive. He is for that purpose a part of the legislative department of the state. Fowler v. Pierce, 2 Cal. 172; People v. Bowen, 21 N. Y. 521."

And so we find in 36 Cyc., 958, the following:

"Under the system of government adopted in this country the chief executive, either the president or a governor, is a part of the law-making power."

The last legislative act which breathes the breath of life into a statute and makes it a part of the laws of the state is the approval of the Governor.

Stewart vs. Chapman, 104 Me., 17.

The veto power of the President is not executive in its nature, but essentially legislative. It makes him in effect a branch of Congress, although only to a limited and qualified extent.

Black on Constitutional Law, sec. 67.

The sovereign in England, who is charged with the duty of approving and disapproving acts of Parliament, is considered a constituent part of the supreme legislative power.

1 Blackstone's Commentaries, sec. 361.

If, then, we have regard to the mode of procedure in this state, it will not do to confine the meaning of the word "legislature," as used in the Enabling Act, to the General Assembly. It must also include the Governor when acting in a legislative capacity. In other words, it should be construed to mean the legislative power of the state.

The meaning of the word has also been defined when a bill referred by the people has been involved, and this is the only case I have been able to find in which the word has been construed in such connection.

Thus, in State ex rel. Schrader vs. Polley, Secretary of State, 127 N. W., 848, the word "legislature" was defined by

the Supreme Court of South Dakota, which state has long had in operation the initiative and the referendum. Section 1 of Article III of the Constitution of South Dakota provides, in part, as follows:

"The legislative power shall be vested in a Legislature which shall consist of a Senate and a House of Representatives. Except that the people expressly reserve to themselves the right to propose measures, which measures the Legislature shall enact and submit to a vote of the electors of the State, and also the right to require that any of the laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect."

Section 4 of Article I of the United State Constitution provides as follows:

"The times, place and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to place of choosing Senators."

In that case a law had been passed by the General Assembly of South Dakota relating to nominations for Congress, which law, under the initiative and referendum provision above set forth, had been referred to the people.

Schrader proceeded under the provisions of the law, and presented a nominating petition to the Secretary of State, and entirely disregarded the fact that the law had been referred to the people, claiming that, the United States Constitution having provided that the times, place, and manner of holding elections shall be prescribed in each state by the legislature, only the General Assembly had the right to pass upon such matters, and such a law could not be referred.

The Secretary of State refused to file the nominating petition, whereupon mandamus proceedings were brought against him to compel him to file the same. The contention of the parties is best set forth in the language of the court, on page 849, as follows:

"The contention of the defendant is that chapter 223, Laws 1909, is in all things the same as any other law; that it is subject to the same constitutional limitations, as to the manner of passage, and approval, veto and referendum, as any other law that may be passed by the legislature. While, on the other hand, the relator contends that under section 4, art. 1, Const. U. S., the legislature only is authorized and empowered to act in the creation of congressional districts; that the Governor has no veto power, nor the people any referendum power, under the state constitution, over such action of the members of the legislature, and when a majority of the members of the legislature consent and vote to divide the state into con-

gressional districts, the Governor has no veto power over such action; and that such action is not subject to referendum vote of the people, under the power reserved in the people, over the passage of laws, by section 1, art. 3, Const. S. D., on the theory that the Governor who exercises the veto power, and the people, who exercise the referendum power, are not a part of the legislature, and because the power granted by the United States Constitution says that the time, place and manner of holding elections for Representatives in Congress shall be prescribed in each state by the legislature thereof. It is the contention of the relator that, when the federal Constitution gave power to the 'Legislature' this power so given could not be delegated to the people."

The court, on page 850, proceeds to define the word "legislature" as used in the Federal Constitution; and certainly the definition there given should be applicable to the definition of the same word as used in our Enabling Act. The court says:

"We are also of the opinion that the word 'legislature' as used in section 4, art. 1 of the federal Constitution does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative and judicial departments, and the federal Constitution refers to the 'Legislature' in the sense of its being the legislative department of the state, whether it is denominated a legislature, general assembly, or by some other name. Under section 1, art. 3 of the state Constitution, it will be observed the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum upon any law passed by the legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are 'such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government or its existing state institutions.' It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and the legislature is only empowered to act in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'Legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dictionary; Webster's Dictionary; 18 Am. & Eng. Ency. 822; 25 Cyc. 182), and which in this state, under section 1, art. 3, Const. S. D., includes the people. Therefore, we are of the opinion that

in the passage of this act dividing the state into two congressional districts, by the lawmaking power of this state, it was necessary that such law be passed according to the constitutional provisions of this state, and that the referendum was applicable thereto."

In view of the foregoing, I am of opinion that the moneys in the Internal Improvement Fund may be appropriated by an initiated measure.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 5, p. 666.)
June 21, 1912.
To Senator Stephan.
By Mr. Griffith.
In re: Initiation of a "good roads" bill.

Hon. George Stephan,
Delta, Colorado.

Dear Senator: I am in receipt of a copy of your letter to the Governor in reference to the initiation of a "good roads" bill, and I enclose herewith a copy of my opinion on the same subject. This opinion was printed by the State Highway Commission, and this office had nothing to do with the printing or distribution of the same.

Since writing the opinion to the Governor, and after thinking the matter over considerably, I have become more firmly convinced that the conclusion I arrived at is good law. Of course, we arrive at one or the other conclusion from the meaning which we give to the word "legislature."

You seek to construe the word "legislature" to mean the General Assembly and no more. Such a construction is not in accord with the practice in this state ever since its admission, since the right of the Governor to veto a bill has never been questioned, and when he vetoes a bill, he is an arm of the legislature, under all of the authorities.

While it is true that in the case of People vs. Polley the court relied upon the grounds stated in your opinion, it also relied upon the broad ground that, when the word "legislature" was used in the Constitution, it meant the law-making power of the state, which includes the people. You will readly ascertain this from the quotations in my opinion to the Governor.

Furthermore, the definition of the word "legislature," as determined by the contested election cases in Congress, as set forth on page 851 of 127 N. W., in State vs. Polley, absolutely goes to the point that the people in a proper case may be the

legislature itself. These cases certainly indicate the meaning that should be given to the word, if the Congress of the United States is to be considered.

Take again the primary meaning of the word, as defined by Webster, and you must come unalterably to the conclusion that the people in this state are a part of the legislature under our constitutional provision relating to the initiative and referendum. Thus, Webster defines the word "legislature" as follows:

"The body of persons in a state or kingdom invested with power to make and repeal laws; a legislative body.

"The legislature of Great Britain consists of the Lords and Commons, *with the King or Queen,* whose sanction is necessary to every bill before it becomes a law.

"The legislatures of most of the United States consist of two houses or branches, *but the sanction or consent of the governor is required to give their acts the force of law,* or a concurrence of two-thirds of the two houses, after he has refused his sanction and assigned his objections."

This, in the edition of 1894, before any of the states had adopted the initiative and refendum.

Clearly, the meaning of the word "legislature" as defined by Webster is the law-making power. No one can read section 1 of Article V of the Constitution, as it is now constituted, without coming to the conclusion that the people must be considered to be the legislature of this state, when acting under the initiative or referendum, as well as the General Assembly. And this provision provides that while acting in their law-making capacity they may act entirely independently of the General Assembly.

Furthermore, a reading of our own Constitution confirms the meaning which I have ascribed to the word "legislature," since, so far as I have been able to ascertain, the word "legislature" is not used in that instrument. Those bodies known as the Senate and the House are called the "General Assembly" and not the "Legislature." But in section 1 of Article V we have set out for us what the legislative power consists of; namely, the Senate and the House, and also the people acting independently of either in a given case.

The very citation used by you in your opinion, to-wit: "A legislature is the body of persons in the State, clothed with authority to make laws," citing 121 Ind., 20, it seems to me, works against your contention. Of course, the word has been defined in some cases in such a way that it is restricted to the General Assembly, but it is always to be borne in mind that in those cases the law-making power had never been conferred upon the people by the initiative and referendum. Those laws are comparatively recent, and the only case in which those laws have been considered in determining what is meant by "legislature"

is the case of State vs. Polley, which, it seems to me, absolutely bears out my contention.

With best wishes to yourself, I remain,

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinon Book 5, p. 687.)
June 26, 1912.
To the Public Examiner.
By Mr. Talbot.
In re: Payment of personal taxes. May not be claimed against witness and jurors' fees.

Certificates for fees of witnesses and jurors, when properly issued, are payable in cash upon presentation, and there is no authority given to the county commissioners to make personal taxes a counter-claim against such certificates.

(Opinion Book 5, p. 696.)
July 5, 1912.
To the Governor.
By Mr. Griffith.
In re: Interpretation of word "legislature"—Authorities.

Hon. John F. Shafroth,
Governor of Colorado,
State Capitol.

Dear Sir: Mr. T. M. Stuart, of my office, has just called my attention to the language of our own Supreme Court, which unquestionably bears out the interpretation that I placed upon the word "legislature" in the opinion given to you recently involving the right of the people to initiate a "good roads" bill, and I append the following citations, since they may be of interest if the matter comes up further:

In Speer vs. The People, reported in the advance sheets of the Pacific Reporter, Volume 122, page 768, we find the following:

"When the general assembly enacts a law, the general assembly is the legislature, leaving out of consideration the question whether the governor is a member of it when he approves or vetoes an act.

"When the general assembly proposes an amendment to the constitution and it is submitted to and voted upon by the people of the State, the general assembly and the people are the legislature. People vs. Mills, 30 Colo. 262; 70 Pac. Rep. 322."

And, in People vs. Mills, we find the following, at page 263:

"Changes in the organic law in the way of simple amendments can only be effected by the general assembly submitting

to the voters the amendments proposed, upon whom then devolves the power of adopting or rejecting such proposals. For the purpose of such legislation the voters exercise a legislative function and constitute a part of the legislative branch of the State government. State vs. Thorson, 9 S. D. 149; Jameson on Constitutional Conventions, §513c."

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 5, p. 721.)
July 17, 1912.
To the Secretary of State.
By Mr. Mothersill.
In re: Petitions under initiative and referendum—Forged signatures.

1. Under the provisions of Constitutions, the petitions to initiated and referred bills and amendments, when duly verified, are *prima facie* evidence of the genuineness of the signatures.
2. The Secretary of State must recognize petitions duly verified as valid until *prima facie* case is overcome by competent evidence in a proper legal proceeding.
3. The courts would probably not pass upon the validity of petitions on account of forged signatures until after the completion of procedure of enactment.
4. The voters of the state, when exercising their power of adopting or rejecting proposed laws, are exercising a legislative function and constitute a part of the legislative branch of the state government.
5. The expense of publishing proposed laws which may later be held invalid does not warrant the courts in interfering in the course of their enactment.
6. Prosecutions for perjury may be instituted against those making false affidavits as to the genuineness of signatures on petitions.

(Opinion Book 5, p. 731.)
July 18, 1912.
To Robinson & Robinson.
By Mr. O'Connor.
In re: Primary elections.

1. Under section 39 of the Election Act of 1911, the Board of Registry in outlying precincts is required to sit three weeks before the primary, one week before the primary, and the Saturday and Monday before the primary; and on said last-mentioned two days it should sit from seven o'clock a. m. to seven o'clock p. m.
2. It is the intention of the Election Law to provide as great an opportunity for registration before the primary as before the election, and to provide the additional opportunity afforded by the days named.

(Opinion Book 5, p. 734.)
July 19, 1912.
To the Secretary of State.
By Mr. Mothersill.

A proposed constitutional amendment need not be published with the laws of that session of the General Assembly at which the amendment was proposed, previous to the general election at which the amendment is submitted to the people.

(Opinion Book 5, p. 739.)
July 19, 1912.
To the Colorado State Board of Barber Examiners.
By Mr. Griffith.

The board has no power to revoke a barber's license for exacting excessive prices.

(Opinion Book 5, p. 748.)
July 22, 1912.
To County Attorney.
By Mr. O'Connor.
In re: Authority of county commissioners to change precinct lines.

1. Section 2206, Revised Statutes, 1908, forbids the change of precinct lines within five months of an election.
2. Said section is a part of the act of 1905, which act is limited in its application, by its title, to precincts in cities of more than five thousand population.
3. Section 22A, page 361, Session Laws of 1911, controls as to the change of precinct lines in cities of less than two thousand population; and by the terms of said section the lines may be changed at any time within less than three months prior to election.

(Opinion Book 5, p. 788.)
August 5, 1912.
To County Attorney, Jefferson County.
By Mr. O'Connor.
In re: Registration in cities of from 2,000 to 5,000 inhabitants.

1. The act of 1877 has been repealed by the acts of 1891 and 1894 as to this class of precincts.
2. Neither the act of 1905, the Primary Election Law of 1910, nor the registration law of 1911 changes the method of registration for this class of precincts. The law of 1894 has not been repealed as to such precincts, and its provisions govern.

(Opinion Book 5, p. 797.)
August 9, 1912.
To State Board of Lunacy Commissioners.
By Mr. Griffith.
In re: Purchase of farm for State Insane Asylum.

1. The legislature has power to classify appropriations except as restricted by the Constitution.
2. No part of the one-fifth mill levy for the State Insane Asylum can be used in the purchase of a farm.

(Opinion Book 5, p. 813.)
August 16, 1912.
To the Election Commission of the City and County of Denver.
By Mr. Griffith.
In re: Primary elections.

One who possesses the constitutional qualifications of a voter may vote at primary elections, but only for the candidates of his party, and, if challenged, must swear that he is a qualified voter, belongs to one of the parties represented by ballot, and will vote only for the candidates of the party with which he is affiliated.
A voter need not vote at the general election for the candidates for whom he voted at the primary election.

(Opinion Book 5, p. 829.)
August 15, 1912.
To County Clerk and Recorder.
By Mr. O'Connor.
In re: Primary elections.

1. The Primary Election Law of 1910 does not preclude one whose name appears on the ballot as a candidate for nomination to public office from also being a candidate for precinct committeeman of his party.
2. The expense of additional deputies in the office of the county clerk and recorder is provided for and governed by sections 2580 and 2185, Revised Statutes of 1908.
3. Section 39 of the Election Law of 1911 makes section 2185 of the Revised Statutes of 1908 applicable to primary registration in the class of precincts within the terms of said section 39.

(Opinion Book 5, p. 834.)
August 21, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Powers of assessment accident associations.

1. Assessment accident associations organized under the provisions of section 71 of the Insurance Act may carry on the business of casualty insurance.
2. The term "casualty insurance" has no fixed and settled meaning in law, and its meaning as used in the Insurance Act is to be determined from an examination of the act.
3. Consideration of the scope of the Insurance Act, and especially of sections 29 and 71, leads to the conclusion that assessment accident associations should be organized for the purpose of issuing only contracts whereby benefits accrue upon the accidental death or physical disability from accident or sickness of a person.
4. Insurance upon the lives of horses and cattle, plate glass, burglary insurance, etc., is not included within the powers of such associations.

(Opinion Book 5, p. 843.)
August 20, 1912.
To County Attorney of Crowley County.
By Mr. O'Connor.
In re: Qualification of voters on location of county seat.

1. Statutory and constitutional provisions as the same have existed at various periods, with the changes therein from time to time reviewed and commented upon.
2. The rule as announced in County Commissioners vs. Love, 26 Colo., 304.
3. Elections for *location* of county seats are to be held according to the provisions of sections 1172-1174, Revised Statutes of 1908.
4. Qualifications of electors at such elections are residence in the state for twelve months, in the county for six months, and in the precinct for ninety days.
5. Special registration, special judges of election, and special ballot boxes are required for taking the vote at such elections.
6. It is the duty of the county clerk to prepare forms of affidavits of qualifications of electors, and affidavits of challenged voters, in conformity to an election held under the provisions of sections 1171-1174, inclusive, Revised Statutes of 1908.

Mr. J. M. Smith,
County Attorney of Crowley County,
Ordway, Colorado.

Dear Sir: Since my letter to you of August 15 I have received numerous inquiries from county officials and citizens of your county regarding the above proposition, but press of business permitted only a most cursory examination of the statute at the time my former letter was addressed to you. Owing, however, to the public nature and importance of the proposition involved, I have since that time made a very careful and exhaustive search into the statutes of the state as they have existed at various periods, and make the following epitome for the information of all concerned.

The Revised Statutes of 1868, Chapter 20, in section 40 of said chapter provides that the people—

"May locate permanently the county seat by a majority of the *legal voters* in each county according to law."

Section 41 empowers the *qualified voters* to select the place of their county seat.

Section 42 provides:

"Whenever the *legal voters* of any county are desirous of *changing* their county seat * * * "

and then provides for the holding of an election for that purpose, and the casting of ballots thereon.

Section 43 provides for special elections in case no place has a majority of all votes polled for the *location or change* of the county seat.

This section 40 above quoted appears as section 370 of the General Laws of 1877, section 683 of the General Statutes of 1883, section 957, Mills' Annotated Statutes, and section 1165 of the Revised Statutes of 1908.

Section 41 of the Revised Statutes of 1868 is section 371 of the General Laws, section 684 of the General Statutes, section

958 of Mills' Annotated Statutes, and section 1166 of the Revised Statutes of 1908.

Sections 42 and 43, above quoted, have been omitted from the General Laws of 1877, but are sections 685 and 686 of the General Statutes of 1883.

Up to the time of the adoption of the State Constitution in 1876, the above sections named of the Revised Statutes of 1868 were the only law upon the subject of locating or removing the county seat, and, as will appear from a reading of the sections, no *special* or additional qualifications were requisite to entitle an elector to vote thereon, the language used being "legal voters," "qualified voters." Neither did the statutes make any distinction as to qualifications on the proposition of locating, as distinguished from removing a county seat. The word used, except in section 43, is "changing," which might have been held to have been broad enough to include either "locating" or "removing."

Section 43 in connection with the election uses both phrases, "location" and "change."

By the adoption of the Constitution the people, in section 2 of Article XIV, limited the authority of the assembly to *remove* the county seat, and precluded anyone from voting on the "removal" who had not resided in the county six months. This constitutional provision is still in force and unchanged, but, in our opinion, its application does not extend beyond the proposition of removal of a county seat, and does not apply to the locating of the county seat. Regardless, however, of the correctness of our conclusion on the effect of the constitutional provision, the result arrived at would be the same, owing to our interpretation of subsequent legislation, as will hereinafter appear.

The General Assembly of 1881 passed "An Act to regulate elections for the removal of county seats." (See Session Laws of 1881, pp. 103, 104.) Certain sections of said act are Mills' Annotated Statutes, sections 963, 964, and 965; Revised Statutes of 1908, sections 1171, 1172, and 1173. By the terms of said act, special judges and special registration are provided, and a special ballot is required, for elections for the removal or location of county seats. The additional qualifications of voters therein required are a residence in the *county of at least six months*, and in the precinct of at least ninety days, prior to the date designated for holding such election. No others are permitted to register.

You will note that the act of 1881 does not expressly repeal the Revised Statutes of 1868, and makes no reference thereto. It is not in the form of an amendment. It, however, impliedly repeals the provisions of the Revised Statutes of 1868 in so far as the same are inconsistent therewith; that is, in allowing all qualified voters to vote on county seat removal or location. It adds to the qualifications of voters for location of a county seat the six months' residence in the county, and ninety days in the pre-

cinct, which had theretofore been required by the constitutional provisions above quoted, of election for removal. The same session of the legislature also enacted a law on qualifications of electors. Said law is found at Session Laws of 1881, pages 113 and 114, and is an amendment to section 926 of the General Laws. In our opinion, however, this act did not limit, or repeal, or change the effect of the act passed a week before by the same legislature on the subject of *elections* for *the removal of a county seat.* This last-named act prescribed, and was intended to prescribe, only the qualifications of electors at *general elections.*

The legislature of 1885 (see Session Laws of 1885, pp. 163, 164) passed an act providing for the *change* of county seats. This act was in the form of an express amendment to section 3, Chapter 24, of the General Statutes, being section 685 of that compilation, which was also section 42, pages 162 and 163, of the Revised Statutes of 1868; but said section so attempted to be amended had already been impliedly repealed by the enactment of the law of 1881, above referred to. Neither section 43, nor the act of 1885 purporting to amend the same, *makes any qualifications as to residence of the qualified electors,* and in that regard would leave the qualifications as the same were prescribed in the act of 1881. The act of 1885 was amended by the legislature of 1891. (Session Laws of 1891, pp. 117, 118); the wording used in the act of 1891 being "changing the county seat" and "legal voters." This act is also silent on the proposition of *length of residence, and makes no requirements in that regard.* It added the requirement that *only taxpayers could vote on removal,* which said provision was held *unconstitutional* in the case of County Commissioners vs. Love, 26 Colo., 304, 305. Section 3 of said act of 1891 expressly repeals the identical act which it purports to amend.

The act of 1891 was amended by the act of 1911 (Session Laws of 1911, sec. 263), which last-mentioned act goes only to removal of county seats when the same have been permanently located. The legislature of 1903 (Session Laws of 1903, p. 214) amended section 1 of Chapter 34, General Statutes of Colorado, being the act of 1881, *fixing qualifications for electors at general elections,* but, like the act of 1881, which it amends, goes only to *qualifications of electors at general elections.* This act of 1903 is also Revised Statutes of 1908, section 2145, and Mills' Annotated Statutes, section 1571.

In our opinion, therefore, the election for the *location* of the county seat in Crowley County must be held under and according to the provisions of the act of 1881—that is to say, sections 1171, 1172, 1173, and 1174 of the Revised Statutes of 1908—and that, to be qualified to vote on the proposition of locating the county seat, the electors must have resided *in the state twelve months, in the county at least six months,* and *in the precinct at least ninety days* prior to the day designated for holding such election.

And that it is the duty of the county clerk to prepare and furnish for said election the necessary forms of affidavits of qualifications, affidavits of challenged voters, etc., and that all such forms should be prepared to conform to an election held as required in sections 1171-1174, inclusive, Revised Statutes of 1908

This represents our final conclusion and supersedes any and all letters heretofore written by us regarding the matter.

Trusting that the effort we have made in this behalf may be of assistance to yourself, as well as to the other county officials, in arriving at a correct conclusion as to the law governing the premises, and this being our only desire for interest in the matter, I am,

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General;

By CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 5, p. 858.)
August 22, 1912.
To the Insurance Commissioner.
By Mr. Lee.
In re: Mortgage on coal lands by insurance company.

1. Under the statute, capital and funds accumulated in the course of business may be invested in mortgages on real estate; surplus may be invested in the bonds or evidences of indebtedness of solvent dividend-paying institutions other than mining corporations.
2. These provisions must be construed together and a reasonable interpretation given, if possible. It would seem that the Insurance Commissioner ought not to approve an investment in the bonds or mortgage of a mining corporation, but it may be within the discretion of the department to approve a mortgage on real estate containing mining property.

(Opinion Book 5, p. 884.)
August 29, 1912.
To the District Attorney, La Plata County.
By Mr. Griffith.
In re: Direct Primary Election Law—Meaning of "personal expenses."

Hon. George W. Lane,
District Attorney,
Durango, Colorado.

Dear Sir: I have your letter of recent date, inquiring as to the meaning of the words "personal expenses" as used in the Direct Primary Election Law.

While I have not made as thorough a search of the authorities as I should like to have done, owing to the stress of business in the office, suffice it to say that I have found no case directly in point upon the proposition.

It will be noted that by section 28 of the Direct Primary Election Law it is provided that a candidate shall not expend any moneys or other valuable thing, except for personal expenses. Then follows the provision that personal expenses, within the meaning of the act, shall not in any event exceed $5,000 if a person is a candidate for United States senator, $2,500 if a person is a candidate for a state office or Congress, and $1,000 if such person is a candidate for any other office.

However, the statute does not go on, as it would seem it ought to have done, and define what is meant by personal expenses. The definition of "personal expenses," therefore, must be a matter of construction, and it should be defined so as to conform to the intent and the spirit of the law.

In the State of Idaho the Primary Election Law, with reference to the expenditures of moneys, is substantially the same as ours, and is quite similar in its wording, so far as the first sentence of the first paragraph of section 28 is concerned, comprising some nine lines. But the Idaho law, after providing that no person shall, in order to aid, or promote, or secure his own nomination, etc., expend any moneys save for personal expenses, proceeds to define the words "personal expenses" as follows:

"The words 'personal expenses' as used in this law, shall include only expenses directly incurred and paid by a candidate for traveling and for purposes properly incidental to traveling, and for writing, printing and transmission of any letter, circular or other publication not issued at regular intervals, whereby he states his position or views upon public or other questions, for stationery, postage, and for the necessary expenses in hiring halls or other room for the purpose of holding public meetings to address the voters and others upon public questions, and matters relating to his candidacy."

While our legislature did not see fit, after using the words "personal expenses," to define these words, yet it seems to me their intention must have been along the lines indicated by the definition of personal expenses in the Idaho statute, since a restriction upon public meetings and written statements of a candidate's position would not be in accord with common sense or the public good. Such a restriction would place the voters of the state at a disadvantage as to the position of the different candidates, and the very purpose of the primary law—namely, to permit the voters of the state to choose their candidates without reference to the action of conventions or assemblies—would be defeated, if the voters themselves were not given every reasonable opportunity for information with reference to the different candidates presented to them for their suffrage.

As was said by the Supreme Court of Idaho, in construing certain provisions of their Direct Primary Election Law relating to expenditures, in the case of Adams vs. Lansdon, Secretary of State, 110 Pac., 280, the intent and purpose of the Primary Elec-

tion Law is to prevent large expenditures of money, property, or promises, to aid or promote the nomination of any person, and this intent is effected by the provisions restricting expenditures to certain amounts.

So far as candidates are concerned, therefore, I see no objection to their holding public meetings, traveling from place to place, stating their position in writing, and publishing the same by means of circulars or newspapers, and using the mails therefor. And I am of opinion that all expenditures necessary and reasonable in carrying out the above purposes may properly be construed as personal expenses.

This represents my conclusion in reference to the matters inquired of by you; and further than this I am not prepared to express any opinion.

Very sincerely yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 5, p. 919.)
September 5, 1912.
To Chairman Democratic State Central Committee.
By Mr. O'Connor.
In re: Closing saloons on primary election day.

1. Section 2385, Revised Statutes of 1908, requires saloons to be closed on election day.
2. Section 31 of the Primary Election Law of 1910 is broad enough, and was intended to apply the provisions of section 2385 to primary elections.
3. Primary elections are placed upon the same dignity as general elections, and are to be as fully protected from fraud, vice, and violence as are the general elections, and are to be safeguarded to the same extent.

(Opinion Book 5, p. 921.)
September 4, 1912.
To Town Clerk, Del Norte, Colorado.
By Mr. Stuart.

The town of Del Norte may supply water to outside consumers, and collect charges therefor, by ordinance duly passed in compliance with the Session Laws of 1911, Chapter 1750.

(Opinion Book 5, p. 944.)
September 16, 1912.
To Chairman Board of County Commissioners, Durango, Colorado.
By Mr. Stuart.

A county clerk is paid $5 per day for each day of eight hours actually employed as clerk of the board of county commissioners, and the fees for such service are fees of the office of county clerk and not of the country clerk personally.

(Opinion Book 5, p. 948.)
September 17, 1912.
To the Public Examiner.
By Mr. Lee.
In re: Naturalization fees as the personal compensation of the clerk of the District Court.

Mr. H. J. Leddy,
Public Examiner,
Denver, Colorado.

Dear Sir: I have your letter of September 13, inquiring whether the fees for naturalization are the personal compensation of the clerk of the District Court, or whether they are part of the fees of the office.

Our letter of July 16, 1912, referred to the decision rendered by the Court of Appeals on May 13, 1912, in the case of Glaister vs. Board of County Commissioners of Kit Carson County. That decision held that fees accruing in connection with acts done by a judge of the County Court, under the provisions of section 2294 of the Revised Statutes of the United States as amended in 1890 (26 Statutes at Large, 121), relating to the making of proofs under the land laws of the United States, should be paid into the county treasury and were not the personal emoluments of the officer, but part of the fees of the office.

Under date of May 16, 1911, we advised you that with regard to naturalization fees the contrary rule prevailed, relying upon the peculiar wording of the Naturalization Act and upon the cases of Eldredge vs. Salt Lake County, 106 Pacific, 939 (Utah, 1910), and Inhabitants of Hampden vs. Morris, 93 N. E., 579 (Mass.), as authority for our position.

Since the decision of those cases, however, the case of San Francisco vs. Mulcrevy, 15 Cal. App., 11, has been decided to the contrary, as also the case of Barron County vs. Beckwith, 142 Wis., 519, showing that the courts differ very materially upon the construction to be given to state statutes similar to our own, when considered in connection with the federal statute providing that—

"* * * clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees collected in any fiscal year up to the sum of three thousand dollars."

In view of these more recent decisions, therefore, and the strong ruling of the Court of Appeals in the case of Glaister vs. Board of Commissioners, 123 Pacific, 955, I believe that the courts of this state would require the clerk of the District Court to account for these fees, and that they ought not to be regarded

as a personal emolument in addition to the salary provided by law.

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General;
By A. A. LEE,
Deputy Attorney General.

(Opinion Book 5, p. 958.)
September 17, 1912.
To the Secretary of State.
By Mr. Griffith.

The General Assembly has no power to propose amendments to more than six articles of the Constitution at the same session.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: Replying to your inquiry by letter of August 13, as to whether more than six proposed constitutional amendments can legally be submitted at the same election, I beg leave to submit the following:

I understand from your Mr. Dillon that there are about fourteen proposed constitutional amendments to be submitted at this election, of which five have been submitted by the General Assembly, the remaining number being submitted by the people under the initiative.

The only restriction relating to the submission of constitutional amendments is found in the last paragraph of section 2 of Article XIX of the Constitution, which reads as follows:

"Provided that if more than one amendment be submitted at any general election each of said amendments shall be voted upon separately and votes thereon cast shall be separately counted, the same as though but one amendment was submitted. But the general assembly shall have no power to propose amendments to more than six articles of this constitution at the same session."

It will be observed that the restriction in regard to the submission of amendments here is with reference to the General Assembly.

By section 1 of Article V of the Constitution as amended (see Session Laws of 1910, page 11), it is provided, among other things, as follows:

"Section 1. The legislative power of the State shall be vested in the general assembly consisting of the senate and house

of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution," etc.

The restriction, then, of section 2 of Article XIX of the Constitution relates to the number of amendments that may be submitted by our House of Representatives and our Senate, which constitute the General Assembly.

Therefore, inasmuch as only five amendments have been submitted by the General Assembly, there does not seem to be any conflict with our Constitution. Furthermore, I am informed that two of the amendments submitted by the General Assembly purport to amend Article XI of the Constitution.

Trusting that this answers your inquiry, I remain,

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

(Opinion Book 5, p. 973.)
September 23, 1912.
To the Secretary of State.
By Mr. Mothersill.
In re: Publication of proposed constitutional amendments.

1. Publication for "four successive weeks" is complied with by one publication a week for four successive weeks in a weekly paper, even though the first publication is not fully twenty-eight days previous to the time set for doing that of which the publication is notice.
2. Publication once a week for four successive weeks in a daily newspaper, the publications being made regularly one week apart in the same way that publications would be made in a weekly paper, would comply with constitutional requirement of publication for four successive weeks.

Hon. James B. Pearce,
Secretary of State,
Denver, Colorado.

Dear Sir: In reply to your request for an opinion as to the duration of publication and number of insertions in county newspapers of proposed constitutional amendments and laws, in order to comply with the requirement of the Constitution that publication shall be for four successive weeks, we respectfully submit the following:

We are of the opinion that the Supreme Court of this state, in the cases of Orman vs. Bowles, 18 Colo., 463; Decker vs. Myles, 4 Colo., 558, and Calvert vs. Calvert, 15 Colo., 390, has unquestionably determined that a requirement that a publication shall be made for four successive weeks is complied with by one publication a week for four successive weeks in a weekly paper, and that, too, even though the first publication is not

fully twenty-eight days previous to the time set for doing that of which the publication is notice.

You also inquire whether the publication once a week for four successive weeks may be made in a daily newspaper.

After a careful examination, we have been unable to find any case decided by the appellate courts of this state directly upon that point. In Kansas and Nebraska it has been decided that publication must be made in each issue of the paper in which notice is published from the beginning of the publication until the close; that is, if publication is to be for four successive weeks, then the law is complied with by publication once a week for four successive weeks in a weekly newspaper, but, in case publication is made in a daily, then publication must be made in every issue of the paper during the four successive weeks.

The foregoing rule is held by the case of Lawson vs. Gibson, 21 Neb., 137.

The contrary has been held, however, by the Court of Appeals of Illinois, in the case of Illinois Watch Company vs. National Manufacturing and Importing Company, 63 Ill. App., 480. The court had under consideration a statute which required that certain notice should be made—

"By publication in some newspaper published in the county, if any, and if none, then in the next county thereto, which publication shall be continued at least six weeks."

The certificate of publication showed that the notice was published—

"For six successive weeks, to-wit: Six times in the 'Chicago Daily Law Bulletin,' a public daily newspaper, * * * and that the date of the first paper containing the same was the twenty-fourth day of April, A. D. 1905, and that the date of the last paper containing the same was the twenty-ninth day of May, A. D. 1905."

The whole case turned upon whether the notice so published was in compliance with the statute. It was urged that the duration of the publication was less than six weeks, and that it was also insufficient because the publication was made in a daily paper.

The court said:

"The requirement that the publication shall be 'continued six weeks' is made by the notice having been published for six successive weeks. The notice was published the first time on the day it was dated and being published six successive weeks, to-wit, six times, is the same as to say it was published once in each week for six successive weeks, which is all that the statute contemplates."

We believe this decision by the Illinois court is a more sensible rule than that laid down by the Nebraska courts, and that it is in harmony with the decisions of the Colorado courts to the effect that publication for four successive weeks is complied with by publication once each week for four successive weeks in a weekly newspaper.

We are of the opinion that publication once a week for four successive weeks in a daily newspaper, the publications being made regularly one week apart in the same way that publications would be made in a weekly paper, would be a compliance with the constitutional requirement of publication for four successive weeks; but, as we have said before, there is no decision of Colorado appellate courts directly upon the point, so far as we are able to find, and there are decisions of the highest courts of other states on both sides of the question; and the only way to be absolutely sure, beyond a peradventure, that sufficient publication is being made, would be to have publication made in each issue, where the publication is made in a daily paper.

Yours very truly,

BENJAMIN GRIFFITH,
Attorney General.

By PHILIP W. MOTHERSILL,
Assistant Attorney General.

(Opinion Book 6, p. 28.)
October 5, 1912.
To the Governor.
By Mr. Griffith and Mr. O'Connor.
In re: Report of investigation of the Stratton Estate.

To HON. JOHN F. SHAFROTH,
Governor of Colorado,
Denver, Colorado.

Dear Sir: For some time past there has been considerable public discussion as to the affairs of that certain concern generally referred to as the "Stratton Estate," the property of which consists of the estate of Winfield Scott Straton, deceased, a residen in his lifetime of El Paso County, Colorado. I have been requested as a public officer, by various citizens residing in Denver, Colorado Springs, and elsewhere throughout the state, to make an investigation particularly into the legal aspects of this estate, and since the Attorney General of a state occupies, under the law, the position of its chief legal officer, I have considered it not outside of the line of my duties to inquire into the affairs of the estate from a legal viewpoint, and having in mind

the interests of the State of Colorado in this property. My office has not the facilities, nor is it within our duties, to audit the books or accounts of the estate. There have been numerous audits and accountings made from time to time by certified public accountants, sometimes by order of court and sometimes by order of those in charge of the estate. The only audit made by state authorities, to my knowledge, is one by the present Public Examiner, whose report is found at pages 189 and 190 of his Annual Report for the year 1911. In none of these audits are any serious discrepancies found in the accounts.

Certain investigations of this estate have been made by our General Asemblies from time to time. The Sixteenth General Assembly made an investigation, the report of which is found on page 1232 of the House Journal of that session in 1907. The Eighteenth General Assembly, which convened in Denver in 1911, also appointed a committee to investigate the estate, and we have failed to find any report of the committee. The Public Examiner, however, in his annual report above referred to, addresses the report to this legislative committee, and states that the report is made as per their request.

I have had occasion to call upon those in charge of this estate, such as its executors and the trustees of "The Myron Stratton Home," and have been accorded the utmost courtesy and every opportunity requested for examination. I desire, therefore, to express to them my appreciation of their attitude in the premises. As you are the chief executive officer of the state, I take the liberty, therefore, of submitting to you the results of my investigations, and shall be pleased to have your views as to the course of action the state should pursue in this matter.

Mr. Stratton died September 14, 1902, and left an estate which, by appraisement of Judge J. A. Elstun, made for the purpose of fixing the inheritance tax due the state, was valued at $6,307,166.36. The principal assets of the estate, as then found, consisted of:

(a) Certain stocks and bonds of The Colorado Springs and Interurban Railway Company, this company operating the street-car system of Colorado Springs and vicinity.

(b) Certain stocks of The International Realty Company, a company owning many valuable pieces of real estate situated principally in Colorado Springs and Denver.

(c) Certain stocks owned in The Stratton-Cripple Creek Mining and Development Company, this company owning many valuable mining properties in the Cripple Creek district.

(d) Certain miscellaneous stocks.

(e) A certain judgment and interest against the Brown Palace Hotel.

The three corporations referred to above were incorporated by Mr. Stratton in his lifetime, and the value of his holdings in these companies amounted to almost 75 per cent of the value of

his entire estate. Since his death his property has not been invested in any other concerns, and no new corporations have been formed by those in charge of his estate, except "The Myron Stratton Home" corporation, which was provided for in his will, which was duly admitted to probate about April, 1903.

It now becomes necessary to set forth some of the provisions of the will. It is not necessary to consider the first clause of the will. The second clause makes a certain bequest. The third clause is as follows:

> "Third: All the rest, residue and remainder of the estate of which I may die seized of whatsoever nature, real, personal or mixed and wheresoever situated, I give, devise and bequeath unto my Executors hereinafter named, In Trust, however, to be used and disposed of by them in the manner hereinafter stated:"

Then there are set out in successive clauses, the objects and purposes of this trust, as follows:

The fourth clause is as follows:

> "Fourth: I direct that my said Executors shall as soon as they conveniently can, and within the period required by law, after my decease, sell and dispose of all the real and personal estate of which I may die seized and which is by this will vested in them in trust, at such prices and upon such terms as to them or to the majority of them shall seem most advantageous, hereby giving and granting unto my said Executors or unto the majority of them full power and authority to make, execute and deliver to the purchasers such proper deeds and instruments of conveyance, acquittance, relinquishment and transfer as may be necessary to vest in the purchasers full title to the property so sold and disposed of."

Then follow the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh clauses of the will, which provide for certain bequests to certain relatives, friends, and institutions, and certain conditions, and other matters relating to the same.

Then follow the last three clauses of the will, which are important to this discussion, and which are therefore set out *in haec verba:*

> "Eleventh: I hereby direct that, in the event of any of the foregoing legacies and bequests lapsing or becoming void under decree of Court or under any other circumstances whatsoever, such legacy or legacies so lapsing or becoming void shall be and become in that event a part of the residuum of my estate and I direct my executors to pay the same to my residuary legatee for the purposes hereinafter named:
>
> Twelfth: I direct my said Executors, after the full payment and satisfaction of all of the several legacies and be-

quests hereinbefore given devised and bequeathed to the several persons and institutions named herein and after the payment of all the legal and just costs, charges and expenses arising from the collection, preservation, settlement and distribution of my estate, to pay over all the rest, residue and remainder of my said estate, of each and every kind and character and wheresoever situated, unto Dr. D. H. Rice, Moses Hallett and Tyson S. Dines, In Trust, however for the following purposes: All sums of money received by said Trustees from my said Executors shall be invested as speedily as possible in safe interest-bearing securities which shall be selected by them with special care for the preservation without loss or depreciation of the principal sum so invested and for the securing of as large an income therefrom as may be consistent with the safety and preservation of the sums so invested:

After payment of all legal and just costs and expenses connected with the execution of said Trust, including suitable and just compensation to said Trustees to be allowed and approved by the District Court of El Paso County, Colorado, I direct said Trustees to pay over and deliver to the Trustees of a corporation to be created and organized by me during my lifetime or by them after my decease under the laws of the State of Colorado for charitable purposes only, the name of which shall be 'The Myron Stratton Home,' in memory of my father, all the property, moneys, credits, notes, bonds, mortgages and evidences of debt of every kind whatsoever remaining in their hands to be applied to the carrying out of the objects and purposes of such corporation as follows:

The purpose for which said corporation shall be created and to which this bequest is devoted is and shall be the erection, furnishing and maintenance of a free home for poor persons, who are without means of support and who are physically unable by reason of old age, youth, sickness or other infirmity to earn a livelihood and who are not by rea son of disease, insanity, gross indecency or immorality unfit to associate with worthy persons of the condition in life above named:

The inmates of said home shall be selected by the Board of Trustees of said Corporation, first from poor persons of the condition above stated, who are actual residents of the County of El Paso in the State of Colorado, and second from any poor persons of the condition above stated, who are at the time of their selection, actual residents of any other County in the State of Colorado who shall be admitted thereto in the order of priority of their application up to the full capacity of said Home to accommodate and provide for them without serious inconvenience to persons who shall at the time of their application be inmates of said Home:

A suitable sum, not exceeding the sum of One Million (1000000.) Dollars, out of this bequest shall be expended in purchasing suitable grounds and a site for said home within the County of El Paso, State of Colorado, and in erecting, furnishing and equipping the necessary buildings for the use of the inmates of said Home and for the maintenance of careful supervision over the erection of said buildings and improvement and beautification of said grounds: All the balance and remainder of this bequest shall be kept carefully invested in good and safe interest-bearing securities, and all the proceeds or income derived from such investments shall be expended under the direction of the Trustees, directors or managers of said Corporation, in accordance with the By-Laws of said Corporation, for the maintenance and support of said Home and to the payment of all expenses of the repairing, superintending and conducting the same, including suitable compensation to said trustees, all of which expenditures and disbursements shall be subject to the inspection and approval of the District Court of El Paso County, Colorado, or to the inspection and approval of such auditing committee or Board of Inspection as may be provided for in the By-Laws of said 'The Myron Stratton Home.' It is my especial desire and command that the inmates of the said Home shall not be clothed and fed as paupers usually are at public expense, but that they shall be decently and comfortably clothed and amply provided with good and wholesome food and with the necessary medicines, medical attendance, care and nursing to protect their health and insure their comfort:

And that no inmate of said Home shall be constrained against his or her will to perform any manual service for any inmate of said Home not related to him or her by blood or marriage, nor for any officer or employe of said Home; nor shall any of such inmates be constrained to perform any manual labor when physically unable to do so.

And full and specific rules, regulations and directions shall be contained in the By-Laws of said 'The Myron Stratton Home' relating to the regulation and conduct of said Home and the inspection, auditing and approval of the accounts and disbursements of the Superintendent of said Home and of the Trustees thereof so that said Home may be guarded and protected in every way against wasteful, extravagant and improper management and said Trust funds fully protected and conserved for the uses and purposes herein named.

Thirteenth: In the event of the lapse of the bequest of the residuum of my estate as contained in sub-division 'Twelfth' hereof or in the event that said bequest should be, by final judgment or decree of any court of competent jurisdiction held to be illegal or void, then and in that event I direct my said executors to pay over and deliver to the

State of Colorado, all of that portion of my estate included in the bequest of the residue and remainder thereof which shall so lapse or be held to be illegal or void to be appropriated and applied in such manner as the Legislature of said State shall direct to the support of such Charitable and Benevolent institutions as are now supported at the expense of the State of Colorado."

Very briefly restated, the will provides that the estate shall go to the executors, in trust; that they shall, as soon as they conveniently can, and within the period required by law after his death, sell and dispose of his estate at such prices and on such terms as shall seem most advantageous; that, after paying and fully satisfying certain legacies, and after paying all costs and expenses arising from the collection, preservation, settlement, and distribution of the estate, they shall pay and deliver over the remainder of the estate to the three trustees for certain purposes; that is to say, the trustees shall invest all sums of money received from the executors, in safe, interest-bearing securities, and, after paying all costs connected with this trust, including their own compensation, to be fixed by the court, the trustees shall pay over to the trustees of a corporation, to be known as "The Myron Stratton Home," all moneys and properties in their hands, to be applied to carrying out the objects of the corporation, which are the erection and maintenance of a free home for poor persons who come within certain qualifications, as set out in the will. The inmates are to be selected first from El Paso County, then from the other counties in the state, and a suitable sum, not exceeding $1,000,000, shall be expended in purchasing, erecting, and furnishing the site and buildings, and in the maintenance of the grounds. The remainder of the estate shall be kept in safe, interest-bearing securities, and the income from the same shall be expended by the trustees of the corporation in maintaining and supporting the home and its inmates, all expenditures being subject to the inspection and approval of the District Court of El Paso County, or such auditing committee as may be provided for in the by-laws of the corporation. Then follow provisions as to the internal management of the home and its inmates. Then there is the provision for the State of Colorado taking over the entire estate for its charitable and benevolent institutions, in case the bequest to and for "The Myron Stratton Home" should lapse, or be held void or illegal by a court of competent jurisdiction.

Having recited the main provisions of the will, let us inquire briefly into the history of the estate and its present status.

As already stated, Mr. Stratton died September 14, 1902, and his estate was appraised at $6,307,166.36. An attempt was made to break the will by Mr. Stratton's son, when it was presented for probate, with the result that administrators to collect—being Tyson S. Dines, D. H. Rice, and A. G. Sharp—were appointed,

and the executors, not knowing the result of the litigation, were forced to hire counsel on a contingent basis to defend the will. The result of these proceedings was that the contest was dismissed, the estate paying the son $350,000 in settlement, and the attorneys defending the will were paid, under order of court approving the same, the aggregate amount of $204,109.16. The administrators to collect were allowed, by order and the approval of the court, the sum of $185,207.67. They were also allowed by the court interest on the same amounting to $18,685.95.

With the dismissal of the contest about April, 1903, the administrators to collect delivered the estate to the executors, who managed the same exclusively until about March, 1909, when the court, upon petition, filed in January, 1909, by the trustees named in the will, ordered the transfer of the bulk of the estate to Messrs. Rice, Dines, and William Lennox as trustees; Mr. Hallett, one of the trustees named in the will, having refused to act. It thus appears that the executors were in exclusive charge of the estate, subject to the orders of the court, for about six years; i. e., from April, 1903, to March, 1909. The executors for their services were allowed, by order and approval of the court, the sum of $207,684.90.

The trustees named above, however, remained in charge of the estate only until about January 3, 1910, when, by order of court, the trustees were ordered to turn over the estate to "The Myron Stratton Home" corporation, as provided by the will. The incorporation of the Home and all matters in connection with it at that time were approved by the court as being in conformity with the provisions of the will and the law. We do not understand that these trustees have as yet been allowed anything for their services, nor that they have been discharged. The will provides that they shall receive such sum for their services as the court shall approve.

Since January 3, 1910, the entire estate, except the sum of about $350,000 retained by the executors (who have not yet been discharged) to await the result of litigation now pending, has been held by "The Myron Stratton Home" corporation, the trustees of which are Tyson S. Dines, D. H. Rice, and William Lennox. According to a report just published by these trustees, the estate held by them is valued at $6,794,949.78. This is exclusive, of course, of the $350,000 or thereabouts now held in the hands of the executors, as above stated. Its principal assets are not materially different in form from the assets at the time of Mr. Stratton's death, and consist almost entirely of:

(a) All stock in the Realty Company above referred to;

(b) All stock in the Mining Company above referred to; and

(c) All stocks and certain of the bonds in the street-car system above referred to.

(d) The fee-simple title to the Brown Palace Hotel.

(e) The Broadmoor property in El Paso County, consisting of some 2,700 acres with valuable water rights, purchased for $350,000, as a site for "The Myron Stratton Home." Architects are now completing plans for some of the buildings, but we are not advised that construction work has begun.

The trustees of "The Myron Stratton Home" corporation receive as compensation the following:

D. H. Rice, $7,000 per year.

Tyson S. Dines, $4,000 per year.

William Lennox, $4,000 per year.

Mr. Rice also receives, as president of the Street Car Company, $1,800 per year.

Mr. Chamberlain, one of the executors, receives, as vice-president of the same company, $1,200 per year. None of these trustees or executors receives any other compensation from any of the holdings of the estate.

Mr. William Lloyd acts as secretary to "The Myron Stratton Home" corporation, the executors, and the various corporations in which the Home holds stock, and receives a salary of $6,000 per year.

The attorneys hired by the trustees to represent their various interests receive $6,000 per year, which covers services for litigation.

The salaries received by other officers and employes of the Home, and the various corporations in which it holds stock, seem to be reasonable and not excessive.

In view of the foregoing, it would seem that the State of Colorado is interested from a legal viewpoint in this estate in what might for convenience be treated from three different aspects, as follows, and which I shall discuss in the order named:

1. The state's interest in supervision and visitation of a public charity such as "The Myron Stratton Home."

2. The state's interest in seeing that the terms of a will, establishing and aiding a public charity, are complied with and carried out.

3. The state's interest in case the bequest to "The Myron Stratton Home" should lapse, or be held to be void or illegal by any court of competent jurisdiction, as provided in section 13 of the will.

1. Taking up now the interest of the state, if any, in the matter of supervision or visitation of the Home as a public charity, we shall discuss the same from three viewpoints, to-wit:

(a) The provisions of the law, the will, and the by-laws of the Home, for affording the state opportunity of inspecting and supervising the affairs of the Home and the estate.

(b) The apparent need or desirability of such inspection.

(c) How supervision and visitation on the part of the state should be obtained.

(a) That the Home is a *public charity* seems beyond dispute. Thus:

> "In the modern sense, and especially in America, the accepted definition of a public charity is that it is 'a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.'"
>
> 6 Cyc., p. 900.

Again:

> "A gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons; and its benefits may be confined to special classes, as decayed seamen, laborers, farmers, etc., of a particular town or county."
>
> 6 Cyc., pp. 902-903.
>
> See also the case of Clayton vs. Hallett, 30 Colo., 231.

There is no statute of this state authorizing the supervision or regulation of public charities not supported by the state.

The only provision in the will affecting this matter is found in that part of section 12 of the will which reads as follows:

> "A suitable sum, not exceeding the sum of one million (1000000) Dollars, out of this bequest shall be expended in purchasing suitable grounds and a site for said Home within the County of El Paso, State of Colorado, and in erecting, furnishing and equipping the necessary buildings for the use of the inmates of said Home and for the maintenance of careful supervision over the erection of said buildings and improvement and beautification of said grounds: All the balance and remainder of this bequest shall be kept carefully invested in good and safe interest-bearing securities, and all the proceeds or income derived from such investments shall be expended under the direction of the Trustees, directors or managers of said Corporation, in accordance with the By-laws of said Corporation, for the maintenance and support of said Home and to the payment of all expenses of the repairing, superintending and conducting the same, including suitable compensation to said trustees, *all of which expenditures and disbursements shall be subject to the inspection and approval of the District Court of El Paso County, Colorado, or to the inspection and approval of such auditing committee or Board of Inspection as may be*

provided for in the By-laws of said 'The Myron Stratton Home.'"

It will be noted that the above provision recites that the expenditures and disbursements of the Home shall be subject to inspection and approval of the District Court or an auditing committee provided for in the by-laws. They need not necessarily be approved by the District Court. The by-laws adopted by the trustees of the Home make no provision for any report to the District Court at all. Article 12 of the by-laws provides:

> "An auditing committee, consisting of one or more certified public accountants under the laws of the State of Colorado, shall be annually appointed by the Board of Trustees to examine the receipts, expenditures and disbursements of said corporation, and make report of its examination to said Board of Trustees.
>
> The member or members of said auditing committee shall in no event be a Trustee, member or officer of said corporation or related by blood or marriage to any Trustee, member or officer of said corporation and no person shall serve upon said auditing committee for more than two successive years. The report of said committee shall, within thirty days after its submission to the Board of Trustees, be published in full in a daily newspaper of general circulation in the City of Colorado Springs, Colorado."

Up to the time "The Myron Stratton Home" corporation was formed, in 1909, all the acts and doings of administrators to collect, executors, and trustees were subject to the inspection and approval of the courts. Since the adoption of the by-laws no reports are made by the trustees of the Home to the courts, and none is provided for. The whole matter is entirely in charge of the trustees of the Home. Nor can it be said that the trustees in so acting have violated any provision of the will. They have acted within their powers.

(b) Yet, if the trustees should continue to act under this by-law, it would seem that they should not resent—but, on the other hand, should welcome—proper public supervision of this worthy public charity, to the end that the people at large may rest assured that there is a checking up of the acts and doings of the trustees, who, under the terms of the will, have taken unto themselves alone the great power and deep responsibility of managing such a large public enterprise. Such a statement as that just made does not presume any dishonesty or unfaithfulness on the part of any person, but merely expresses the sentiment, we believe, of the people of this state, who will demand the strictest accounting in a public charity of such magnitude as this to an authority who has no opportunity nor object of being biased, consciously or unconsciously, by reason of selection or employment. It is worthy of comment in this connection also that

by the terms of the by-laws of "The Myron Stratton Home" no bond or other security is required of any of the trustees. Mr. Lloyd, the secretary, gives a bond, but the penalty is only $5,000.

In accordance with Article 12 of the by-laws of the Home, providing for an audit of the affairs of the Home corporation annually, the report of Horace H. Mitchell, certified public accountant, for the year 1911, who also prepared the report for the year 1910, was rendered to the trustees on June 28, 1912, and published in the Colorado Springs papers shortly afterwards. Mr. Mitchell sets forth the receipts of "The Myron Stratton Home" corporation, showing receipts from companies and properties owned by the Home corporation, such as the Street Car Company, the Mining Company, the Brown Palace Hotel, etc.; also disbursements made by the Home during the year, and also the assets of the Home corporation. He also states that he has made an audit of the books of the Street Car Company, the Realty Company, the Mining Company, and all of the other properties of the Home, and has found the same satisfactory. There is, however, no statement in detail or at all throughout his report showing, for instance, the gross receipts, or the expenses and expenditures, and for what purpose, of any of the large corporations owned and operated by the Home corporation, as, for example, the Street Car Company, the Realty Company, the Mining Company, etc. The ostensible purpose of publishing the report of the accountant is no doubt to inform the public as to the status of the property of the Stratton Estate. But while the public is informed as to the receipts, disbursements, and assets of the holding company, as it were—i. e., "The Myron Stratton Home" —it is left in the dark as to the operations, or the receipts or the expenses, and for what purposes, of the large properties which are separate entities from the Home corporation, and on the proper management of which the success of the whole undertaking must depend—such properties, e. g., as the Street Car Company, the Mining Company, the Realty Company, etc. The same patent omission is found in each of the reports filed by the trustees, and in the reports of the executors heretofore filed with the County Court of El Paso County before the incorporation of the "Myron Stratton Home" corporation, as provided by law. So far as the trustees are concerned, these reports contained no specific or detailed information as to the gross earnings and the expenses of such corporations and properties as those named above. We note that for each of the years 1905, 1906, 1907, and 1908 the then county judge refused his approval to such reports, and the court made the following endorsement on the report for the year 1906:

> "This report is not approved for the reason that it is insufficient and incomplete. The assets of the estate consist almost entirely of property held by three corporations, under the control of the executors, The International Realty Company, The Colorado Springs and Interurban Railway Com-

pany, and The Mining and Development Company, and this report gives the Court no information concerning the receipts and expenditures, management or condition of these corporations. The court does not now pass on the report in other respects."

On the incoming of a new county judge in 1909, the new incumbent found the reports for the past four years not approved, and on petition of the executors he appointed a referee for the following purposes:

"To ascertain facts, and report to the court upon the following matters and things concerning the estate:

1st. The total amount of money received by the Executors of said Estate during each of the years 1905, 1906, 1907 and 1908, and the sources from which it was received.

2nd. The total amount of money paid out by said executors during each of said years, to whom paid and the date of payment.

3rd. Whether all expenditures of said Executors during said years are evidenced by proper vouchers, and whether such vouchers can be produced by said Executors on demand of this Court.

4th. What amounts of money, if any, have been paid out or expended by said Executors, during said years without an order of Court, and when, to whom and for what it was paid.

5th. Whether The Colorado Springs and Interurban Railway Company, The Stratton-Cripple Creek Mining and Development Company, The International Realty Company and all other companies of which the Estate may own the stock control, have accounted for and turned over to said executors from time to time during said years the proper amounts of money as dividends or otherwise, and if so, are those amounts properly accounted for in the several reports filed in this Court by said Executors as above mentioned.

6th. What was the general policy of W. S. Stratton during his lifetime and while President of The Colorado Springs and Interurban Railway Company, with reference to the issuance of free transportation over the lines of said railway and in what way, if any, have the officers of said railway changed, enlarged or modified said policy since the death of said Stratton.

Said referee shall make report of such findings of fact and conclusions of law to this Court for its information with all convenient speed."

The referee filed an extended report, and, the report of the referee being approved by the County Court, the court then approved, on June 26, 1909, the reports of the executors for the years 1904, 1905, 1906, 1907, and 1908. The referee's report had

attached thereto exhibits showing all receipts and disbursements of the executors as such, for the said years, being, however, only the same in character and extent as had heretofore been furnished to the court by the reports of the executors. The report of the referee gave the court no information whatever as to the gross revenue, the expenses, and the net earnings of the various corporations, but in lieu of such information stated that the accounts had been examined, and that the same were proper and correct.

In our judgment, unless excused by the court upon a sufficient showing therefor, all of these reports should detail the affairs of the various corporations and properties of the estate direct to the court, showing the gross income thereof and the disbursements made therefrom. The property of the corporations is the property of the estate. The payments made by the corporations are made out of the funds of the estate, and should be subject to the inspection of the court. Under the practice permitted in this estate, the statutes of the state requiring reports from the executors would be of little or no avail where the estate might own all of the stock in corporations, because such a practice would permit the corporations to manage the corporate affairs as they saw fit, and report only the dividends, if any there be; while the gross earnings and the payments made therefrom are a much larger item, concerning which the court would be completely ignorant, and in the making of which those in charge would be independent of any control or supervision of the court; and such independence would open the way to, and permit of, grave abuses in the handling of the funds of an estate. Such a practice should not be sanctioned, and we shall discuss hereafter our recommendations in this matter.

Another matter which is deserving of consideration, when the question of supervision is concerned, is that of the practice of the officers of the Street Car Company to grant free transportation over its lines to certain people. When the county judge in 1909 ordered the referee to look into certain matters in connection with the estate, as above set forth, it will be recalled that one of the matters to be inquired into was the custom of Mr. Stratton in his lifetime, when he owned and operated the Street Car Company, with reference to free transportation. The referee reported that it was Mr. Stratton's custom to issue free transportation, and that he considered it necessary to do so; that those in charge of the estate after his death have followed this custom, but that the amount of transportation issued at this time is less than at any time previous, and considerably less than when Mr. Stratton was living. We do not believe that it is necessary to discuss this matter at length. If there ever was any justification for such a practice, we are firmly of the opinion that it does not exist at this time, and that the trustees and those operating the Street Car Company should forthwith issue an order that free transportation shall no longer be permitted; and we recommend that this be done.

We note also that the cash on hand of the Home corporation, the Mining Company, the Realty Company, and the Street Car Company is all deposited in the Exchange National Bank of Colorado Springs, except a small deposit for the Realty Company, ranging at different times from about $5,000 to about $25,000, in the First National Bank of Denver, and that these cash deposits do not draw any interest for the estate. An average of these deposits taken on the first of certain months in 1910, 1911, and 1912 ranged from about $115,000 to about $260,000. The State Treasurer, on daily balances on the deposits made by him to various banks in the State of Colorado, collects 2½ per cent per annum interest on daily balances, and the collections are made monthly. The same is true of the treasurer of the City and County of Denver, and certain other public officers collect interest on daily balances. We are also informed that some of the large corporate interests of the state do likewise, and that the banks of this state generally are willing to accept large deposits and pay interest on daily balances. The trustees call attention to the fact that Mr. Stratton in his lifetime had a working arrangement with the Exchange National Bank of Colorado Springs, whereby, when he had a surplus of cash, he would buy at par bonds of the Street Car Company and draw 5 per cent interest. When, on the other hand, he needed cash for immediate purposes, he sold these bonds to the bank at par and secured the cash. In this way Mr. Stratton and the bank had a system whereby he was enabled to dispose of his surplus cash and receive bonds drawing interest, and at other times, when he needed cash, he could secure the same by selling these bonds. The trustees state that they have continued to carry out this arrangement with the bank since Mr. Stratton's death, and that the net results of the same are that they have secured a greater return than could have been secured by interest on the daily deposits. This may be true, and we have not undertaken to check out exactly the results of the course pursued by the trustees, or the results that might have been secured if interest had been received on daily balances; that is a matter which is properly a question of auditing. It is sufficient to say that, inasmuch as it appears that there are, notwithstanding this arrangement, large cash balances from time to time, this matter should be subject to the inspection and supervision of the courts, in the manner we shall hereafter set forth.

A great deal has been said from time to time in regard to the fees allowed attorneys and executors in connection with the estate, and particularly with reference to fees allowed to counsel for executors in defending the will against the contest instituted by Mr. Stratton's son, amounting to something over $200,000; the administrators' fees, with interest, amounting to something over $175,000, and the executors' fees, amounting to over $200,000. The principle is well established that the executors, in order to defend the will contest, had a right to hire counsel to represent them, the amount to be paid them for their services to be deter-

mined by the court. So far as the fees of the administrators and executors are concerned, the matter is governed by section 7243 of the Revised Statutes of 1908, which provides as follows:

> "Executors, administrators, guardians and conservators shall be allowed, as a compensation for their trouble, a sum not exceeding six per cent. on the whole amount of personal estate, and not exceeding three per cent on the money arising from the sale, mortgage or letting of land, with such additional allowances for costs and charges in collecting and defending the claims of the estate, and disposing of the same, as shall be reasonable, to be allowed and paid as other expenses of administration."

Most of the estate of Mr. Stratton, such as the stocks and bonds of the various corporations, would be regarded in the law as personal property, and it is quite apparent, therefore, that the fees received by the executors and administrators were well within the maximum amount provided for by law; and whatever may justly be said at this time in regard to these various fees being excessive, I am of the opinion that no recourse under the law may now be had, because all of these charges were presented to the courts which had jurisdiction over this estate, and, after presentation, were allowed and paid under the order of the court. These orders are the judgments of the court, and as such cannot be set aside in the absence of a showing as to fraud, mistake, or accident. The whole matter was determined and settled by the courts, and no appeal or writ of error was ever sued out, within the time required by law, to review the orders of the court in these respects. When these orders were entered was the proper time and the only time, in the absence of fraud or mistake, that the matters decided could be objected to and remedied. The amounts of these fees are matters within the discretion of the court, and, it having decided what those fees should be, it is sufficient to say that I have found no competent evidence which would justify me in saying that these orders and judgments of the court now entered, in the neighborhood of a decade ago, could be overturned. If it could have been shown, when the matters were presented to the court, that such fees were excessive, that circumstance is a cogent reason why there should be a supervision of this estate, in the manner and form as hereinafter recommended.

(c) We would recommend that Article 12 of the by-laws be amended to require all reports to show all receipts and expenditures, not only of the Home corporation, but also of the other corporations, and properties controlled and owned by the Home corporation, and that the reports, and all of the acts and doings of the estate, be submitted to the District Court of El Paso County for its inspection and approval (which is one of the methods contemplated by the will with reference to the reports

of the Home corporation). Further, that the District Court, subject to the approval of the Governor, appoint the accountant or auditing committee, as the case may be, who shall make the accountings and report, and that at the time the report is presented for the inspection and approval of the court, the Governor and Attorney General be notified of that fact, so that the state may appear and be heard, if necessary, before the approval by the court of the report. Also, that if for any good and sufficient reason the interest of the estate will suffer by reason of the publicity of the details mentioned, then that such matters shall be presented to the court, upon notice to the Governor and the Attorney General, for such action as the court may order in the premises. Further, that if the trustees fail or refuse to so amend their by-laws, the Governor report the entire matter to the legislature, and urge the passage of legislation looking to the supervision and regulation of this estate, as to all of the matters mentioned above and recommended herein. I am of opinion that, in view of the position of the state as *parens patriae,* its legislature has the power to so regulate and supervise a public charity. Such a course does not contemplate the violation or alteration of any of the terms of the will or its purposes and objects, but merely deals with the proper regulation of the affairs of the estate, to the end that its aims and objects are economically and carefully complied with and fulfilled.

2. As to the state's interest in seeing that the terms of a will, establishing and aiding a public charity, are complied with and carried out. We have special reference here to the fulfillment of the will, in regard to its objects and purposes. In this case it is the foundation, erection, and maintenance of "The Myron Stratton Home." That the state has the right and authority to enforce the provisions of a will establishing a public charity, the benefits of which are to flow to that portion of the public which is designated in the will as "the worthy poor," etc., we believe permits of no dispute.

Considering now the provisions of the will, we find that Mr. Stratton gave certain specific instructions as to how the trust should be carried out. Among others, we note again that in the third item of the will he recites that he gives his estate to his executors in trust, and in the fourth item directs that his executors—

> "shall, as soon as they conveniently can and within the period required by law, after my decease, sell and dispose of all the real and personal estate of which I may die seized and which is by this will vested in them in trust," etc.

Then, in item 12, the executors were directed, after the full payment and satisfaction of all of the several legacies and bequests, and the payment of all the legal and just costs, charges,

and expenses arising from the collection, preservation, settlement and distribution of the estate—

> "to pay over all the rest, residue and remainder of my said estate, of each and every kind and character, and wheresoever situated, unto Dr. D. H. Rice, Moses Hallett and Tyson S. Dines, in trust, however, for the following purposes: *All sums of money received by said trustees from my said Executors shall be invested as speedily as possible in safe interest-bearing securities which shall be selected by them with special care for the preservation without loss or depreciation of the principal sum so invested and for the securing of as large an income therefrom as may be consistent with the safety and preservation of the sums so invested.*"

Then these trustees were directed, after paying all legal and just costs and expenses connected with their trust, to pay over to the trustees of "The Myron Stratton Home" corporation all property, moneys, credits, etc., in their hands, which properties were to be applied by the Home in the foundation, erection, and maintenance of the charity referred to as "The Myron Stratton Home."

Referring now to the fourth item of the will, which prescribes that the executors shall, *as soon as they conveniently can and within the period required by law,* sell and dispose of the real and personal property, we are unable to fix definitely upon any specific statute requiring the conversion of real and personal property of an estate into money within a specific time. Section 7158 of the Revised Statutes of 1908, however, prescribes as follows:

> "The executor, administrator, guardian or conservator shall, as soon as convenient, after making the inventory and appraisement, as herein directed, sell at public auction or private sale, as the county court shall order and direct, all the goods and chattels of the testator, intestate or ward, not reserved to the widow, wife or minor heirs, and also excepting specific legacies and bequests, when the estate is sufficient to discharge the debts over and above the specific legacies and bequests, and in case of public sale, three weeks' notice of the time and place of such sale shall be given, by publication in some newspaper, or by posting notices in three public places in the county, as the court shall direct; and such sale may be made for cash or upon credit, as the county court shall direct, security to be approved by the court; Provided, that the county court may, except in cases where it is necessary to sell to pay debts, bequests or legacies, order that the executor, administrator, guardian or conservator dispense with the sale of personal property, or any part thereof, and to distribute the same in kind to the heirs or devisees of the testator or intestate, or hold the same as assets of the ward, as the case may be; Provided, further, That water rights

and stock in ditch companies may be reserved, to be sold with the lands of such estate, if deemed for the best interests of such estate."

However, it seems quite clear that the executors were directed, as soon as they conveniently could, to dispose of and sell all of the real and personal estate, and convert it into money; that these moneys and all property remaining of the estate should go to the trustees, and be by them invested as speedily as possible in safe, interest-bearing securities, which should be selected with special care for the preservation, without loss or depreciation, of the principal sum so invested, and for the securing of as large an income therefrom as might be consistent with the safety and preservation of the sum so invested.

It is fair to conclude that Mr. Stratton intended that such properties as the stocks of the Street Car Company, the Mining Company, the Hotel, and other properties which were in active operation, and would require considerable skill and time in the successful management of the same, should be sold, and the proceeds from the same invested in safe, interest-bearing securities; also, that this should be done with all convenient speed, and from the proceeds the Home should be erected and maintained. The estate still owns and operates the Street Car Company, the Mining Company, and the Hotel; and while it is now preparing plans for the erection of the Home, and the trustees state that the construction of the Home is to be begun forthwith and a unit of the Home to be opened within the next few months, the work of construction has not actually been begun. But, of course, as already stated above, a very valuable, extensive, and suitable property for the Home has been selected and purchased. The trustees give, among other reasons, two principal ones for the delay in not converting into cash the active properties of the estate, and in not having the Home opened at this time:

First, because of the large number of lawsuits, involving great amounts of money, which have been filed against the estate, and which have only recently, with the exception of one or two lawsuits still pending, been settled and determined, and, in a very great majority of cases, in the estate's favor. It is pointed out that lawsuits involving over twenty-three million dollars of claims have been made against the estate.

> "That the principal suits were prosecuted against the estate with ample funds and by the best legal talent of the country, including a United States Senator and a leading firm of New York lawyers, and that in order to defeat these, notably, the will contest, the Venture Corporation, and Stratton's Independent Ltd., suits, the best legal talent obtainable had to be employed by the estate." (See report of Secretary Lloyd, addressed to the public, dated January 1, 1909.)

Second, that repeated and continued efforts had been made to sell the Street Car Company property, the Hotel, and the Mining Company properties, at a price believed by the trustees and the executors to be the fair market value of the same, and that up to this time such efforts to sell have been unsuccessful.

It is also pointed out that to establish a Home which shall be conducted along wise and efficient lines, and still conform to the provisions of the will, which are in many respects rather unusual, requires long and detailed study and investigation, both in constructing the Home itself and in maintaining the same after construction; that the plans for the Home have been fully completed, and that they are the result of mature and exhaustive investigation; and it is pointed out that, while Mr. Girard died December 26, 1831, the Girard College was not opened until January 1, 1848—sixteen years later. (See the report of William Lloyd, secretary, dated January 1, 1909, and addressed to the public.)

We are confronted, then, over nine years after the probate of the will, on the one hand with the Home not yet open to the public, and with certain active properties of the estate not yet sold, as contemplated by the will; and, on the other, with the statement of those in charge that, on account of complicated and much litigation, and on account of the fact that they have not been able to secure fair market values for their properties, and on account of the difficulties of properly establishing and opening the Home, they have not yet been able to comply with all of the terms of the will. It cannot be doubted but that Mr. Stratton's provision that these active properties be sold, and the income thereof invested in safe, interest-bearing securities, was a most wise and proper provision, since, as long as the estate is incumbered with managing successfully these properties, it cannot give the time and attention required and intended for the proper conduct of the Home, and the full ownership and control of such properties, and the management of the same, would not be regarded such safe and conservative investments as Mr. Stratton intended as a source of income for the establishment and maintenance of the Home.

In this situation—the trustees insisting that they are endeavoring to sell these properties at a fair market value, that they are doing everything in their power to open up the Home—it seems to us that what is required at this time is not so much an action to compel the performance of what the trustees insist they are endeavoring in every possible manner to do, but rather a wise supervision and inspection of the various acts and doings of the trustees by the courts, the state officers being fully represented by notice to the Governor, the Attorney General, and such other persons or bodies as might be considered desirable; and if it should then appear that the trustees have become derelict in any of their duties, action should be taken forthwith to compel them to proceed, or remove them from office. And we would recommend, therefore, that in changing the by-laws of the Home

which we have already alluded to, ample provisions should be made, after consultation between the state authorities and the trustees, for the inspection and supervision by the state authorities, under the direction of the court, of the acts and doings of the trustees with reference to the sale of the various properties and the opening of the Home, and in the event that the trustees should refuse to change their by-laws substantially to meet with this recommendation, we believe that the Governor should report the matter to the next legislature, and recommend the passage of a law to provide for the supervision and inspection herein set forth; and also suits should be begun forthwith requiring the trustees to proceed at once, or show cause for said delays.

3. The state's interest, in case the bequest to "The Myron Stratton Home" should lapse, or be held to be void or illegal by any court of competent jurisdiction, as provided in section 13 of the by-laws.

It will be recalled that item 13 provides that—

> "In the event of the lapse of the bequest of the residuum of my estate contained in sub-division 12 hereof [referring to The Myron Stratton Home], or in the event that said bequest should be by final judgment or decree of any Court of competent jurisdiction held to be illegal or void, then and in that event I direct my said executors to pay over and deliver to the State of Colorado*** "

all of the portion of the estate which should lapse or be held illegal or void, to be appropriated by the legislature to the support of such charitable and benevolent institutions as are supported at the expense of the state.

This item contemplates the State of Colorado taking over active charge of the residuum of the estate in case of:

First, a lapse of the bequest to "The Myron Stratton Home;"

Second, a decree by a court of competent jurisdction that the bequest is void or illegal.

By the lapse of a bequest is meant—

> "A lapsed legacy or devise is one which although good and capable of taking effect at the time when the will was made, and never revoked by the testator, fails to take effect by reason of something which has occurred between the time of the making of the will, and the time when the gift under the will would otherwise vest."

And:

> "A testamentary gift is said to lapse when it fails by reason of the inability or refusal of the beneficiary to take it."
>
> 40 Cyc., 1925.

If "The Myron Stratton Home" corporation had not been and could not be incorporated, or if by any reason of law it became impossible for that corporation to take over the properties of this estate, we would have a lapsed legacy of the Home, since the legatee—that is, the Home corporation—could not take over the gift. It also seems to be the law that there can be no lapse after the legacy or devise is once vested.

40 Cyc., 1927.

And in this case, as already pointed out, "The Myron Stratton Home" corporation was incorporated November 12, 1909, and on January 3, 1910, the trustees named in the will petitioned the District Court of El Paso County, praying that the property held by the trustees should be by them turned over to the "Myron Stratton Home" corporation. On January 3, 1910, the District Court entered an order finding that the incorporation of "The Myron Stratton Home" was in conformity with the laws of the state and with the terms of the will, and approved, confirmed, and ratified the same, and ordered the trustees to pay over and convey to "The Myron Stratton Home" corporation all funds and property in their hands as such trustees.

It thus appears that the legatee—to-wit, "The Myron Stratton Home" corporation—came into existence, and by order of court was recognized as such legatee, and the property of the estate turned over to it. It would seem, therefore, that the legacy to this Home has vested, except as to the amount of money still held by the executors to meet certain contingencies, and there would, therefore, be no ground for asserting the doctrine of a lapsed legacy in this case.

No court of competent jurisdiction has ever declared that this legacy to the Home is void or illegal. We have been referred to certain authorities from which it is said it can be deduced that this legacy, as made under the terms and conditions of the will to "The Myron Stratton Home" corporation, is void, because the will in its provisions as to the same violates the rule against perpetuities. It is not necessary to enter into any exhaustive discussion as to that rule, and the authorities cited in support of it, since our Supreme Court has set the whole matter at rest in the case of Clayton vs. Hallett et al., 30 Colo., 231, in which the court, speaking through Mr. Justice Steele, holds that a bequest or devise to charity is not affected by the law applicable to perpetuities or the accumulation of income, but is to be given the most liberal construction, to the end that the wishes of the donor may be enforced; and, to give the exact language of the learned justice, we refer to the following excerpt, found on pages 247 and 248, as follows:

> "The following cases and the citations therein are decisive of one or more of the various questions involved in this controversy, and in them we find the following propo-

sitions fully sustained: That the statute of 43 Elizabeth, chapter 4, so far as it recognizes or indicates what are charitable uses, and in so far as it gives validity to gifts for such uses, is in force in this country as a part of the common law, unless it has been expressly repealed. That the details of the statute, and the remedies provided therein, are not applicable to our conditions or institutions and are not in force here. That, independently of that statute, the courts of this country have original, inherent jurisdiction over charitable gifts and trusts. That such jurisdiction was exercised by the courts of England prior to the enactment of the statute of Elizabeth. That in the exercise of this jurisdiction the courts will enforce such gifts in accordance with the desires of the donor. That a gift for charitable purposes will not fail for want of a trustee. *That such gifts are excepted from the rule against perpetuities and accumulation.* That it is not necessary that the beneficiary or the trustees should be clothed with power or capacity to accept the gift at the time of the grant, but the intention of the donor will be executed if a capacity arises within a reasonable time thereafter. That a charitable gift will not fail because it favors a class of the population. That it is immaterial how indefinite or vague the subjects are, provided there is a discretionary power vested anywhere over the application of the donor's bounty. That where there exists the least circumstances from which to collect the testator's intention of anything else than an immediate devise to take effect *in praesenti,* then, if confined within legal limits, it is good as an executory devise."

Clayton vs. Hallett et al., 30 Colo., 231, 247, 248.

This case arose over the will of the late George W. Clayton, establishing the George W. Clayton College, in which the contention was set up that that provision of the will providing for the George W. Clayton College was void. The will was sustained, and the court announced, among other rules, the ones above set out.

Considering the doctrines as established by our own Supreme Court and by the courts in other states in the country, that a bequest or devise to charity is to be given the most liberal construction, to the end that the wishes of the donor may be enforced, and that they are favored in courts of equity and are construed as valid when possible, I am of opinion that an action brought to declare this bequest void or illegal would not be sustained. However, in connection with the history of this estate, I desire to call your attention to the report of the committee of investigation named by the Sixteenth General Assembly, in which the committee recommended that appropriate action be brought to determine the validity and legality of this bequest to the Home

corporation, which action has never been instituted, although more than five years have lapsed since the making of that report.

We have not sought or intended to cast any accusation of wrongdoing against any of the trustees or executors of this estate. We have endeavored to state conditions as we found them, and we believe that, if the trustees will co-operate with the state authorities in the manner suggested herein, it will result in a better understanding between the public at large and those in charge of the estate, that there will be a certain and responsible supervision and inspection of the affairs of the estate, which should result in the carrying out of the terms of the will at the earliest date possible, and in an efficient and capable manner, so that, as a result thereof, the aims and intentions of Mr. Stratton as to the disposition of his property shall be realized. No other disposition of this property should be contemplated or sanctioned, unless Mr. Stratton's will proves to be illegal and void, or absolutely incapable of fulfillment.

Respectfully submitted,

BENJAMIN GRIFFITH,
Attorney General.

CHARLES O'CONNOR,
First Assistant Attorney General.

(Opinion Book 6, p. 107.)
November 9, 1912.
To Acting Superintendent of the Colorado State Insane Asylum.
By Mr. Stuart.

The Board of Lunacy Commissioners has power to fix what is the reasonable capacity of the Colorado State Insane Asylum, and to refuse patients beyond the same.

(Opinion Book 6, p. 192.)
January 3, 1913.
By Mr. Talbot.
In re: Eight-Hour Law—When same takes effect.

Dear Sir—In reply to yours of recent date, I will say that the Eight-Hour Law is not available in pamphlet form for distribution.

It provides that "no female shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant in this state more than eight hours during any twenty-four hours of any one calendar day."

The vote was canvassed on the 23rd day of December, 1912. The law takes effect "from and after the date of the official

declaration of the vote thereon by proclamation of the Governor, but not later than thirty days after the vote has been canvassed."

There has been no proclamation as yet by the Governor; so, at the latest, this law takes effect on January 22, which is thirty days after the canvass of the vote.

The punishment for a violation of this law may be by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment; and every day's violation of the provisions of this act shall constitute a separate offense.

Trusting this fully answers your letter, I am

Very truly yours,

BENJAMIN GRIFFITH,
Attorney General.

By
GEORGE D. TALBOT,
Special Counsel.

INDEX

INDEX